

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.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: SB 50

INTRODUCER: Senator Gruters and others

SUBJECT: Sales and Use Tax

DATE: January 22, 2021

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------|----------------|-----------|------------------|
| 1. | McMillan | McKay | CM | Favorable |
| 2. | _____ | _____ | FT | _____ |
| 3. | _____ | _____ | AP | _____ |

I. Summary:

SB 50 requires marketplace providers and out-of-state retailers with no physical presence in Florida to collect Florida's sales tax on sales of taxable items delivered to purchasers in Florida if the marketplace provider or out-of-state retailer makes a substantial number of sales into Florida.

A substantial number of remote sales means conducting any number of taxable remote sales in an amount exceeding \$100,000 during the previous calendar year.

The Revenue Estimating Conference has not yet estimated the revenue impact of this bill.

Except as otherwise provided in the bill, the bill takes effect July 1, 2021.

II. Present Situation:

Florida Sales and Use Tax

Florida levies a 6 percent sales and use tax (sales tax) on the sale or rental of most tangible personal property, admissions,¹ transient rentals,² and a limited number of services, and a 5.5 percent sales and use tax on commercial real estate.³ Chapter 212, F.S., authorizes the levy and collection of Florida's sales and use tax, and provides exemptions and credits applicable to certain items or uses under specified circumstances. Florida requires a dealer to add the tax to the sales price of the taxable good or service and collect it from the purchaser at the time of sale.⁴

¹ Section 212.04, F.S.

² Section 212.03, F.S.

³ Section 212.031, F.S.

⁴ See ss. 212.07(2) and 212.06(3)(a), F.S.

In addition to the state tax, s. 212.055, F.S., authorizes counties to impose nine local discretionary sales surtaxes. A surtax applies to “all transactions occurring in the county which transactions are subject to the state tax imposed on sales, use, services, rentals, admissions, and other transactions by [ch. 212, F.S.], and communications services as defined in ch. 202.”⁵ The discretionary sales surtax is based on the tax rate imposed by the county where the taxable goods or services are sold, or are delivered. Discretionary sales surtax rates currently levied vary by county in a range from 0.5 to 2.5 percent.⁶

Remote Sales Tax Collection

As discussed above, sales tax is added to the price of taxable goods and the selling dealer is required to collect the tax from the purchaser at the time of sale.⁷ A dealer then remits the collected taxes to the Department of Revenue (department).⁸

For items sold by an out-of-state dealer and delivered to the in-state purchaser via mail (mail-order sales), states have relied on their use tax. Florida’s use tax requires an in-state purchaser to remit to the department a tax on their purchase of an untaxed item.⁹ However, use tax compliance is notoriously low. Avalara reports that use tax compliance can be as low as 2 percent and is difficult to enforce.¹⁰

States would prefer to have the out-of-state dealer collect the state’s sales tax at the time of sale and remit those taxes to the state. However, the U.S. Supreme Court has interpreted the Commerce Clause of the U.S. Constitution to require that a dealer have a “substantial nexus” with the taxing state before the taxing state may require the dealer to collect its sales taxes.¹¹ For decades, the U.S. Supreme Court has interpreted this substantial nexus requirement to require that the dealer have a physical presence (people or property) within the taxing state.¹² The Court reasoned that it was an undue burden on interstate commerce to allow a taxing state to require an out-of-state dealer located outside of the taxing state to collect tax on behalf of the taxing state.¹³

Under the “substantial nexus” and “physical presence” standard, Florida, in 1987, adopted its “mail order sales statute,” which defines a mail order sale to be the sale of tangible personal property, ordered from a dealer who receives the order in another state and then causes the property to be transported to a person in this state.¹⁴ Although the statute describes dealers who

⁵ Section 212.054, F.S.

⁶ Office of Economic and Demographic Research, The Florida Legislature, *Florida Tax Handbook*, 2020 Local Discretionary Sales Surtax Rates in Florida’s Counties, 231-232 (2020), available at <http://edr.state.fl.us/content/revenues/reports/tax-handbook/taxhandbook2020.pdf> (last visited Jan. 22, 2021).

⁷ Florida Dept. of Revenue, *Florida Sales and Use Tax*, available at http://floridarevenue.com/taxes/taxesfees/Pages/sales_tax.aspx (last visited Jan. 22, 2021).

⁸ Section 212.15, F.S.

⁹ See s. 212.06, F.S.

¹⁰ Gail Cole, *5 questions about use tax reporting requirements for non-collecting businesses*, avalara.com, Feb. 16, 2018, available at <https://www.avalara.com/us/en/blog/2018/02/5-use-tax-reporting-requirements-questions-for-non-collecting-businesses.html> (last visited Jan. 22, 2021).

¹¹ See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

¹² *National Bellas Hess, Inc., v. Illinois*, 386 U.S. 753 (1967); *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992).

¹³ *Quill Corporation v. North Dakota*, at 314-315.

¹⁴ See s. 212.0596(1), F.S.

“receive [orders] in another state,” application of the statute was still limited by the U.S. Supreme Court’s physical presence standard.¹⁵ In fact, much of the statute is written in terms of being physically present within Florida.¹⁶

Taxation of Mail Order Sales

Section 212.0596, F.S., establishes when a dealer¹⁷ who makes a mail-order sale is subject to Florida’s sales tax. A “mail-order sale” is a sale of tangible personal property, ordered by mail or other means of communication, from a dealer who receives the order in another state of the United States, or in a commonwealth, territory, or other area under the jurisdiction of the United States, and transports the property or causes the property to be transported to a person in Florida.¹⁸

Every dealer as defined in s. 212.06(2)(c), F.S., who makes a mail-order sale is subject to the power of Florida to levy and collect the tax imposed by this ch. 212, F.S., when:

- The dealer is a corporation doing business under the laws of this state or is a person domiciled in, a resident of, or a citizen of, this state.
- The dealer maintains retail establishments or offices in Florida.
- The dealer has agents in Florida who solicit business or transact business on behalf of the dealer.
- The property was delivered in Florida in fulfillment of a sales contract that was entered into in Florida when a person in Florida accepted an offer by ordering the property.
- The dealer, by purposefully or systematically exploiting the market provided by Florida by any media-assisted, media-facilitated, or media-solicited means, creates nexus with Florida.
- Through compact or reciprocity with another jurisdiction of the United States, that jurisdiction uses its taxing power and its jurisdiction over the retailer in support of Florida’s taxing power.
- The dealer consents, expressly or by implication, to the imposition of the tax imposed by ch. 212, F.S.
- The dealer is subject to service of process under s. 48.181, F.S.
- The dealer’s remote sales are subject to the power of Florida to tax sales or to require the dealer to collect use taxes under a statute or statutes of the United States.
- The dealer owns real property or tangible personal property that is physically in Florida.
- The dealer is a corporation that is a member of an affiliated group of corporations and whose members are eligible to file a consolidated tax return for federal corporate income tax purposes and any parent or subsidiary corporation in the affiliated group has nexus with Florida.
- The dealer or the dealer’s activities have sufficient connection with or relationship to Florida or its residents of some type, other than those described above, to create nexus empowering

¹⁵ See p. 3, *infra*, ‘Taxation of Mail Order Sales’ for further discussion of what activities subject a dealer to the levy and collection of tax pursuant to ch. 212, F.S.

¹⁶ See s. 212.0596(2)(j), F.S. (requiring dealers to collect tax on mail order sales if the dealer owns real property or tangible personal property that is physically in this state...).

¹⁷ Section 212.06(2)(a), F.S., defines “dealer” as every person, who manufactures or produces tangible personal property for sale at retail; for use, consumption, or distribution; or for storage to be used or consumed in Florida.

¹⁸ Section 212.0596(1), F.S.

this state to tax its mail order sales or to require the dealer to collect sales tax or accrue use tax.¹⁹

Section 212.0596, F.S., also imposes a duty on dealers to cooperate in the collection of taxes, requires the department to enforce these provisions in other jurisdictions when the other jurisdiction consents, and specifies that sales tax required under this section is to be collected and any amount unreturned to a purchaser that is not tax but was collected from the purchaser under the representation that it was tax constitute funds of the State of Florida from the moment of collection.

A dealer who makes a mail order sale into this state is exempt from collecting and remitting any local option surtax on the sale.²⁰ The department may establish rules for collecting the use tax from unregistered persons who, but for their remote purchases, would not be required to remit sales or use tax directly to the department.²¹

Currently, a purchaser who remits use tax on an item imported into Florida for use or consumption is not required to include in the remittance any local discretionary sales surtax.²²

The Wayfair Decision

On June 21, 2018, the U.S. Supreme Court decided *South Dakota v. Wayfair*.²³ *Wayfair* involved a new South Dakota sales tax collection statute and Wayfair, Inc., a large online retailer with no physical presence in South Dakota that sells and ships tangible personal property to customers all over the United States.

The *Wayfair* decision overturned the “physical presence test.” The removal of the physical presence test will expand states’ abilities to collect sales taxes; however, the foundational constitutional requirement (substantial nexus) remains in place, and thus, the extent of states’ authority is largely unknown at this time.

The facts involved in *Wayfair* provide the only situation currently known to satisfy all constitutional requirements for a remote seller without physical presence in the taxing state to collect and remit a states’ sales and use tax.

For example:

- The South Dakota law only requires remote sellers with \$100,000 of sales or 200 individual transactions into South Dakota to collect tax. The law effectively has a “small seller exception” allowing small retailers—theoretically the ones most burdened by remote sales tax collection—to avoid collection responsibilities.
- The South Dakota law does not apply retroactively.
- South Dakota is a member of the Streamlined Sales and Use Tax Agreement.

¹⁹ Section 212.0596(2), F.S.

²⁰ Section 212.0596(6), F.S.

²¹ Section 212.0596(7), F.S.

²² *Id.*

²³ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

State Reactions to Wayfair

After the *Wayfair* decision, 43 states and the District of Columbia have enacted laws requiring remote sellers to collect the sales tax, and 38 states and the District of Columbia have enacted laws requiring a marketplace provider/facilitator to collect the sales tax.²⁴

III. Effect of Proposed Changes:

Taxation of Remote Sales and Marketplace Sales

The bill requires marketplace providers and out-of-state retailers with no physical presence in Florida to collect Florida's sales tax on sales of taxable items delivered to purchasers in Florida if the provider or retailer makes a substantial number of sales into Florida.

Section 1 amends the definition of "retail sale" in s. 212.02, F.S., to include a remote sale and a sale facilitated through a marketplace.

Section 2 amends s. 212.05, F.S., to apply the sales and use tax to remote sales.

Section 3 substantially amends s. 212.0596, F.S. The bill changes the catch line to refer to the taxation of remote sales, removes references or requirements related to a "mail order sale," and provides that a person who makes a substantial number of remote sales is a dealer for purposes of ch. 212, F.S.

"Substantial number of remote sales" means conducting any number of taxable remote sales in an amount exceeding \$100,000 during the previous calendar year.

Section 4 creates s. 212.05965, F.S., which provides for the taxation of marketplace sales.

The bill defines:

- "Marketplace" to mean any physical place or electronic medium through which tangible personal property is offered for sale.
- "Marketplace provider" to mean a person who facilitates a retail sale by a marketplace seller by listing or advertising for sale by the marketplace seller tangible personal property in a marketplace, and who directly, or indirectly through agreements or arrangements with third parties, collects payment from the customer and transmits the payment to the marketplace seller, regardless of whether the marketplace provider receives compensation or other consideration in exchange for its services.

Excluded from the definition of marketplace provider is (1) any person who solely provides travel agency services, (2) a delivery network company, unless the delivery network company is a registered dealer that notifies all local merchants that sell through the delivery company's website or mobile application that the delivery network company must remit taxes in the same way as a marketplace provider, or (3) a payment processor business whose

²⁴ National Conference of State Legislatures, Remote Sales Tax Collection, (March 13, 2020), *available at* <https://www.ncsl.org/research/fiscal-policy/e-fairness-legislation-overview.aspx#Marketplace> (last visited Jan. 22, 2021).

sole activity with respect to marketplace sales is to handle payment transactions between two parties.

- “Marketplace seller” to mean a person who has an agreement with a marketplace provider and who makes retail sales of tangible personal property through a marketplace owned, operated, or controlled by the marketplace provider.

Marketplace providers with a physical presence in Florida, or those making or facilitating a substantial number of remote sales into this state, are subject to the requirements imposed on dealers by ch. 212, F.S., for registration and for the collection and remittance of taxes. A marketplace provider must certify to its marketplace sellers that it will collect and remit the tax to the department.

A marketplace seller may not collect and remit sales tax when the marketplace provider certifies that it will collect and remit the tax. A marketplace seller must exclude sales made through the marketplace from the marketplace seller’s tax return. A marketplace seller with a physical presence in Florida, or that makes a substantial number of remote sales must register, collect, and remit sales tax on taxable sales made outside of the marketplace.

A marketplace provider must allow the department to examine and audit its books and records. If the department audits a marketplace provider, the department may not propose a tax assessment on the marketplace seller for the same retail sales unless the marketplace seller provides incorrect or incomplete information to the marketplace provider.

The marketplace provider is relieved of liability for the tax, and the marketplace seller or customer is liable for the tax imposed under this chapter if the marketplace provider demonstrates that it made a reasonable effort to obtain accurate information related to the retail sales facilitated through the marketplace from the marketplace seller, but the failure to collect and pay the correct amount of tax imposed under this chapter was due to incorrect or incomplete information provided by the marketplace seller to the marketplace provider.

The bill defines:

- “Delivery network company” as a person who maintains a website or mobile application used to facilitate delivery services, the sale of local products, or both.
- “Delivery network courier” as an individual who provides delivery services through a delivery network company website or mobile application using a personal means of transportation, such as a motor vehicle as defined in s. 320.01(1), F.S., bicycle, scooter, or other similar means of transportation; using public transportation; or by walking.
- “Delivery services” as the pickup and delivery by a delivery network courier of one or more local products from a local merchant to a customer, which may include, the selection, collection, and purchase of the local product in connection with the delivery. The term does not include any delivery requiring more than 75 miles of travel from the local merchant to the customer.
- “Local merchant” as a kitchen, restaurant, or a third-party merchant, including a grocery store, retail store, convenience store, or business of another type, which is not under common ownership or control of the delivery network company.

- “Local product” as any tangible personal property, including food, but excluding freight, mail, or a package to which postage has been affixed.

Section 5 amends s. 212.06, F.S., to specify that the term “dealer” includes a retailer who transacts a remote sale or who is a marketplace provider.

Section 6 amends s. 212.12, F.S., to (1) remove the authority given to the executive director of the department to negotiate a collection allowance with a dealer who makes mail order sales and (2) delete language that kept dealers who made mail order sales from participating in the state’s 2.5 percent collection allowance.

Section 7 makes conforming changes to s. 212.18 F.S., to change the term “mail order sale” to “remote sale.”

Section 8 amends s. 212.20(4), F.S., to incorporate s. 212.05965, F.S.

Section 9 makes conforming changes to s. 213.27(5), F.S., to clarify that s. 213.27(5), F.S., applies to a person making or facilitating remote sales under s. 212.0596, F.S. or s. 212.05965, F.S.

Section 10 provides that this act first applies to remote sales made or facilitated on or after July 1, 2021, by a person who made or facilitated a substantial number of remote sales in calendar year 2020.

Section 11 authorizes the department to adopt emergency rules to implement the bill. The emergency rulemaking grant is authorized upon the act becoming law, and expires July 1, 2022.

Section 12 provides that if any provision of the bill is found to be invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end, the provisions of this act are severable.

Section 13 provides that this section take effect upon becoming law, and except as otherwise provided, the bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties and municipalities to spend funds, limit their ability to raise revenue, or reduce the percentage of a state tax shared with them. Therefore, the mandates provision does not apply.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

Article VII, s. 19 of the Florida Constitution requires new or increased taxes or fees to be passed by a 2/3 vote of the membership of each house of the Legislature in a separate bill that contains no other subject.

Since 1990, Florida has required dealers who transact mail-order sales to collect Florida's tax when the activities of the dealer have sufficient connection with this state to create nexus under the U.S. Commerce Clause.²⁵

The bill neither imposes a tax where none was due before, nor does it increase the amount of a current state tax. Rather, the bill updates Florida's mail-order statute to align with U.S. Commerce Clause limitations, as redefined by the U.S. Supreme Court in *Wayfair*. As such, the bill does not appear to implicate the requirements of Article VII, s. 19 of the Florida Constitution.

E. Other Constitutional Issues:

The facts involved in *Wayfair* provide the only situation currently known to satisfy all constitutional requirements for a remote seller without physical presence in the taxing state to collect and remit a states' sales and use tax. The court did not decide the constitutionality of marketplace providers to collect and remit a states' sales and use tax on behalf of retailers who sell on a marketplace.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The Revenue Estimating Conference has not yet estimated the revenue impact of this bill.

B. Private Sector Impact:

More remote sellers and marketplace providers will have to collect and remit Florida's sales tax.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

²⁵ Section 212.0596(2)(1), F.S.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 212.02, 212.05, 212.0596, 212.06, 212.12, 212.18, 212.20, and 213.27.

This bill creates section 212.05965 of the Florida Statutes.

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.