Maryland Comptroller’s Regulatory Evaluation Report Foreshadows Significant Changes to Regulations Relating to Apportionment for Banks

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Maryland law generally requires each state agency vested with the authority to adopt regulations to review its regulations every eight years.[1] The purpose of the review and evaluation process is to determine whether an agency’s regulations remain supported by statutory authority and judicial opinions, whether the regulations are necessary for the public interest, and whether there is a need to retain, amend, or repeal any obsolete or duplicative provisions.[2] The Comptroller of Maryland’s eight-year cycle began in 2021, and the deadline to complete the agency’s evaluation of its regulations was January 2022.

The Comptroller’s recently completed report reveals changes the Comptroller intends to propose to his regulatory guidance on how banks and similar institutions must allocate and apportion income to Maryland once the report is approved. The tax impact of these changes could be significant for banks and similar institutions.

Single Sales Factor Apportionment for Banks and Similar Institutions

On Jan. 14, 2022, the Comptroller’s Office made its Regulatory Review and Evaluation Report 2021 (Evaluation Report) available for public inspection and comment.[3] Pages 72 through 74 of the Evaluation Report contain the Comptroller’s evaluation of the Comptroller’s Banking Regulations. Although the Evaluation Report notes the Comptroller’s Banking Regulations remain supported by statutory authority and judicial opinion, it also notes they are obsolete or otherwise appropriate for amendment or repeal. Evaluation reports generally provide only summaries of proposed changes and not the actual proposed language.

The summary section of the Comptroller’s report provides that a portion of the Comptroller’s Banking Regulations, governing the apportionment and allocation of banking institutions whose business activity is taxable both within and without Maryland, “is amended to require banks and similar institutions to transition to single sales factor apportionment, as required by TG §10 – 402. The substitution of ‘receipts’ for ‘sales’ is unchanged.”’

The impact of this shift to single sales factor apportionment will vary based on the nature of an institution’s business model. Generally, in-state corporations with property and payroll pay less under single sales factor apportionment than out-of-state companies. This is because putting more weight on the sales factor tends to cause the inclusion of a larger percentage of an out-of-state corporation’s income within the taxing jurisdiction of the state.

Background

In 2018, Maryland’s tax code was modified by changing the state’s standard corporate income tax apportionment formula for most corporations from a three-factor formula with double-weighted sales to a single sales factor formula (ratio of a corporation’s in-state property + payroll + 2x its sales over its property + payroll + sales everywhere / 4) for tax years beginning after Dec. 31, 2017.[4] Maryland’s tax code requires most corporations to phase in single sales factor apportionment over a five-year period by increasing the weight of the sales factor by one each year (e.g., a triple-weighted sales factor, plus payroll and property, with a denominator of five for tax year 2018 up to a sextuple-weighted, plus payroll and property, with a denominator of eight for tax year 2021). From Jan. 1, 2022, and later, a single sales factor will be used.

After the law change, the Comptroller’s Office advised banks and similar institutions to continue to follow the Comptroller’s regulations that provided special apportionment rules for these institutions.[5] The applicable provision of the Comptroller’s Banking Regulations reads:

All income which is includable in the Maryland modified income, as defined in Tax-General Article, §10-304, Annotated Code of Maryland, shall be apportioned to this State by multiplying that income by the apportionment percentage. The apportionment percentage is determined by adding the taxpayer's property factor (as described in Regulation .05 of this chapter), payroll factor (as described in Regulation .06 of this chapter), and twice the receipts factor (as described in Regulation .04 of this chapter), together and dividing the sum by four. If any of the factors are missing, the remaining factors are added and the sum is divided by the number of remaining factors. A factor is missing if both its numerator and denominator are zero, but it is not missing merely because its numerator is zero.

What’s Next?

The Evaluation Report was submitted to the General Assembly’s Joint Committee on Administrative, Executive, and Legislative Review (AELR). The Evaluation Report is also available for (currently in-person) public inspection and comment for 60 days from Jan. 14, 2022, or through March 15, 2022. During this 60-day period, the AELR will also review the report and make recommendations on or approve the Evaluation Report. Within 120 days after the approval the Comptroller’s Officer must submit its proposal for adoption any amendments to or repeal of its regulations summarized in the Evaluation to Maryland’s Division of State Documents for publication in the Maryland Register.

* *Greenberg Traurig is not officially registered to provide legal services in Maryland. Specific Maryland law questions and Maryland legal compliance issues, however, can be addressed by attorneys licensed to practice law in Maryland*.

[1] *See* State Government Article, §§10-130—10-139, Annotated Code of Maryland. Maryland State Government Article § 10 – 132.1(b)(1) provides an exception for regulations adopted to implement a federal program and regulations adopted or comprehensively amended during the preceding eight years.

[2] *See* State Government Article, §10-135.

[3] *See* Maryland Register, volume 49, issue two (Jan. 14, 2022).

[4] *See* Maryland Code, Tax-General § 10-402 (10-402).

[5] *See e.g.*, Part one of 2018 – 2021 Maryland's Income Tax Form Instructions for Corporations (instructing that "[a]ll financial institutions are subject to corporation income tax and have special apportionment rules…").

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