

ORDER OF THE DEPARTMENT OF REVENUE REPEALING RULES

The Wisconsin Department of Revenue proposes an order to: **repeal** Tax 11.97 **relating to** sales and use tax provisions for out-of-state retailers.

The scope statement for this rule, SS 016-19, was approved by the Governor on January 30, 2019, published in Register No. 758A1 on February 4, 2019, and approved by the Secretary of Revenue on February 26, 2019.

Analysis by the Department of Revenue

Statutes interpreted: Sections 77.51 (13) (c) and (k), (13g), (13h) and (14) (j), 77.53 (3), (5), (7), (9) and (9m), and 77.73, Stats.

Statutory authority: Sections 77.51 (13), (13g), and (13gm), 77.52 (1) and (2), 77.53 (3), 77.65 (3) and 227.11 (2) (a) and (b), Stats.

Explanation of agency authority: Previously, an out-of-state seller was not required to collect Wisconsin sales or use taxes unless the seller had a physical presence in Wisconsin based on prior U.S. Supreme Court decisions (*Quill Corp. v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Ill.*). On June 21, 2018, the U.S. Supreme Court overruled these decisions in *South Dakota v. Wayfair, Inc. (Wayfair)*. New standards to enforce sales tax laws on remote sellers were developed in 2017 Wisconsin Act 368, which approved a small seller exception for remote sellers who do not have annual sales of products and services into the state of more than \$100,000 or 200 or more separate transactions. Section Tax 11.97 should be repealed because it reflects pre-Wayfair standards related to remote sellers, does not address the new small seller exception, and is duplicative of current statutory language.

Sections 77.51 (13) and (13g), Stats., define "retailer" and "retailer engaged in business in this state."

Section 77.51 (13g), Stats., provides a non-exclusive list of activities that define a "retailer engaged in business in this state."

Section 77.51 (13g) (c), Stats., provides that "retailer engaged in business in this state" includes any retailer making sales of taxable products and services "unless otherwise limited by federal law."

Section 77.51 (13gm) provides that a "retailer engaged in business in this state" does not include those who fall under the small seller exception.

Section 77.52 (1) and (2), Stats., provides the authority to impose a sales tax on retailers for the privilege of selling, licensing, leasing, or renting at retail in this state tangible personal property and items, property, and goods under s. 77.52 (1) (b), (c), and (d), Stats., and taxable services.

Section 77.53 (3), Stats., provides the authority to impose a use tax on retailers engaged in business in this state on sales of tangible personal property and items, property, and goods under s. 77.52 (1) (b), (c), and (d), Stats., and taxable services.

Section 77.65 (3), Stats., provides “[t]he department may promulgate rules to administer this section...”

Section 227.11 (2), Stats., provides statutory rule-making authority as follows:

- (a) "Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute..."
- (b) "Each agency authorized to exercise discretion in deciding individual cases may formalize the general policies evolving from its decisions by promulgating the policies as rules ..."

Related statute or rule: There are no other applicable statutes or rules.

Plain language analysis: The objective of the proposed order is to repeal s. Tax 11.97 which describes activities, currently listed in sec. 77.51(13g), Stats., that require out-of-state retailers to register and collect Wisconsin sales and use tax. In light of the U.S. Supreme Court decision in *Wayfair*, and the new standards for remote small sellers in 2017 Wisconsin Act 368, effective December 16, 2018, s. Tax 11.97 is redundant and outdated, and should be repealed.

Summary of, and comparison with, existing or proposed federal regulation: There is no existing or proposed federal regulation that is intended to address the activities regulated by the rule.

Summary of public comments and feedback on scope statement:

Comment – Corydon Fish of Wisconsin Manufacturers & Commerce supports the proposed rule to repeal s. Tax 11.97. However, he objects to the use of the word "guidance" in describing the rule in the scope statement. Mr. Fish suggests that the use of the word guidance refers to a "guidance document" in sec. 227.01 (3m), Wis. Stats.

DOR's Response to Comment – The objective of the proposed rule is to repeal sec. Tax 11.97 as a result of the recent U.S. Supreme Court decision in *Wayfair* and enactment of 2017 Wisconsin Act 368. Mr. Fish agrees with the repeal. DOR understands that the use of the term "guidance" in describing an administrative rule could be confused with "guidance document" in sec. 227.01(3m), Wis. Stats. No changes were made in the drafting of this proposed rule order as a result of the comments received. We'll keep Mr. Fish's comments in mind in future scope statements.

Comparison with rules in adjacent states: Adjacent states have implemented the U.S. Supreme Court's decision in *Wayfair* through legislation and administrative policy. Minnesota had an existing 1989 law that became effective due to the Court's decision in *Wayfair*. North Dakota enacted an economic nexus law for remote sellers prior to the *Wayfair* decision. Michigan issued an administrative bulletin to address economic nexus standards consistent with the *Wayfair* decision. All three states required remote sellers to begin collecting tax on October 1, 2018. Iowa enacted legislation prior to the *Wayfair* decision, although the legislation effective date and remote seller required collection date was January 1, 2019.

Summary of factual data and analytical methodologies: Previously, an out-of-state retailer was not required to collect Wisconsin sales or use taxes unless the retailer had a physical

presence in Wisconsin based on prior U.S. Supreme Court decisions (*Quill Corp. v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Ill.*). *Wayfair* overruled these decisions. The department has created this proposed rule order to repeal s. Tax 11.97, which describes an obsolete nexus standard and lists nexus activities already found in the statutes. No other data was used in the preparation of this proposed rule order or this analysis.

Analysis and supporting documents used to determine effect on small business: This rule order repeals s. Tax 11.97, which describes activities that requires out-of-state retailers to register and collect Wisconsin sales and use tax that is duplicative of current statutory language. Therefore, there is no effect on small business.

Anticipated costs incurred by private sector: This proposed rule does not have anticipated costs on the private sector.

Effect on small business: This proposed rule does not have an effect on small businesses.

Agency contact person: Please contact Jen Chadwick at (608) 266-8253 or jennifer.chadwick@wisconsin.gov, if you have any questions regarding this proposed rule.

Place where comments are to be submitted and deadline for submission: Comments may be submitted to the contact person shown below no later than June 24, 2019. A public hearing is not required pursuant to s. 227.16 (2) (b), Stats.

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SECTION 1. Tax 11.97 is repealed.

SECTION 2. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.