

STATEMENT OF SCOPE
Department of Revenue

Rule No.: Sections Tax 11.55 and 11.88 (6)

Relating to: Sales and use tax provisions

Rule Type: Permanent

This scope statement was approved by the Governor on May 7, 2020.

1. Detailed description of the objective of the proposed rule:

The objective of the rule is to provide guidance for sales agents, brokers, consignors and others facilitating sales of products subject to Wisconsin sales or use tax on behalf of sellers consistent with provisions in 2019 Wisconsin Act 10. Sections Tax 11.55 and 11.88 (6), Wis. Adm. Code, will be repealed and recreated to explain sales and use tax collection and remittance requirements for marketplace providers and sales agent, brokers and consignors that also facilitate sales on behalf of sellers. Also, information regarding credit liens and repossessions will be moved from s. Tax 11.55 to s. Tax 11.30, Credit sales, bad debts and repossessions, which already addresses credit sales and repossessions.

2. Description of existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Currently, ch. Tax 11 does not specifically address marketplace providers facilitating sales on behalf of marketplace sellers. The determination of who is responsible for collecting and remitting Wisconsin sales or use tax in the case of agents, brokers, and consignors is determined based on who is (a) known to the purchaser as the seller of taxable product, and (2) receives payment from sales of taxable products.

Unlike the marketplace provider provisions, which put sole liability for sales and use tax collection and remittance on the facilitator of retail sales, s. Tax 11.55 provides that a seller may be liable for sales and use tax on sales of taxable products by the agent, broker, or consignor if the agent, broker or consignor did not collect and remit the sales or use tax to the Department of Revenue. In addition, s. Tax 11.55 addresses only sales of tangible personal property rather than all taxable products subject to sales and use tax, which includes certain taxable services and digital goods.

The repealed and recreated rule will explain the requirements to collect and remit sales or use tax by all types of sellers that facilitate sales of all types of taxable products on behalf of other sellers, as provided by 2019 Wisconsin Act 10.

Section Tax 11.88 (6) explains the sales and use tax treatment of consignment sales of recreational vehicles similar to Tax 11.55. It will be repealed and recreated to also reflect the marketplace provisions in 2019 Wisconsin Act 10.

Section Tax 11.30 currently addresses how credit sales and repossessions impact bad debt deductions and the sales price of taxable products used in computing sales or use tax. The provisions in s. Tax 11.55, regarding sales of property after repossession or in enforcement of liens on credit sales should be addressed in the same rule.

3. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

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 ..."

Sections 77.52 (1) and (2) and 77.53 (3), Stats., provide the authority to impose a sales or use tax on retailers for the privilege of selling, licensing, leasing, or renting at retail tangible personal property and items, property, and goods under s. 77.52 (1) (b), (c), and (d), Stats., and taxable services in Wisconsin (taxable products).

Section 77.51 (7i) and (7j), Stats., defines a "marketplace provider" and "marketplace seller."

Section 77.51 (13) (a), (p) 7., and (q) and (17) (g), Stats., defines a "retailer" and "seller" required to collect and remit Wisconsin sales or use tax to include a person selling on behalf of a seller and gives the department authority to determine that marketplace providers are agents of marketplace sellers for purposes of collecting and remitting Wisconsin sales or use tax.

Section 77.51 (14) (n) 7., Stats., defines "sale" to include the transfer of ownership, title, possession, or enjoyment of a taxable product regardless of whether on behalf of another seller.

Sections 77.52 (3m), 77.523, and 77.585 (11), Stats., place liability for the sales and use tax imposed on taxable products on the marketplace provider unless (a) the department grants a waiver to certain providers or (b) finds the marketplace seller gave incorrect information to the provider. Only in such cases may the department impose the liability to collect and remit sales or use tax on the marketplace seller.

Section 77.585 (1g), Stats., allows the marketplace provider to claim deductions for bad debts on sales facilitated on behalf of a marketplace seller.

Section 77.51 (14g) (f), Stats., defines that a sale does not include repossession of taxable products when the only consideration is cancellation of the purchaser's obligation to pay the remaining balance of the purchase price.

Section 77.585 (5), Stats., provides that a retailer may not reduce its taxable sales by credit sales of property repossessed unless the sales price is returned to the purchaser or the retailer recognizes a bad debt.

Sections 66.0615, 77.982 (2), 77.991, and 77.9951, Stats., apply the marketplace provisions in ch. 77, subchs. III and V, to the local exposition district taxes and state vehicle rental fees administered by the Department of Revenue.

4. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

The department estimates it will take 40 hours to develop the rule.

5. List with description of all entities that may be affected by the proposed rule:

Entities that may be affected by the rule are:

- Marketplace providers that have developed online sales platforms to efficiently manage sales, payments, and collection of sales tax on behalf of small businesses
- Marketplace sellers, which are often small businesses, that use marketplace providers to facilitate their sales
- Consignment shops and antique dealers that often sell used merchandise on behalf of others
- Property managers that rent properties on behalf of property owners for periods of less than thirty days
- Boat, recreational vehicle, and other property brokers that generally connect sellers with persons who are looking to buy the property

6. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

The following federal bills of the 116th Congress would in various ways pre-empt state taxation on remote sellers, including marketplaces, if enacted:

- US H.R. 379 (2019): This measure would prohibit localities from imposing collection responsibilities on remote sellers and would place conditions on states before they could do so as well. Specifically, states would need to establish a uniform sales tax rate and centralized collections and could not require sellers to provide information on purchasers beyond ZIP codes and the amount of taxes collected from ZIP codes. It would also delay the ability of states to impose sales tax collection obligations on remote sellers until Jan. 1, 2020.
- US S. 128 (2019): The Stop Taxing Our Potential Act is a recently reintroduced version of a failed measure in 2018 (SB 3180) which would undo the *Wayfair* decision by re-establishing a physical presence nexus requirement for state sales tax collection responsibilities. It goes on to define what does and does not constitute “physical presence.”

7. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

There is no anticipated economic impact as current law supersedes the current guidance provided in s. Tax 11.55.

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Department Head Signature

Date Submitted

