

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: SM 196

INTRODUCER: Senator Margolis

SUBJECT: Marketplace Fairness Act of 2013

DATE: February 18, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hrdlicka</u>	<u>Hrdlicka</u>	<u>CM</u>	<b>Favorable</b>
2.	<u>Hrdlicka</u>	<u>Phelps</u>	<u>RC</u>	<b>Favorable</b>

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**I. Summary:**

SM 196 urges the U.S. House of Representatives to pass the Marketplace Fairness Act of 2013 or similar legislation that authorizes states to collect sales tax on sales by remote retailers.

**II. Present Situation:**

Forty-five states and the District of Columbia impose sales and use taxes.<sup>1</sup> States that do not have a personal income tax – Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming – rely most heavily on sales tax collections.<sup>2</sup> Because Florida has no personal state income tax, the state primarily depends on sales taxes for its general revenue.<sup>3</sup> Sales tax collections make up over 70 percent of general revenue.<sup>4</sup>

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<sup>1</sup> Alaska, Delaware, Montana, New Hampshire, and Oregon do not impose a state sales and use tax, although Alaska permits local governments to impose sales and use taxes.

<sup>2</sup> New Hampshire and Tennessee both have income taxes, but the taxes are not imposed on wages or other income other than dividends and interest.

<sup>3</sup> Chapter 212, F.S., contains the statutory provisions authorizing the levying and collection of Florida's sales and use taxes, as well as the exemptions and credits applicable to certain items or uses under specified circumstances. A sales tax of 6 percent is levied on the sales price of tangible personal property sold at retail in Florida, and a use tax of 6 percent is levied on the cost price of tangible personal property when it is used, consumed, distributed, or stored, rather than sold, in Florida. s. 212.05(1), F.S. The statutes currently provide more than 200 different exemptions; for a list of exemptions and history, see Florida Revenue Estimating Conference (REC), 2013 Florida Tax Handbook. Exemptions are estimated to total about \$11.5 billion. Additionally, Florida counties are authorized to levy a discretionary sales surtax on all transactions subject to the state sales and use tax when the goods or services are sold, or delivered into the county. ss. 212.054 and 212.055, F.S. Currently, the maximum surtax actually imposed is 1.5 percent in several counties; however, the theoretical maximum rate ranges between 2 percent and 3.5 percent, depending on the specifics of each individual county. See Florida's Discretionary Sales Surtax, Department of Revenue, available at <http://dor.myflorida.com/dor/taxes/discretionary.html> (last visited 2/10/2014).

<sup>4</sup> See REC, 2013 Florida Tax Handbook. Revenues from the sales and use tax for FY 2012-13 totaled over \$18 billion.

## Remote (Out-of-State) Sales and Retailers<sup>5</sup>

States that impose a sales and use tax typically require the dealer to collect the tax at the time of a taxable sale.<sup>6</sup> The statute does not differentiate between a sale at a brick and mortar store within Florida or remotely.

However, a state's ability to compel a remote retailer to collect and remit sales tax on a remote sale is limited by the Commerce Clause and the Due Process Clause of the U.S. Constitution.<sup>7</sup> The U.S. Supreme Court has held that the states' disparate state and local sales tax systems make collecting taxes an undue burden on remote retailers.<sup>8</sup>

When the sales tax is not collected at the time of purchase, generally a "use" tax is due.<sup>9</sup> "Use" taxes are imposed on the use of a taxable item in the state. They function as complements to sales taxes.<sup>10</sup> Use taxes are difficult for states to enforce because states lack the information to know that a use tax liability exists. Therefore, states must rely primarily on purchasers voluntarily to remit the tax themselves.

The U.S. Supreme Court has determined that in order to impose a sales tax collection requirement on a remote retailer, the retailer must have a "physical presence" (nexus) in the state.<sup>11</sup> Generally, this means that the retailer must have representatives or property within the taxing state.<sup>12</sup> Importantly, the U.S. Supreme Court has held that Congress has the clear authority to adopt another standard.<sup>13</sup>

According to the U.S. Census Bureau about 70 percent of U.S. households have Internet access.<sup>14</sup> The U.S. Census Bureau estimated that national e-commerce sales over the last 4 quarters exceeded \$250 billion dollars. However, e-commerce sales make up only about 5.5 percent of total retail sales in the U.S.<sup>15</sup>

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<sup>5</sup> For an in depth analysis, see Senate Budget Subcommittee on Finance and Tax, Interim Report 2012-107: Application of Florida's Sales Tax to Sales by Out-of-State Retailers (August 2011), available at <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/BFT1072012-107ft.pdf> (last visited 2/10/2014).

<sup>6</sup> See for example s. 212.07(1)(a), F.S.

<sup>7</sup> Due Process requires some minimal contact with the taxing state for a taxing statute to be upheld. Upholding a statute against a Commerce Clause challenge is dependent upon satisfying a 4-part test: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to a service provided by the taxing state. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), rehearing denied, 430 U.S. 976 (1977). See AMJUR STATELOCL s. 157; 71 A.L.R.5th 671.

<sup>8</sup> See Closing the Online Tax Loophole, Blackston, Michelle, NCSL's State Legislatures, April 2008.

<sup>9</sup> See Department of Revenue (DOR), Florida Consumer Information website on remitting use tax for Internet sales, available at <http://dor.myflorida.com/dor/taxes/consumer.html> (last visited 2/10/2014).

<sup>10</sup> Scripto, Inc., v. Carson, 362 U.S. 207, 210 (1960).

<sup>11</sup> See Quill Corporation v. North Dakota, 504 U.S. 298 (1992).

<sup>12</sup> National Bellas Hess, Inc. v. Dept. of Revenue of State of Illinois, 386 U.S. 753, 757 (1967).

<sup>13</sup> Quill, 504 U.S. at 318 (1992).

<sup>14</sup> 2011 data available at <http://www.census.gov/population/www/socdemo/computer.html> (last visited 2/10/2014).

<sup>15</sup> Quarterly Retail E-Commerce Sales, 3<sup>rd</sup> Quarter 2013, available at [http://www.census.gov/retail/mrts/www/data/pdf/ec\\_current.pdf](http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf) (last visited 2/10/2014).

The issue of sales and use taxes on e-commerce is important to the states for three main reasons:

- The continued growth in e-commerce points to an increasing number of transactions on which sales taxes will not be collected, resulting in sales tax revenue losses for state and local governments;
- Since remote retailers do not have to collect sales taxes, except in states where they have “nexus,” they enjoy a competitive advantage over “brick and mortar” local businesses; and
- Because of on-line retailers, consumers who can afford access to the Internet escape paying sales and use taxes while forcing those without access to shoulder a heavier burden of the sales tax.<sup>16</sup>

Studies estimate differing amounts of lost sales tax revenue. The most recent study, a September 2011 report by Arudin, Laffer, and Moore Econometrics, estimated tax revenue losses of \$374 million in 2010 and between \$449.6 million and \$454.0 million in 2012.<sup>17</sup> Other studies suggest that between \$280 million to \$800 million dollars of Florida state and local sales tax collections are not being remitted annually.<sup>18</sup> The actual amount of lost sales tax revenue is difficult to determine due to the more than 200 sales tax exemptions in Florida law and the 67 different state and local taxing jurisdictions in the state.

### **Actions of Other States**

States have attempted to address the issue of taxing sales by remote retailers through various methods.

Some states have amended their sales tax laws in an attempt to erase the disparities between their taxing systems in hopes that Congress would pass legislation allowing them to require remote retailers to collect their taxes at the point of sale. These states fully participate in the Streamlined Sales and Use Tax Agreement (SSUTA) and have “modernized” their sales and use tax structures to create a uniform, simplified taxing system that would apply to all businesses collecting sales and use taxes.<sup>19</sup> However, participation in collecting sales tax under the agreement is voluntary for retailers who do not have a physical presence or “nexus” within a state. Currently, over 1,000 businesses have voluntarily agreed to collect taxes on remote sales.

Other states have enacted laws which attempt to define e-commerce relationships that create a physical presence for a remote retailer to collect and remit sales taxes. Some states take the approach of establishing nexus through existing state laws related to mail order sales.<sup>20</sup> Other states have elected to exempt certain retailers from collecting and remitting sales tax if the

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<sup>16</sup> Graham Williams, “Streamlined Sales Tax for the New Economy,” National Conference of State Legislatures, Nov./Dec. 2000, Vol. 8, No. 44.

<sup>17</sup> Report on file with the Senate Commerce and Tourism Committee.

<sup>18</sup> See Senate Budget Subcommittee on Finance and Tax, Interim Report 2012-107.

<sup>19</sup> Florida legislative action in response to this project includes s. 213.27, F.S., which grants DOR authority to enter into contracts with public or private vendors to develop and implement a voluntary system for sales and use tax collection and administration, and ch. 2001-225, L.O.F., which among other things, created the Simplified Sales and Use Tax Act, authorizing Florida to participate in the next phase of discussions with other states for the purposes of developing the project. See the SSUTA website for more information: <http://www.streamlinedsalestax.org/>.

<sup>20</sup> See Pennsylvania Department of Revenue, Nexus Resources for Retailers, available at [http://www.revenue.state.pa.us/portal/server.pt/community/nexus\\_resources/20610](http://www.revenue.state.pa.us/portal/server.pt/community/nexus_resources/20610) (last visited 2/10/2014).

retailer agrees to make a substantial investment in the state in the form of a distribution center and create a certain number of jobs.<sup>21</sup>

States that have enacted laws or taken the above approaches have been challenged by remote retailers for violation of the U.S. Constitution. While some retailers have been awarded an injunction from enforcement of the state's statutes, in December 2013, the U.S. Supreme Court denied a hearing on two New York cases involving New York's approach to resolving the nexus issue where the Court of Appeals of New York upheld the state's laws.<sup>22</sup> There have been no definitive decisions affording a resolution of the issues.

### **Federal Involvement in the Issue**

Since the power to regulate interstate commerce resides at the federal level, federal legislation appears to be the only comprehensive solution for states to have the authority to require remote retailers to collect sales tax. Multiple bills have been filed in Congress over the years to try to address the issue, but none have been passed into law.

The Marketplace Fairness Act of 2013 authorizes states meeting certain conditions to require the collection and remittance of sales tax by a remote retailers that has more than \$1 million of gross annual receipts in total remote sales in the U.S. in the preceding calendar year.<sup>23</sup>

Member states under the SSUTA<sup>24</sup> are authorized to require the collection and remittance of sales tax without a change in their current state laws.

Nonmember states must enact "minimum simplification requirements" in order to require remote retailers to collect and remit sales tax. "Minimum simplification requirements" include:

- Specifying a single state tax administration entity for all state and local sales taxes, including a single audit and tax return;
- Establishing tax return filing and other requirements on remote retailers that are similar to those for other retailers;
- Creating a uniform base for state and local jurisdictions, by specifying which taxes the remote retailers would be required to collect, the products and services that are exempt, and by sourcing the sale to location where the product or service is delivered to the purchaser;<sup>25</sup>
- Providing free software through certified software providers for remote retailers that calculates sales tax due, files tax returns, and is updated for tax rate changes;

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<sup>21</sup> For example, South Carolina's statute requires a \$125 million investment and 2,000 new jobs in exchange for exemption from sales tax collections until 2016. However, the exemption is repealed if Congress passes a law permitting the collection of the tax on remote retailers. S.C. Code s. 12-36-2691.

<sup>22</sup> Overstock.com, Inc. v. New York State Dept. of Taxation and Finance 134 S.Ct. 682 (2013), and Amazon.com, LLC v. New York State Dept. of Taxation and Finance 134 S.Ct. 682 (2013).

<sup>23</sup> See the summary for S. 743 – Marketplace Fairness Act of 2013 (113<sup>th</sup> Congress), available at <http://beta.congress.gov/bill/113th-congress/senate-bill/743> (last visited 2/10/2014).

<sup>24</sup> Twenty-three states are full members of the SSUTA. See State Info, Streamlined Sales Tax Governing Board, Inc., available at <http://www.streamlinedsalestax.org/index.php?page=state-info> (last visited 2/10/2014).

<sup>25</sup> If the delivery address is unknown, the sale is sourced to the purchaser's billing address or the retailer's address from which the remote sale was made.

- Exempting remote retailers and certified software providers from liability for incorrect collection, remittance, or noncollection of sales and use taxes for reliance on erroneous or inaccurate information; and
- Providing remote retailers and certified software providers with 90 days' notice of tax rate changes.

In May 2013, the U.S. Senate passed S. 743, the Marketplace Fairness Act of 2013. The U.S. House of Representatives has yet to take up the issue.

### III. Effect of Proposed Changes:

**Resolution:** SM 196 urges the U.S. House of Representatives to pass the Marketplace Fairness Act of 2013 or similar legislation that authorizes states to collect sales tax on sales by remote retailers.

**Rationale for Resolution:** SM 196 states that the two U.S. Supreme Court cases denied states the authority to require a remote retailer to collect sales tax when the remote retailer did not have a physical presence in the taxing state. The memorial stipulates that the future viability of sales tax as a stable revenue source is threatened by the combination of the Court decisions and tax base erosion from electronic commerce and that a 2009 university report estimated that in FY 2012, states collectively lost out on \$23 billion in uncollected sales tax revenues from remote sales.<sup>26</sup>

SM 196 states that the Marketplace Fairness Act, which was introduced in both houses of Congress, authorizes states meeting certain conditions to require retailers to collect and remit sales tax for remote sales. The memorial stipulates that the U.S. Senate passed the act on May 6, 2013, and that the President of the United States has indicated that he would sign the legislation.

**Circulation:** Copies of this memorial are to be dispatched to the President of the United States, to the President of the United States Senate, to the Speaker of the United States House of Representatives, and to each member of the Florida delegation to the United States Congress.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

None.

#### C. Trust Funds Restrictions:

None.

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<sup>26</sup> The memorial cites "State and Local Sales Tax Revenue Losses from E-Commerce Estimates as of April 2009" by Dr. Donald Bruce and Dr. William Fox, Center for Business and Economic Research, University of Tennessee.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

None.

**IX. Additional Information:**

## A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

## B. Amendments:

None.