HB429

145259-1

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RFD: Ways and Means Education

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SYNOPSIS: This bill would establish a factor presence nexus standard for business activity for purposes of income tax.

A BILL

TO BE ENTITLED

AN ACT

To add a new Section 40-18-31.2 to the Code of Alabama of 1975, to establish a factor presence nexus standard for business activity for purposes of income tax.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 40-18-31.2 is added to the Code of Alabama 1975, to read as follows:

§40-18-31.2

(a)(1) Individuals who are residents or domiciliaries of this state and business entities that are organized or commercially domiciled in this state have substantial nexus with this state.

(2) Nonresident individuals and business entities organized outside of the state that are doing business in this state have substantial nexus and are subject to the taxes provided for in Chapters 14A, 18, and 16 of this title, when in any tax period the property, payroll, or sales of the individual or business in the state, as they are defined in subsection (d), exceeds the thresholds set forth in subsection (b).

(b) Substantial nexus is established if any of the following thresholds is exceeded during the tax period:

(1) A dollar amount of fifty thousand dollars ($50,000) of property.

(2) A dollar amount of fifty thousand dollars ($50,000) of payroll.

(3) A dollar amount of five hundred thousand dollars ($500,000) of sales.

(4) Twenty-five percent of total property, total payroll, or total sales.

(c) At the end of each year, the commissioner shall review the cumulative percentage change in the consumer price index. The commissioner shall adjust the thresholds set forth in subsection (b) if the consumer price index has changed by any of the following:

(1) Five percent or more since January 1, 2012, or since the date that the thresholds were last adjusted under this subsection. The thresholds shall be adjusted under this subsection. The thresholds shall be adjusted to reflect that

cumulative percentage change in the consumer price index. The adjusted thresholds shall be rounded to the nearest one thousand dollars ($1,000). As used in this subsection, "consumer price index" means the Consumer Price Index for All Urban Consumers (CPI-U) available from the Bureau of Labor Statistics of the United States Department of Labor.

(2) Any adjustment shall apply to tax periods that begin after the adjustment is made.

(d) Property, payroll, and sales are defined as follows:

(1) Property counting toward the threshold is the average value of the taxpayer's real property and tangible personal property owned or rented and used in this state during the tax period. Property owned by the taxpayer is valued at its original cost basis. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from sub-rentals. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period; but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(2) Payroll counting toward the threshold is the total amount paid by the taxpayer for compensation in this state during the tax period. Compensation means wages,

salaries, commissions, and any other form of remuneration paid to employees and defined as gross income under the Internal Revenue Code §61. Compensation is paid in this state if a. the individual's service is performed entirely within the state; b. the individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; c. some of the service is performed in the state and 1. the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state, or 2. the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(3) Sales counting toward the threshold include the total dollar value of the taxpayer's gross receipts, including receipts from entities that are part of a commonly owned enterprise as defined in subdivision (2) of subsection (e) of which the taxpayer is a member, from a. the sale, lease, or license of real property located in this state; b. the lease or license of tangible personal property located in this state; c. the sale of tangible personal property received in this state as indicated by receipt at a business location of the seller in this state or by instructions, known to the seller, for delivery or shipment to a purchaser, or to another at the direction of the purchaser, in this state; and d. the sale, lease, or license of services, intangibles, and digital

products for primary use by a purchaser known to the seller to be in this state. If the seller knows that a service, intangible, or digital product will be used in multiple states because of separate charges levied for, or measured by, the use at different locations, because of other contractual provisions measuring use, or because of other information provided to the seller, the seller shall apportion the receipts according to usage in each state; e. if the seller does not know where a service, intangible, or digital product will be used or where a tangible will be received, the receipts shall count toward the threshold of the state indicated by an address for the purchaser that is available from the business records of the seller maintained in the ordinary course of business when such use does not constitute bad faith. If that is not known, then the receipts shall count toward the threshold of the state indicated by an address for the purchaser that is obtained during the consummation of the sale, including the address of the purchaser's payment instrument, if no other address is available, when the use of this address does not constitute bad faith.

(4) Notwithstanding the other provisions of this subsection, for a taxpayer subject to special apportionment methods, the property, payroll, and sales for measuring against the nexus thresholds shall be defined as they are for apportionment purposes under those special apportionment methods or regulations association with that special apportionment method. Financial institutions subject to an

apportioned income tax shall determine property, payroll, and sales for nexus threshold purposes the same as for apportionment purposes under Chapter 16 of this title. Pass-through entities, including, but not limited to, partnerships, limited liability companies, S corporations, and trusts shall determine threshold amounts at the entity level. If property, payroll, or sales of an entity in this state exceeds the nexus threshold, members, partners, owners, shareholders, or beneficiaries of that pass-through entity are subject to tax on the portion of income earned in this state and passed through to them.

(e)(1) Entities that are part of a commonly owned enterprise shall determine whether they meet the threshold for nexus as follows:

a. Commonly owned enterprises shall first aggregate the property, payroll, and sales of their entities that have a minimum presence in this state of five thousand dollars ($5,000) of combined property, payroll, and sales, including those entities that independently exceed a threshold and separately have nexus. The aggregate number shall be reduced based on detailed disclosure of any intercompany transactions where inclusion would result in one state double counting assets or revenue. If that aggregation of property, payroll, and sales meets any threshold in subsection (b), the enterprise shall file a joint information return as specified by the department separately listing the property, payroll, and sales in this state of each entity.

b. Those entities of the commonly owned enterprise that are listed in the joint information return and that are also part of a unitary business grouping conducting business in this state shall then aggregate the property, payroll, and sales of each such unitary business grouping on the joint information return. The aggregate number shall be reduced based on detailed disclosure of any intercompany transactions where inclusion would result in one state double counting assets or revenue. The entities shall base the unitary business groupings on the unitary combined report filed in this state. If no unitary combined report is required in this state, then the taxpayer shall use the unitary business groupings the taxpayer most commonly reports in states that require combined returns.

c. If the aggregate property, payroll, or sales in this state of the entities of any unitary business of the enterprise meets a threshold in subsection (b), then each entity that is part of that unitary business is deemed to have nexus and shall file and pay income tax as required by law.

(2) "Commonly owned enterprise" means a group of entities under common control either through a common parent that owns, or constructively owns, more than 50 percent of the voting power of the outstanding stock or ownership interests or through five or fewer individuals (individuals, estates, or trusts) that own, or constructively own, more than 50 percent of the voting power of the outstanding stock or ownership interests taking into account the ownership interest of each

such person only to the extent such ownership is identical with respect to each such entity.

(f) A state without jurisdiction to impose tax on or measured by net income on a particular taxpayer because that taxpayer comes within the protection of Public Law 86-272, 15 U.S.C. § 381, does not gain jurisdiction to impose such a tax even if the taxpayer's property, payroll, or sales in the state exceeds a threshold in subsection (b). Public Law 86-272 preempts the state's authority to tax and will therefore cause sales of each protected taxpayer to customers in the state to be thrown back to those sending states that require throwback. If Congress repeals the application of Public Law 86-272 to this state, an out-of-state business shall not have substantial nexus in this state unless its property, payroll, or sales exceeds a threshold in this act.

Section 2. This act shall become effective for tax years beginning after December 31, 2012, following its passage and approval by the Governor, or its otherwise becoming law.