

# Legislative Analysis



## UNCLAIMED PROPERTY: ADMINISTRATIVE APPEALS PROCESS

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**House Bill 4703 (Reported from committee without amendment)**

**Sponsor: Rep. Jeff Farrington**

**Committee: Tax Policy**

### First Analysis (6-19-13)

**BRIEF SUMMARY:** The bill would establish an administrative appeals process to appeal a determination by the Department of Treasury that a holder of unclaimed or abandoned property had under-reported the amount of unclaimed or abandoned property that should be escheated to the state.

**FISCAL IMPACT:** House Bill 4703 would have an indeterminate fiscal impact on the Department of Treasury and Michigan circuit courts. See the section on *Fiscal Implications* for further information.

### THE APPARENT PROBLEM:

The Uniform Unclaimed Property Act provides for the reversion to state custody of any unclaimed property, including money orders, travelers checks, personal checks, gift certificates, wages, bank accounts, and the contents of safe deposit boxes.<sup>1</sup> Generally speaking, property that remains unclaimed or dormant for a certain number of years, as provided in the act, will be transferred to the state (that is, "escheated"). Once property is escheated, the value of the property reverts to the state's General Fund, less a portion set aside to meet expected claims and related administrative expenses. Unclaimed property (or its equivalent value) is maintained by the state for property owners in perpetuity. There is no time limit in which a claim for abandoned or unclaimed property must be made; a person or his or her heirs always has the right to claim the property.<sup>2</sup>

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<sup>1</sup> The state's unclaimed property statute is taken from the uniform unclaimed property law developed in 1995 by the Uniform Law Commission/National Conference of Commissioners on Uniform State Laws, [http://www.uniformlaws.org/Act.aspx?title=Unclaimed Property Act](http://www.uniformlaws.org/Act.aspx?title=Unclaimed%20Property%20Act).

<sup>2</sup> One observer notes that although the concept of escheatment traces its history to common-law and feudal England and Roman law, "[i]n modern escheats of unclaimed property, the state does not take title, but rather acts as a perpetual custodian until a beneficial owner comes forward; in this respect, the unclaimed -property laws of all fifty-five U.S. states and territories that require unclaimed-property remittance are not considered 'true' escheat statutes. The principle underlying this structure is known as the 'derivative rights doctrine,' which essentially provides that a state's rights in unclaimed property do not extend any further than the original owner's rights in the property." See, William S. King, "A Bridge Too Far: Due Process Considerations in State Unclaimed-Property Law Enforcement", 45 Suffolk U. L. Rev. 1249, [http://suffolklawreview.org/wp-content/uploads/2012/12/King\\_Note\\_PDF.pdf](http://suffolklawreview.org/wp-content/uploads/2012/12/King_Note_PDF.pdf). See, Teagan J. Gregory, "Unclaimed Property and Due Process: Justifying 'Revenue-Raising' Modern Escheat", 110 Mich. L. Rev. 319, <http://www.michiganlawreview.org/assets/pdfs/110/2/Gregory.pdf>. See, T. Conrad Bower, "Inequitable Escheat?: Reflecting on Unclaimed Property Law and the Supreme Court's Interstate Escheat Framework", 74 Ohio St. L. J. 515, [http://moritzlaw.osu.edu/students/groups/oslj/files/2013/05/11\\_Bower\\_Publisher.pdf](http://moritzlaw.osu.edu/students/groups/oslj/files/2013/05/11_Bower_Publisher.pdf).

The act requires that individuals, businesses, and other commercial entities ("holders") of presumably abandoned and unclaimed property file an annual unclaimed property report to the Department of Treasury by July 1, and also requires them to pay or deliver the abandoned property to the department.

To ensure compliance with the act, the department (or its authorized agents) may examine (audit) the records of persons and holders of property, including persons that believe that they do not hold any reportable property. Given the revenue implications of the escheating of unclaimed property, there has been a renewed focus throughout the country – with Michigan being no exception – on state unclaimed property laws and how they are administered.<sup>3</sup> These efforts have included longer look-back periods, shorter dormancy periods (requiring properties to escheat more quickly), and aggressive audit techniques.<sup>4</sup>

In response, there has been a push back against these increasingly revenue-focused measures in an effort to keep unclaimed property laws focused their rightful purpose of reuniting missing owners with their property.<sup>5</sup> Legislation already passed by the House of Representatives this session has focused on establishing auditing standards and providing limits on the use of estimation during the course of unclaimed property audits.<sup>6</sup> Given the revenue implications, there is a significant need for an administrative appeals process for holders to dispute audit determinations. The state's unclaimed property law only provides one remedy to aggrieved holders: initiating a court action. The absence of any administrative appeals process, which is a common aspect of the administration of the several tax statutes, has been viewed as a "gaping hole in state unclaimed property statutes and the 1995 Uniform Act."<sup>7</sup>

### ***THE CONTENT OF THE BILL:***

House Bill 4703 would amend the Uniform Unclaimed Property Act (1995 PA 29) to create an administrative process for a holder of unclaimed property to appeal a determination by the unclaimed property administrator (generally, the Department of Treasury) that the holder under-reported unclaimed or abandoned property.<sup>8</sup> The entire

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<sup>3</sup> See, for example, 2010 PA 197, which shortened the dormancy period of most types of property.

<sup>4</sup> See, for example, Walter Nagel, Donald Griswold, Jeremy Abrams, and Derek Young, "Are States (Es)Cheating You?", *State Tax Notes*, April 29, 2013, <http://www.crowell.com/files/Are-States-Es-Cheating-You.pdf>.

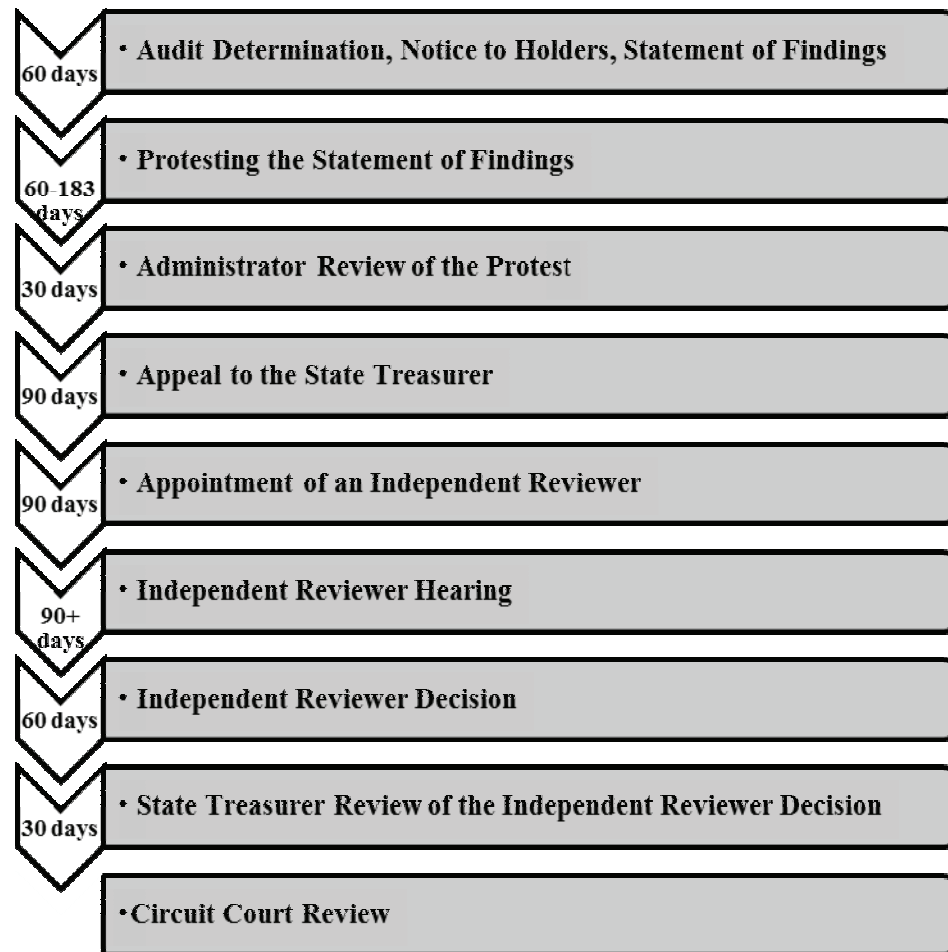
<sup>5</sup> One observer notes, "When escheating funds, a state merely acts as a 'conservator' of the property, rather than a primary party with a claim to the property. When money and property is escheated through an estimation, the state does not stand in the shoes of any owner because the escheated funds and property are not attributable to any; the local conclusion, therefore, is that the calculation of these amounts is driven by revenue-raising motivations, which alone produces further due process concerns." See, William S. King, "A Bridge Too Far: Due Process Considerations in State Unclaimed-Property Law Enforcement", 45 *Suffolk U. L. Rev.* 1249, [http://suffolklawreview.org/wp-content/uploads/2012/12/King\\_Note\\_PDF.pdf](http://suffolklawreview.org/wp-content/uploads/2012/12/King_Note_PDF.pdf).

<sup>6</sup> See HB 4289 (H-2), which passed the House of Representatives on May 22, 2013 by a vote of 109(Y) – 0(N).

<sup>7</sup> Kendall Houghton, Maryann Luongo, and Jana Leslie, "In the Nick of Time? Reforming State Unclaimed Property Laws: Essential Goals and a Review of Potential Forums", Council on State Taxation, October 2009, <http://www.cost.org/WorkArea/DownloadAsset.aspx?id=75198>.

<sup>8</sup> Section 2 of the act (MCL 267.222) defines "administrator" as the state treasurer. As a matter of practice, however, the act is administered by the Department of Treasury, Office of Departmental Services, Unclaimed

appeals process could last 16-21 months, if each step of the process takes the entire time allotted and the time for certain steps is extended as provided in the bill.<sup>9</sup>



Current law (MCL 567.247) provides that a person aggrieved by a decision of the department may bring an action in circuit court within 90 days of the decision by the department. An aggrieved person could, after going through the appeals process established in the bill, still bring an action in circuit court only after exhausting the administrative appeals process.

#### **Notice to Holders – Statement of Findings**

The bill provides that if, after examining any unclaimed property report filed by (or on behalf of) a holder, the administrator determines that a holder underreported unclaimed property due under the act, the administrator would have to mail a statement of findings

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Property Division. Certain provisions of the bill give authority to the state treasurer that is separate and distinct from the state treasurer's general role as the "administrator" under the act.

<sup>9</sup> The bill is modeled after recent changes to the unclaimed property law of Delaware which, because it is a preferred state of incorporation, has a very active unclaimed property program. See Chapter 417 of the 145th General Assembly (2009-10) session laws, <http://delcode.delaware.gov/sessionlaws/ga145/Chp417.pdf>. Final regulations implementing the appeals process were promulgated by the Department of Finance on March 1, 2012, <http://regulations.delaware.gov/register/march2012/final/15%20DE%20Reg%201323%2003-01-12.pdf>.

and request for payment to the holder. This statement of findings would constitute a final determination 60 days after the date the notice is mailed to the holder, unless the holder protests the determination within that 60 day period.<sup>10</sup>

#### **Protesting the Statement of Findings (60 days)**

The holder of unclaimed property would have 60 days from the date the statement of findings is mailed to file a written protest. The protest would have to state the amount and type of property being protested and the reasons for the protest. If a holder files a written protest, the holder would have to exhaust the appeals process established in the bill before bringing an action in circuit court.<sup>11</sup> The holder would have to file any additional documentation in support of its protest within 60 days of the administrator receiving the protest.

At the time the holder submits a written protest, the holder would also have to remit the unclaimed property that is the subject of the statement of findings that the holder is not protesting, and the unclaimed property that is the subject of the protest that the holder agrees is owed. (The holder, then, would not remit the incremental amount of property that it is protesting.) Interest would still accrue on the amount of property not remitted.

Holders could remit the entire amount of property due, including the amount subject to the protest, with any amount refunded to the holder subject to statutory interest from the date of payment. If a holder does not remit unclaimed property as required by the bill, the written protest would be terminated, and the department would enforce the final determination.

#### **Administrator Review of the Protest (60-183 days)**

The administrator's review of the written protest would be limited to the property type and amount, and the other issues that are specifically raised in the written protest by the holder. The holder would have 60 days from receiving the protest to make a written determination. If the holder provides supporting documentation within the 60-day time period, the administrator would have 120 days from receiving the protest to make a written determination. The administrator would extend the time allotted to make a written determination for good cause, although the extension could not exceed 183 days from receiving the protest. The written determination of the administrator would be a final determination 30 days after it is mailed to the holder, unless a timely appeal is filed by the holder.

#### **Appeal to the State Treasurer (30 days)**

The holder would have 30 days after receiving the written determination of the administrator to appeal the determination to the state treasurer. The appeal would have to include the contact information of the holder and their representatives, and a discussion of the matters in which the holder disagrees with the administrator's determination.

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<sup>10</sup> The letter the Department of Treasury uses to inform holders of any amount due following an unclaimed property audit generally advises holders to remit payment to the department within 30 days.

<sup>11</sup> The exhaustion of all administrative remedies (adjudication/contested cases) before an aggrieved party can bring an action in court is also a requirement of the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.301.

**Appointment of an Independent Reviewer (90 days)**

After the receiving the holder's appeal of the administrator's determination, the state treasurer would have to appoint an independent reviewer to consider the appeal and report to the treasurer. This appointment would have to occur "as soon as practicable" but not later than 90 days from the receiving the appeal.

The independent reviewer could not be a current Department of Treasury employee, and would have to be a former member of the judiciary or an attorney who is licensed in the state and qualified by experience or training.

**Independent Reviewer Hearing (90 days) and Decision (90+ days)**

The appeal to the independent review would be considered *de novo* (anew) on the record, with the decision of the independent reviewer based on documentation, evidence, and other non-privileged material generated in the course of the examination by the administrator and the protest.

The independent reviewer would have to hold an oral hearing within 90 days from the dated appointed by the state treasurer. At least 7 days before the oral hearing (or at other times ordered by the independent reviewer), the holder and the administrator would have to submit briefs arguing their position. The independent reviewer would have 90 days from the oral hearing or the submission of any post-hearing briefs, whichever is later, to issue a written decision to the state treasurer stating a finding of facts and conclusions of law.<sup>12</sup> The independent reviewer would assess costs, including the reviewer's fee, against a party or between the two parties.

**State Treasurer Review of Independent Reviewer Decision (60 days)**

The state treasurer could adopt, reject, or modify the determination of the independent reviewer in whole or in part. The state treasurer would have to issue a decision setting forth the reasons for any rejection or modification. The state treasurer's decision (and the original decision of the independent reviewer) would have to be provided to the holder within 60 days from the date the state treasurer receives the independent reviewer's decision.

**Circuit Court Review (30 days)**

The holder would have 30 days from the date the state treasurer's decision is mailed to appeal the decision to the circuit court. The court's review would be limited to whether the state treasurer's decision was supported by substantial evidence on the record. If the record is insufficient, the court would have to remand the case to the department [administrator] for further proceedings on the record.

**Circuit Court Action Related to Payments, Penalties, and Interest**

If a person fails to pay or deliver property, including applicable penalties and interest, as required under the act, the administrator could bring an action in circuit court where the

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<sup>12</sup> The bill does not specify the time by which any post-hearing briefs must be submitted. Delaware regulations provide that post-hearing briefs must be filed within 30 days of the hearing, unless the independent reviewer allows for a longer period of time.

holder resides or maintains a principal place of business (or, if none, the Ingham County circuit court) to enforce payment.

A holder could bring an action in circuit court whenever the holder disputes whether reasonable cause exists for abating a penalty or interest determination by the administrator, with the purpose of the circuit court action to show an abuse of discretion by the administrator in making a determination that penalties and interest are due.<sup>13</sup>

### ***FISCAL INFORMATION:***

House Bill 4703 would have an indeterminate fiscal impact on the Department of Treasury and Michigan circuit courts. Presumably, creating a new administrative appeals process would increase the costs for the department and would lower costs for the circuit courts when compared to current law. The bill would create certain requirements for the department throughout the appeals process. These provisions would increase administrative costs to the department. Any fiscal impact would be directly related to the number, length, and scope of appeals the department was involved in.

Conversely, the creation of the administrative appeals process would likely limit the department's exposure to the circuit court appeals process. While a person could still bring an action in circuit court, they would have to go through the entire administrative appeals process before doing so.

A fiscal comparison of the costs of an administrative appeals process (established under the bill) as opposed to an immediate appeal to the circuit court (current law) is not available. An appeal that followed the entire appeals process under the provisions of the bill would increase administrative costs to the department as compared to current law.

It is anticipated that current appropriation levels would cover the cost of the changes under the provisions of the bill.

### ***ARGUMENTS:***

#### ***For:***

The establishment of an independent administrative appeals process is a vital and important tool in the administration of the state's unclaimed property statute. The revenue generating potential of the unclaimed property statute demands that a counterbalance be added to the unclaimed property statute in order to protect the interest of property holders against the state's revenue generating interests. The current administration of the unclaimed property statute fails to provide such a counterbalance. With the continued use of third-party auditors, the use of estimation to determine

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<sup>13</sup> Section 35 of the act (MCL 567.255) provides that a person who fails to pay or deliver property within the time prescribed shall pay interest at the current monthly rate of 1 percentage point above the adjusted prime rate per annum per month on the property or value of the property from the date the property should have been paid or delivered and imposes civil penalties (fines) for willfully failing to file reports or pay amounts owed when due. The act permits the administrator to waive these penalties and interest.



unclaimed property liabilities, and shorter dormancy periods, there is a great potential for the state's (or, really, any state's) revenue generating interests to lose sight of effect such laws have on the holders of unclaimed property and the costs these measures impose.

These revenue-generating measures alter the original purpose of state unclaimed property laws, making them more akin to the several tax statutes, thus requiring a greater level of protection of the property holder's interests. Indeed one observer notes that "characterizing unclaimed property laws as revenue-generating measures...blurs the line between escheat and taxation and may raise questions as to why the former is not held to the same jurisdictional due process standards....If a court accepts the proposition that unclaimed laws are intended to 'yield public revenue' there is no principled reason to treat these measures differently than taxes or to decline to subject them to the same constitutional restraints of nexus and apportionment....In many ways, escheat laws already resemble taxes. They mandate 'involuntary payments by holders to the state' and often employ record retention, report filing, and audit requirements analogous to those used in the tax context."<sup>14</sup>

To that end, holder (business) interests have argued that unclaimed property statutes should afford holders with an administrative appeals process, which is a common aspect of state tax administration, to challenge audit findings. Few states currently provide for an administrative appeals process, with the only recourse for aggrieved holders being litigation in courts. A report from the Council of State Taxation notes,

*A handful of states provide an independent administrative appeals forum to holders of unclaimed property. The ability to reach an independent tribunal—non-judicial or judicial— is key to ensuring fair and equitable unclaimed property administration. To be truly independent, the tribunal must not be located within or report, directly or indirectly, to the department charged with administering the state's unclaimed property laws, or to any subordinate executive agency. Without independence, the appearance of objectivity is simply not present. That perception, regardless of its accuracy, necessarily detracts from even exemplary personnel and work product of the adjudicative body. Independent tribunals are less likely to be driven by concerns over revenue collection, upholding department policies, or off ending departmental decision-makers.*<sup>15</sup>

**Response:**

Although the bill purports to establish an "independent" administrative appeals process to review disputed Department of Treasury unclaimed property audit determinations, the language of the bill does not create a truly free and independent administrative appeals process. There are four aspects where the bill, however well-intentioned, can be improved upon: (1) appointment of the independent reviewer; (2) independent reviewer's

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<sup>14</sup> See, Teagan J. Gregory, "Unclaimed Property and Due Process: Justifying 'Revenue-Raising' Modern Escheat", 110 Mich. L. Rev. 319, <http://www.michiganlawreview.org/assets/pdfs/110/2/Gregory.pdf>.

<sup>15</sup> Jana Leslie, "The Best and Worst of Unclaimed Property Laws – Scorecard on State Unclaimed Property Statutes: The Holder's Perspective", Council on State Taxation, January 2009, <http://www.cost.org/WorkArea/DownloadAsset.aspx?id=71960>.

fee; (3) independent reviewer's discretion to make adjustments; and (4) independence of the independent reviewer.<sup>16</sup>

*Appointment of the Independent Reviewer.* The bill simply provides that the independent reviewer shall be a former member of the judiciary or an attorney licensed in the state who is "qualified by experience or training to serve." This provision, without any further elaboration, essentially provides the state treasurer with unfettered discretion in appointing an independent reviewer upon the state treasurer's finding that the person is qualified by experience or training to serve. In comparison, the Tax Tribunal Act (1973 PA 186) provides for some minimum qualification requirements for tribunal members and individuals acting as mediators under the act.<sup>17</sup> One of the criticisms of the current process is that the court system lacks expertise in unclaimed property matters. If the bill is to address those concerns, it should more explicitly establish some basic qualifications for independent reviewers.

Moreover, the only opportunity for an independent reviewer found to be disqualified is basically upon the reviewer's own admission. In comparison, the Chapter 4 (Procedures in Contested Cases) of the Administrative Procedures Act provides that the parties in a contested case may file in "good faith" a timely and sufficient affidavit of personal bias or disqualification regarding the hearing officer. The APA further provides that the decision on the disqualification of the hearing officer shall be part of the record and be subject to judicial review.<sup>18</sup>

Further defining in statute the qualifications of the independent reviewer, and providing grounds upon which a reviewer may be disqualified, would provide a better check against the authority of the state treasurer rather than the bill's simple assurance that the state treasurer would have to appoint someone "qualified by experience or training."

*Independent Reviewer's Fee.* The bill would permit the independent reviewer to assess costs, including the reviewer's fee, against one or both of the parties at the reviewer's discretion. This provision needs further elaboration. The bill provides no standard, guidance, or limitation as to how those fees are to be established. Parties should be given advance notice of the nature of the independent reviewer's fees and costs. In contrast, Act 312, which concerns binding arbitration for police officers and firefighters, provides that fees payable to the chair of the arbitration panel shall be established in advance by the Michigan Employment Relations Commission (MERC).<sup>19</sup> Further, MERC rules limit the number of preparation days (for which a fee is paid) to 2 days for each hearing day.<sup>20</sup> COST suggests something similar to the method used by courts to determine awards for attorney's fees.<sup>21</sup>

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<sup>16</sup> This discussion is based on comments submitted by the Council on State Taxation to the Delaware Department of Finance regarding its proposed regulations implementing its independent administrative appeals process law, upon which HB 4703 is based. See, <http://www.cost.org/WorkArea/DownloadAsset.aspx?id=80419>.

<sup>17</sup> Section 22 of the Tax Tribunal Act, 1973 PA 186, MCL 205.722.

<sup>18</sup> Section 79 of the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.279.

<sup>19</sup> Section 6 of 1969 PA 312, MCL 423.236.

<sup>20</sup> Michigan Administrative Code, R 423.514.

<sup>21</sup> See Footnote 15.



*Independent Reviewer's Discretion to Make Adjustments.* The bill requires that an independent reviewer conduct an oral hearing. It has been suggested that conducting an oral hearing be discretionary with the holder permitted to request that an oral hearing be held.

*Independence of the Independent Reviewer.* The bill permits the state treasurer to adopt, reject, or modify the decision of an independent reviewer. This provision effectively renders the independent reviewer not independent at all. On this the Council on State Taxation notes, "[t]he most important aspect of the independent reviewer statute is that the independent reviewer's decisions should be truly independent from the [department] in order to achieve a fairness in the appeals process. Without independence, the appearance of objectivity is simply not present. That perception, regardless of its accuracy, will necessarily detract from even an exemplary independent reviewer."<sup>22</sup> The bill should limit the authority of the state treasurer to modify or reject the independent reviewer's decision only "for cause".

***POSITIONS:***

The Michigan Chamber of Commerce supports the bill. (6-12-13)

The National Federation of Independent Business supports the bill. (6-12-13)

The Michigan Association of Certified Public Accountants supports the bill. (6-12-13)

Consumers Energy supports the bill. (6-19-13)

DTE Energy supports the bill. (6-19-13)

The Department of Treasury is neutral on the bill. (6-12-13)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

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<sup>22</sup> See Footnote 16.