

Texas Comptroller proposes new treatment to economic nexus threshold to incorporate *Wayfair*

Overview

On September 27, 2019, the Texas Comptroller of Public Accounts (Comptroller) published proposed amendments (Proposed Amendments) with the Office of the Texas Secretary of State to incorporate an economic nexus threshold of \$500,000 Texas gross receipts for Texas franchise tax purposes.¹ The Proposed Amendments to title 34 of the Texas Administrative Code (TAC) § 3.586 were filed in response to the United States Supreme Court decision in *South Dakota v. Wayfair, Inc.*² (*Wayfair*).³ The publishing of the Proposed Amendments triggers a 30-day public comment period.⁴

This tax alert summarizes the Proposed Amendments, effective dates, as well as offers some taxpayer considerations.

Modifications to Texas' franchise tax rules to incorporate *Wayfair* decision

In response to the *Wayfair* decision, the Comptroller has proposed to amend TAC § 3.586 by adding an economic nexus factor-based standard with the Proposed Amendments stating:

(f) Economic nexus. For each federal income tax accounting periods ending in 2019 or later, a foreign taxable entity has nexus in Texas and is subject to Texas franchise tax, even if it has no physical presence in Texas, if during its federal income tax accounting period, it had gross receipts from business done in Texas of \$500,000 or more, as determined under § 3.591 of this title (relating to Margin: Apportionment).

(g) Beginning date. A foreign taxable entity begins doing business in the state on the earliest of:

- (1) the date the entity has physical nexus as described in subsection (c) of this section;
- (2) the date the entity obtains a Texas use tax permit; or
- (3) the first day of the federal income tax accounting period in which the entity had gross receipts from business done in Texas in excess of \$500,000.⁵

Further, new subsection (e) of the Proposed Amendments provides that out-of-state entities with a use tax permit are subject to the Texas franchise tax.⁶

If the Proposed Amendments are adopted as a final regulation, the provisions will apply to Texas franchise tax reports due on or after January 1, 2020.⁷

Considerations

Taxpayers should consider the potential impact of sourcing receipts from transactions, which may under the Texas apportionment regulations be considered Texas sourced, but do not create a physical presence. Taxpayers currently holding a Texas use permit or with Texas annual gross receipts in excess of \$500,000 are advised to consult with their tax advisers to determine Texas franchise tax implications.

¹ Franchise Tax Margin: Nexus, 44 Tex. Reg. 5605, 5605 (proposed Sept. 27, 2019) (to be codified at 34 Tex. Admin. Code § 3.586) (Tex. Comptroller of Pub. Accounts). A copy of the *Texas Register* issue is available [here](#).

² 138 S. Ct. 2080 (2018).

³ Franchise Tax Margin: Nexus, 44 Tex. Reg. 5605, 5605 (proposed Sept. 27, 2019) (to be codified at 34 Tex. Admin. Code § 3.586) (Tex. Comptroller of Pub. Accounts).

⁴ *Id.* at 5606.

⁵ *Id.* at 5607.

⁶ *Id.*

⁷ *Id.* at 5605.

The Proposed Amendments can be adopted as early as October 27, 2019.⁸ The Texas Comptroller of Public Accounts, Tax Policy Division is now accepting comments on the Proposed Amendments until October 27, 2019, which may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

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⁸ *Id.* at 5605, 5607.