

## ORDER OF THE DEPARTMENT OF REVENUE REPEALING AND RECREATING RULES

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

The scope statement for this rule, SS 079-18, was approved by the Governor on July 5, 2018, published in Register No. 751A2 on July 9, 2018, and approved by the Secretary of Revenue on July 31, 2018.

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### *Analysis by the Department of Revenue*

**Statutes interpreted:** Sections 77.51 (13), (13g), (13h) and (14) (j), 77.52 (1), (1b), and (2), 77.53 (3), (5), (7), (9) and (9m), and 77.73, Stats.

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

**Explanation of agency authority:** Federal law limits Wisconsin's ability to impose sales and use tax upon out-of-state retailers, sometimes referred to as remote sellers, as is explicitly mentioned in at least one statute (sec. 77.51(13g), Stats.). The department will interpret the provisions of sales and use tax statutes enforced by it and codify its discretion in this area, to better define what retailers are subject to tax, consistent with the limits set forth in the June 21, 2018, U.S. Supreme Court decision in *South Dakota v. Wayfair, Inc.*

Sections 77.51 (13) and (13g), Stats., define "retailer" and "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."

Sections 77.52 (1) and (2), Stats., provide the authority to impose a sales tax on retailers for the privilege of selling, licensing, leasing, or renting at retail tangible personal property, items, property, and goods under sec. 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 sec. 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 rule is to amend guidance for out-of-state retailers without a physical presence in Wisconsin that make Wisconsin sales. The new guidance will be consistent with limits expressed in the *Wayfair* decision. Wisconsin will begin its enforcement on October 1, 2018.

**Summary of, and comparison with, existing or proposed federal regulation:** The rule codifies the federal limitation on imposing sales and use tax on small, out-of-state retailers consistent with the *Wayfair* decision.

**Summary of public comments and feedback on scope statement:** The department received a number of public comments.

Comment 1 – Trisha Pugal of the Wisconsin Hotel & Lodging Association suggested including the collection of local room taxes as part of the guidance provided in the rule and asked that the scope statement be expanded to include this.

DOR's Response to Comment 1 – Addressing municipal law on room taxes is not appropriate for a rule specific to sales and use taxes. The department is, however, in the process of updating its published guidance for lodging marketplaces. The department is taking additional steps to educate lodging marketplaces that they are required to register for a lodging marketplace license. Once a lodging marketplace license is received, the marketplace is required to collect Wisconsin sales and use taxes and local room taxes.

Comment 2 – Representative John Macco provided a list of principles, adopted by the National Conference of State Legislatures, State and Local Tax taskforce, to consider when drafting the proposed rule. The list of principles is as follows:

1. Consider waiting until January 1, 2019 to begin sales tax collection requirements on remote sellers
2. Determine whether Wisconsin has a statutory basis to require remote sellers to collect tax
3. Have systems, policy, and software in place to easily be able to differentiate between businesses that have only a sales tax liability versus those in-state business that would also have other payroll or property tax liabilities
4. Establish exemption limits based on total in-state sales and volume
5. Simplify the registration process
6. Centralize the Certified Software Provider process
7. Provide a publicly available taxability and exemption table
8. Provide a rates and boundary database
9. Provide a depository of materials that includes all of the information remote sellers need in order to comply with sales tax laws

DOR's Response to Comment 2 – Principles listed are addressed or considered as follows:

1. The effective date of October 1, 2018, is consistent with many other states' effective dates.

2. Current Wisconsin law provides authority for Wisconsin to require out-of-state sellers to collect tax in Wisconsin.
- 3.-4. The rule does not create an exemption; it codifies the Department's application of the federal nexus threshold limiting Wisconsin's power to tax small out-of-state sellers. That threshold is based on total in-state sales and volume.
- 5.-7. Wisconsin is a full-member of the Streamlined Governing Board, Inc.\*; therefore, the registration, reporting, and software simplifications are all available through the Streamlined Governing Board's website.
- 8.-9. Wisconsin currently has a rates and boundary database, as well as a web page, with numerous links, devoted to sales made by out-of-state sellers.

\* Wisconsin is one of the twenty-four states that have adopted the simplification measures outlined in the Streamlined Sales and Use Tax Agreement. The purpose of the agreement is to simplify and modernize sales and use tax administration to reduce the burden of tax compliance on retailers conducting business in multiple states.

Comment 3 – Corydon Fish of the Wisconsin Manufacturers & Commerce (WMC) commented that WMC does not take a position on the policy merits of the tax collection exemptions described in the scope statement, but questions whether the department has the authority to implement the exemption. He suggests that an exemption drafted by rule would be invalid pursuant to sec. 227.40(4)(a), Wis. Stats.

DOR's response to Comment 3 – It is the opinion of the department that current Wisconsin law provides the authority for Wisconsin to (a) require out-of-state sellers to collect Wisconsin tax, and (b) codify the Department's application of the federal nexus threshold limiting Wisconsin's power to tax small out-of-state sellers.

Comment 4 – Bill Smith of the National Federation of Independent Business (NFIB) stated that NFIB has taken a neutral position regarding state collection of sales taxes, but their members believe:

- NFIB should oppose any attempt to make the Wayfair decision retroactive
- NFIB should oppose any attempt to use the Wayfair decision to extend the sales tax to services
- NFIB should support state preemption of local online sales tax definitions

DOR's response to Comment 4 – The department is not seeking a retroactive tax treatment; however, the department believes that current Wisconsin law provides that the sale of taxable services into Wisconsin by out-of-state sellers are taxable, unless federal law limits the department's authority to require collection and remittance by the out-of-state seller. The department will continue to provide clarity on this issue through published guidance.

Comment 5 – Curt Witynski of League of Wisconsin Municipalities commented that the League of Wisconsin Municipalities joins the Wisconsin Hotel and Lodging Association and the City of Madison in asking that the rule provide guidance that national "lodging marketplaces" must fully comply with state registration and tax collection requirements, including local room taxes. He suggested that the department can no longer rely on the Quill decision to allow lodging marketplaces to avoid complying with Wisconsin's mandatory registration requirement.

DOR's response to Comment 5 – See DOR's response to Comment 1.

Comment 6 – Nicholas Zavos, on behalf of the City of Madison Mayor's Office, asked that the department pay particular attention to the issue of lodging marketplaces. He commented that, to the extent the department was using *Quill* to allow non-compliance [of the lodging marketplace license], it should now stop, and that the rule should require full compliance with state statute.

DOR's response to Comment 6 – See DOR's response to Comment 1.

Comment 7 – Erik Reichertz asked questions to consider in drafting the rule. He asked whether (a) a seller will have to remit tax on sales occurring prior to exceeding the small seller exception and (b) whether Wisconsin will follow South Dakota in determining nexus by looking at the current or prior year and whether tax-exempt sales will count towards exceeding a small seller threshold.

DOR's response to Comment 6 – Mr. Reichertz' concerns are addressed in the rule.

**Comparison with rules in adjacent states:** The department has not found a similar rule in an adjacent state; however, other states have published guidance on how they will implement the *Wayfair* decision.

**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, but limited Wisconsin's ability to require out-of-state retailers to collect Wisconsin sales or use tax based on nexus. The department has created this proposed rule order to codify the federal nexus threshold. The department notes that, in the *Wayfair* decision, the Court found sufficient nexus existed where out-of-state retailers had annual sales of products and services into the state of more than \$100,000 or 200 or more separate transactions. 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 amends guidance for out-of-state retailers without a physical presence in Wisconsin making Wisconsin sales. The new guidance will be consistent with the *Wayfair* decision. Wisconsin will begin its enforcement on October 1, 2018. Wisconsin businesses, especially Wisconsin small businesses, will no longer be operating at a competitive disadvantage to out-of-state competitors that will now be required to collect tax. It also ensures that an undue burden will not be placed on small businesses located outside Wisconsin.

**Anticipated costs incurred by private sector:** This proposed rule does not have anticipated costs on the private sector. The costs to out-of-state retailers to collect Wisconsin sales and use tax are already required by Wisconsin law. This proposed rule relieves costs that would otherwise be incurred by small businesses located outside Wisconsin.

**Effect on small business:** This proposed rule ensures that an undue burden to collect Wisconsin sales and use tax will not be placed on small businesses located outside Wisconsin, when federal law limits the applicability of Wisconsin sales and use tax law.

**Agency contact person:** Please contact Jen Chadwick at (608) 266-8253 or [jennifer.chadwick@wisconsin.gov](mailto: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 the date on which the public hearing on this proposed rule is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

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### **FINDING OF EMERGENCY**

The Department of Revenue finds that an emergency exists and that the attached rule is necessary for the immediate preservation of the public peace, health, safety, or welfare. A statement of the facts constituting the emergency is:

Section 77.51(13g), Stats., provides that out-of-state retailers are engaged in business in Wisconsin and required to collect and remit Wisconsin sales and use tax if they make taxable sales in Wisconsin, "unless otherwise limited by federal law."

Federal law limits Wisconsin's ability to impose sales and use tax upon out-of-state retailers, as explained in the *Wayfair* decision. There are thousands of out-of-state retailers affected by this law and its limitation.

The rule interprets Wisconsin law to be consistent with the *Wayfair* decision.

**SECTION 1.** Tax 11.97 is repealed and recreated to read:

**Tax 11.97 Out-of-state retailers. (1) GENERAL.** An out-of-state retailer that sells taxable products or services into Wisconsin is engaged in business in this state and shall register and collect Wisconsin sales or use tax if the retailer is subject to the state's jurisdiction, as limited by federal law. The United States Supreme Court has said that it will sustain a state tax if it applies to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services the state provides. Physical presence in the state is not necessary to create a substantial nexus.

**Note:** Retailers with sales and use tax nexus in Wisconsin may also have nexus in Wisconsin for franchise or income tax purposes. Refer to s. Tax 2.82 for income and franchise nexus standards.

**(2) ACTIVITIES WHICH IN THEMSELVES CREATE WISCONSIN "NEXUS."** An out-of-state retailer shall register and collect Wisconsin sales or use tax if the retailer has activities described

in s. 77.51 (13g), Stats., subject to the thresholds in sub. (4) if only s. 77.51 (13g) (c), Stats., applies.

**Example:** An out-of-state retailer sells taxable products into Wisconsin, and delivers them using its own truck. The retailer is required to register and collect Wisconsin sales or use tax, since delivering products into Wisconsin using its own truck is an activity described in s. 77.51 (13g) (f), Stats. The nexus thresholds for small, out-of-state retailers in sub. (4) do not apply.

(3) ACTIVITIES WHICH IN THEMSELVES DO NOT CREATE WISCONSIN "NEXUS." A retailer is not required to register and collect Wisconsin sales or use tax if its activities are described in s. 77.51 (13h), Stats.

(4) NEXUS THRESHOLDS FOR SMALL OUT-OF-STATE RETAILERS. (a) An out-of-state retailer that sells taxable products or services into Wisconsin, but has no other activities described in s. 77.51 (13g), Stats., shall register and collect Wisconsin sales or use tax if the retailer meets either of the following criteria in the previous year or current year:

1. The retailer's annual gross sales into Wisconsin exceed \$100,000.
2. The retailer's annual number of separate sales transactions into Wisconsin is 200 or more.

(b) For purposes of this subdivision, all of the following apply:

1. "Year" means the retailer's taxable year for federal income tax purposes.
2. The annual amounts include both taxable and nontaxable sales.
3. Each required periodic payment of a lease or license is a separate sale transaction.
4. Deposits made in advance of a sale are not sale transactions.
5. An out-of-state retailer's annual amounts include all sales into Wisconsin by:
  - a. The retailer on behalf of other persons.
  - b. Another person on the retailer's behalf.

(c) If an out-of-state retailer's annual gross sales into Wisconsin exceeds \$100,000 in the previous year, or if the retailer's annual number of separate sales transactions into Wisconsin is 200 or more in the previous year, the retailer is required to register and collect Wisconsin sales or use tax for the entire current year.

**Example:** An out-of-state retailer has \$300,000 annual gross sales into Wisconsin and 175 sale transactions into Wisconsin in 2018. Since it exceeded the annual gross sales threshold in 2018, the retailer is required to be registered and collect Wisconsin sales or use tax on Wisconsin sales in 2019.

(d) If an out-of-state retailer's annual gross sales into Wisconsin are \$100,000 or less in the previous year and the annual number of separate sales transactions into Wisconsin is less than 200 in the previous year, the retailer is not required to register and collect Wisconsin sales or use tax until its sales or transactions meet the criteria in par. (a) for the current year. A retailer is required to collect Wisconsin sales or use tax for the remainder of the year.

**Example:** An out-of-state retailer has \$90,000 annual gross sales into Wisconsin and 175 sales transactions into Wisconsin in 2018. The retailer is not required to register and collect Wisconsin sales or use tax in 2018, because it is below the thresholds for small, out-of-state retailers. From January 1, 2019 through June 29, 2019, the retailer's gross sales into Wisconsin are \$100,000. On June 30, 2019, the retailer has a \$3,000 Wisconsin sale, which brings its annual

gross sales into Wisconsin for 2019 to \$103,000. The retailer is required to register and collect Wisconsin sales or use tax beginning with its next sales transaction in 2019. The retailer is also required to be registered and collect Wisconsin sales or use tax for 2020.

**(5) REGISTRATION.** Every out-of-state retailer engaged in business in this state and not required to hold a seller's permit, who makes sales for storage, use, or other consumption in this state, except as provided in sub. (3), shall apply for a use tax registration certificate.

**Note:** Refer to s. Tax 11.002 for registration information.

**(6) VOLUNTARY COLLECTION.** Out-of-state retailers who are not required to collect Wisconsin sales or use tax, but who elect to collect use tax for the convenience of their Wisconsin customers, may apply for a use tax registration certificate with the department as described in sub. (5). Holders of the use tax registration certificate shall collect the use tax from Wisconsin customers, give receipts, and report and pay the use tax to the Wisconsin department of revenue in the same manner as retailers that are required to collect Wisconsin sales tax.

**(7) COUNTY AND SPECIAL DISTRICT TAXES.** Retailers that are registered or required to register to collect, report, and remit Wisconsin state sales or use taxes are also required to collect, report, and remit the applicable county and stadium district sales or use taxes, as provided in s. 77.73 (3), Stats.

**Note:** Section Tax 11.97 interprets ss. 77.51 (13), (13g), (13h) and (14) (j), 77.52 (1), (1b), and (2), 77.53 (3), (5), (7), (9) and (9m) and 77.73, Stats.

**Note:** Section Tax 11.97 was recreated to be consistent with the June 21, 2018 U.S. Supreme Court decision in *South Dakota v. Wayfair, Inc.*

**SECTION 2. EFFECTIVE DATE.** This rule shall take effect on October 1, 2018.