

1 SB497
2 169886-1
3 By Senators Albritton and Orr
4 RFD: Finance and Taxation General Fund
5 First Read: 21-MAY-15

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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.

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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
16 dollars (\$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, 2015, 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
4 or measured by net income on a particular taxpayer because
5 that taxpayer comes within the protection of Public Law
6 86-272, 15 U.S.C. § 381, does not gain jurisdiction to impose
7 such a tax even if the taxpayer's property, payroll, or sales
8 in the state exceeds a threshold in subsection (b). Public Law
9 86-272 preempts the state's authority to tax and will
10 therefore cause sales of each protected taxpayer to customers
11 in the state to be thrown back to those sending states that
12 require throwback. If Congress repeals the application of
13 Public Law 86-272 to this state, an out-of-state business
14 shall not have substantial nexus in this state unless its
15 property, payroll, or sales exceeds a threshold in this act."

16 Section 2. This act shall become effective for tax
17 years beginning after December 31, 2014, following its passage
18 and approval by the Governor, or its otherwise becoming law.