

1 HB373  
2 127977-1  
3 By Representative Hubbard (J)  
4 RFD: Ways and Means Education  
5 First Read: 29-MAR-11

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

11  
12 A BILL  
13 TO BE ENTITLED  
14 AN ACT  
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16 To add a new Section 40-18-31.2 to the Code of  
17 Alabama of 1975, to establish a factor presence nexus standard  
18 for business activity for purposes of income tax.

19 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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

22 §40-18-31.2

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

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

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

11                   (1) A dollar amount of fifty thousand dollars  
12 (\$50,000) of property.

13                   (2) A dollar amount of fifty thousand dollars  
14 (\$50,000) of payroll.

15                   (3) A dollar amount of five hundred thousand dollars  
16 (\$500,000) of sales.

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

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

24                   (1) Five percent or more since January 1, 2010, or  
25 since the date that the thresholds were last adjusted under  
26 this subsection. The thresholds shall be adjusted under this  
27 subsection. The thresholds shall be adjusted to reflect that

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

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

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

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

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

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

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

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

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

1 apporportioned income tax shall determine property, payroll, and  
2 sales for nexus threshold purposes the same as for  
3 apporportionment purposes under Chapter 16 of this title.

4 Pass-through entities, including, but not limited to,  
5 partnerships, limited liability companies, S corporations, and  
6 trusts shall determine threshold amounts at the entity level.

7 If property, payroll, or sales of an entity in this state  
8 exceeds the nexus threshold, members, partners, owners,  
9 shareholders, or beneficiaries of that pass-through entity are  
10 subject to tax on the portion of income earned in this state  
11 and passed through to them.

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

15 a. Commonly owned enterprises shall first aggregate  
16 the property, payroll, and sales of their entities that have a  
17 minimum presence in this state of five thousand dollars  
18 (\$5,000) of combined property, payroll, and sales, including  
19 those entities that independently exceed a threshold and  
20 separately have nexus. The aggregate number shall be reduced  
21 based on detailed disclosure of any intercompany transactions  
22 where inclusion would result in one state double counting  
23 assets or revenue. If that aggregation of property, payroll,  
24 and sales meets any threshold in subsection (b), the  
25 enterprise shall file a joint information return as specified  
26 by the department separately listing the property, payroll,  
27 and sales in this state of each entity.

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

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

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



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

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

16 Section 2. This act shall become effective for tax  
17 year 2011 and all tax years thereafter, following its passage  
18 and approval by the Governor, or its otherwise becoming law.