

**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 Commerce and Tourism

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BILL: SB 126

INTRODUCER: Senator Gruters

SUBJECT: Sales and Use Tax

DATE: October 14, 2019

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>McMillan</u>	<u>McKay</u>	<u>CM</u>	<b>Favorable</b>
2.	_____	_____	<u>FT</u>	_____
3.	_____	_____	<u>AP</u>	_____

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**I. Summary:**

SB 126 requires 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 retailer makes a substantial number of sales into Florida, and provides for the taxation of sales facilitated through a marketplace provider.

Except as otherwise provided, the bill takes effect July 1, 2020.

**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,<sup>1</sup> transient rentals,<sup>2</sup> rental of commercial real estate,<sup>3</sup> and a limited number of services. 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. Sales tax is added to the price of the taxable good or service and is collected from the purchaser at the time of sale.<sup>4</sup> Sales tax receipts are estimated to account for 77 percent of the state's General Revenue Fund in Fiscal Year 2018-2019.<sup>5</sup>

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<sup>1</sup> Section 212.04, F.S.

<sup>2</sup> Section 212.03, F.S.

<sup>3</sup> Section 212.031, F.S.

<sup>4</sup> Florida Dept. of Revenue, *Florida Sales and Use Tax*, available at [http://floridarevenue.com/taxes/taxesfees/Pages/sales\\_tax.aspx](http://floridarevenue.com/taxes/taxesfees/Pages/sales_tax.aspx) (last visited Oct. 14, 2019).

<sup>5</sup> Florida Legislature, Office of Economic and Demographic Research, *Florida Tax Handbook*, Sources of General Revenue, (2019), available at <http://edr.state.fl.us/content/revenues/reports/tax-handbook/taxhandbook2019.pdf> (last visited Oct. 14, 2019).

In addition to the sales 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.”<sup>6</sup> 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.<sup>7</sup>

### ***Remote Sales and 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.<sup>8</sup> A dealer then remits the collected taxes to the Department of Revenue (department).<sup>9</sup>

Florida imposes a use tax on items sold by an out-of-state dealer and delivered to the in-state purchaser via mail.<sup>10</sup> However, use tax compliance is notoriously low.

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. Recently, the U.S. Supreme Court 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.<sup>11</sup> For decades, the U.S. Supreme Court has interpreted the substantial nexus requirement to require that the dealer have a physical presence (people or property) within the taxing state.<sup>12</sup> The Court reasoned that to allow a taxing state to require a dealer located outside the taxing state to collect tax on behalf of the taxing state was an undue burden on interstate commerce.<sup>13</sup>

To accommodate the “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.<sup>14</sup> Although the statute describes dealers who “receive [orders] in another state,” application of the statute was still limited by the U.S. Supreme Court’s physical presence standard. In fact, much of the statute is written in terms of being physically present within Florida.<sup>15</sup>

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<sup>6</sup> Section 212.054, F.S.

<sup>7</sup> Office of Economic and Demographic Research, The Florida Legislature, *Florida Tax Handbook*, 2019 Local Discretionary Sales Surtax Rates in Florida’s Counties, 224-225 (2019), available at <http://edr.state.fl.us/content/revenues/reports/tax-handbook/taxhandbook2019.pdf> (last visited Oct. 14, 2019).

<sup>8</sup> Florida Dept. of Revenue, *Who must pay tax? Partial list of taxable business activities*, available at [http://dor.myflorida.com/dor/taxes/sales\\_tax.html](http://dor.myflorida.com/dor/taxes/sales_tax.html) (last visited October 14, 2019).

<sup>9</sup> Section 212.15, F.S.

<sup>10</sup> See s. 212.06, F.S.

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

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

<sup>13</sup> *Quill Corporation v. North Dakota*, at 314-315.

<sup>14</sup> See s. 212.0596(1), F.S.

<sup>15</sup> 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...).

### *The Wayfair Decision*

On June 21, 2018, the U.S. Supreme Court decided *South Dakota v. Wayfair*.<sup>16</sup> *Wayfair* involved a new South Dakota sales tax collection statute and Wayfair, Inc., a large online retailer that sells and ships tangible personal property to customers all over the United States. At the time of the decision, Wayfair, Inc., had no physical presence in South Dakota.

The *Wayfair* decision overturned the “physical presence test.” The removal of the physical presence test will expand states’ ability 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.

### *Taxation of Mail Order Sales*

Section 212.0596, F.S., establishes when a dealer<sup>17</sup> who makes a mail-order sale is subject to Florida’s sales tax. A “mail-order sale” is 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.

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.

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<sup>16</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

<sup>17</sup> 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.

- 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, other than those described above, result in making a substantial number of remote sales under s. 212.0596(3), F.S.

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 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.

The department may establish by rule procedures 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.<sup>18</sup>

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.<sup>19</sup>

### III. Effect of Proposed Changes:

#### Taxation of Remote Sales and Marketplace Sales

The bill requires retailers with no physical presence in Florida to collect Florida's sales tax on sales of taxable items delivered to purchasers in Florida if they make a substantial number of sales into Florida. Additionally, the bill provides for the taxation of sales facilitated through a marketplace provider, and requires a marketplace provider to collect and remit sales tax on taxable sales made by marketplace sellers.

**Section 5** creates s. 212.05965, F.S., which provides for the taxation of sales facilitated through a marketplace provider.<sup>20</sup> Marketplace providers with a physical presence in Florida, or those making a substantial number of remote sales into Florida must collect and remit sales tax.

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<sup>18</sup> Section 212.0596(7), F.S.

<sup>19</sup> *Id.*

<sup>20</sup> Examples of "marketplace providers" include Amazon and eBay

Furthermore, a marketplace seller may not collect and remit sales tax when the marketplace provider certifies that it will collect and remit the tax. However, a marketplace seller 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.

With certain exceptions, 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; or
- The marketplace seller or the customer has already remitted the tax.

Consistent with s. 213.21, F.S., the department may compromise any tax, interest, or penalty assessed on retail sales conducted through a marketplace.

- A “marketplace” is any physical place or electronic medium through which tangible personal property is offered for sale.
- A “marketplace provider” is any 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
  - 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.
- A “marketplace seller” is 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 a marketplace provider.

However, a marketplace provider does not include any person who solely provides travel agency services, or 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.

- A “delivery network company” is a person who maintains a website or mobile application used to facilitate delivery services, the sale of local products, or both. A delivery network company’s delivery must be within 75 miles of the local merchant.
- A “delivery network courier” is an individual who provides delivery services through a delivery network company website or mobile application using a person 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.

- A “delivery services” is 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.
- A “local merchant” is 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.
- A “local product” is any tangible personal property, including food, but excluding freight, mail, or a package to which postage has been affixed.

**Section 4** amends s. 212.0596, F.S., to change the term “mail order sale” to “remote sale” and to provide that a person who makes a substantial number of remote sales is a dealer for purposes of ch. 212, F.S.

A dealer makes a “substantial number of remote sales” if it:

- Conducts 200 or more retail sales of tangible personal property to be delivered to a location within Florida; or
- Conducts any number of retail sales of tangible personal property to be delivered to a location within Florida, in an amount exceeding \$100,000, in the previous calendar year.

The bill also deletes a provision that exempts an out-of-state dealer who makes retail sales into this state from collecting and remitting any local option surtax.

**Section 6** amends s. 212.06, F.S., to specify that the term “dealer” includes a retailer who transacts a remote sale and a marketplace provider who facilitates a retail sale through a marketplace.

**Section 1** amends the definition of “retail sale” in s. 212.02, F.S., to include a remote sale.

**Section 2** amends the definition of “retail sale” in s. 212.02, F.S., to include a sale facilitated through a marketplace.

**Section 3** amends s. 212.05, F.S., to apply the sales and use tax to remote sales.

**Sections 7 and 8** make conforming changes to ss. 212.12 and 212.18 F.S., respectively, to change the term “mail order sale” to “remote sale.”

The bill amends s. 212.12 to remove “dealers who make mail order sales” from those who qualify for a credit by filing their tax returns pursuant to s. 212.11.

The bill also deletes a provision that gives the department authority to negotiate a collection allowance with a dealer who makes mail order sales.

**Section 9** reenacts s. 212.20(4), F.S., in order to incorporate the amendment made by this bill to s. 212.0596, F.S.

**Section 10** authorizes the department to adopt emergency rules to implement the bill. The rulemaking grant is authorized upon the act becoming law, and expires July 1, 2021.

**Section 11** provides that if any provision of the bill is found to be invalid, that invalidity does not affect the ability of the other provisions of the bill to go into effect. If that provision is severed, the other provisions of the bill can be given effect.

**Section 12** provides that this section takes effect upon becoming law, and except as otherwise provided, the bill takes effect July 1, 2020.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

The bill does not require counties and municipalities to spend funds or 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:

None.

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 the marketplace.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

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

B. Private Sector Impact:

More remote sellers will have to collect and remit Florida's sales tax pursuant to the provisions relating to remote sales and marketplace sales.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

Section 6 of the bill amends s. 212.06, F.S., and takes effect July 1, 2020, but contains a cross reference to s. 212.05965, F.S., created by section 5 of the bill, which is effective October 1, 2020.

**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, and 212.20.

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.