

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 15 Sales and Use Tax

**SPONSOR(S):** Clemons and others

**TIED BILLS:** **IDEN./SIM. BILLS:**

<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR or BUDGET/POLICY CHIEF</b>
1) Ways & Means Committee		Berg	Aldridge
2) Commerce Committee			

**SUMMARY ANALYSIS**

HB 15 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 200 or more retail sales during the previous calendar year or conducting any number of retail sales in an amount exceeding \$100,000 during the previous calendar year.

The Revenue Estimating Conference determined that the bill will increase General Revenue Fund receipts by \$973.6 million (\$1,079.7 million recurring) in Fiscal Year 2021-2022. Local government revenues are estimated to increase by \$229.5 million (\$253.7 million recurring) in Fiscal Year 2021-2022.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

##### Florida Sales and Use Tax

Florida levies a 6 percent sales and use 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 sales price of the taxable good or service and is collected from the purchaser at the time of sale.<sup>4</sup>

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."<sup>5</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>6</sup>

##### *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.<sup>7</sup> A dealer then remits the collected taxes to the Department of Revenue (department).<sup>8</sup>

For items sold by an out-of-state dealer and delivered to the in-state purchaser via mail (mail-order sales), states have depended on their use taxes. Florida imposes a use tax that applies in these situations;<sup>9</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. However, 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>10</sup> For decades, the U.S. Supreme Court has interpreted the substantial nexus requirement to mean the dealer must have a physical presence (people or property) within the taxing state.<sup>11</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>12</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> Section 212.07(2), F.S., and s. 212.06(3)(a), F.S.

<sup>5</sup> Section 212.054, F.S.

<sup>6</sup> Office of Economic and Demographic Research, The Florida Legislature, *Florida Tax Handbook*, 2020 Local Discretionary Sales Surtax Rates in Florida's Counties, 231-232 (20), available at <http://edr.state.fl.us/Content/revenues/reports/tax-handbook/taxhandbook2020.pdf> (last visited March 9, 2021).

<sup>7</sup> Florida Dept. of Revenue, *Who must pay tax? Partial list of taxable business activities*, available at [https://floridarevenue.com/taxes/taxesfees/Pages/sales\\_tax.aspx](https://floridarevenue.com/taxes/taxesfees/Pages/sales_tax.aspx) (last visited March 9, 2021).

<sup>8</sup> Section 212.15, F.S.

<sup>9</sup> See s. 212.06, F.S.

<sup>10</sup> See *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

<sup>11</sup> *National Bellas Hess, Inc., v. Illinois*, 386 U.S. 753 (1967); *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992).

<sup>12</sup> *Quill Corporation v. North Dakota*, at 314-315.

Under 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>13</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>14</sup>

### *Taxation of Mail Order Sales*

Section 212.0596, F.S., establishes when a dealer<sup>15</sup> who makes a mail-order sale is subject to the powers of this state to levy and collect 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.<sup>16</sup>

Every dealer as defined in s. 212.06(2)(c), F.S., who makes a mail-order sale is subject to the power of this state 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 this state.
- The dealer has agents in this state who solicit business or transact business on behalf of the dealer.
- The property was delivered in this state in fulfillment of a sales contract that was entered into in this state when a person in this state accepted an offer by ordering the property.
- The dealer, by purposefully or systematically exploiting the market provided by this state by any media-assisted, media-facilitated, or media-solicited means, creates nexus with this state.
- 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 this state’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 mail order sales are subject to the power of this state 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 this state.
- 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 this state.
- The dealer or the dealer’s activities have sufficient connection with or relationship to this state or its residents of some type, other than those described above, to create nexus empowering this state to tax its mail order sales or to require the dealer to collect sales tax or accrue use tax.<sup>17</sup>

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.

A dealer who makes a mail order sale into this state is exempt from collecting and remitting any local option surtax on the sale, except under certain circumstances.<sup>18</sup> The department may establish by rule

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<sup>13</sup> See s. 212.0596(1), F.S.

<sup>14</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...).

<sup>15</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.

<sup>16</sup> Section 212.0596(1), F.S.

<sup>17</sup> Section 212.0596(2), F.S.

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>19</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>20</sup>

### The Wayfair Decision

On June 21, 2018, the U.S. Supreme Court decided *South Dakota v. Wayfair*.<sup>21</sup> *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 expanded 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 did not apply retroactively.
- South Dakota is a member of the Streamlined Sales and Use Tax Agreement, which provides a simplified registration process, as well as free software to assist with collection and reporting.

### *State Reactions to Wayfair*

In response to the *Wayfair* decision, 43 states and the District of Columbia have enacted provisions requiring remote sellers to collect sales tax, and 42 states and the District of Columbia have enacted provisions requiring a marketplace provider/facilitator to collect sales tax.<sup>22</sup>

## **Effect of Proposed Changes**

### Taxation of Remote Sales and Marketplace Sales

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

### *Remote Sellers*

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<sup>18</sup> Section 212.0596(6), F.S.

<sup>19</sup> Section 212.0596(7), F.S.

<sup>20</sup> *Id.*

<sup>21</sup> *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

<sup>22</sup> Economic Nexus State Guide by the Sales Tax Institute, available at <https://www.salestaxinstitute.com/resources/economic-nexus-state-guide> (last visited March 9, 2021).

The bill amends s. 212.0596, F.S., to provide that every person making a substantial number of remote sales into Florida is a dealer for purposes of ch. 212, F.S.

The bill defines:

- “Remote sale” to mean a retail sale of tangible personal property, ordered by mail, telephone, the Internet, or other means of communication, from a dealer who receives the order outside of this state and transports the property or causes the property to be transported from any jurisdiction, including this state, to a person in this state, including the person who ordered the property.
- “Making a substantial number of remote sales” to mean (1) conducting 200 or more retail sales of tangible personal property in the previous calendar year to be delivered to a location in Florida, or (2) conducting any number of retail sales of tangible personal property in the prior calendar year to be delivered in Florida, if the total retail sales exceed \$100,000.

The bill removes the provision that allows a dealer who makes a mail order sale into this state to be exempt from collecting and remitting any local option surtax on the sale, which has the effect of requiring all remote sellers and marketplace providers to collect and remit applicable local option surtaxes if they are required to collect state sales tax.

### *Marketplace Provisions*

The bill creates s. 212.05965, F.S., to provide that each marketplace provider that has a physical presence in Florida or that makes or facilitates a substantial number of remote sales in Florida, is subject to the requirements in ch. 212, F.S., relating to registration and the collection and remittance of tax. Unlike remote sellers, the bill does not provide that marketplace providers are dealers.

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 all or a part of 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, and (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.
- “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.

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 makes conforming changes to reflect that references to “mail order sales” are now to “remote sales.”

The bill provides emergency rulemaking authority to the Department of Revenue.

The bill takes effect on July 1, 2021, except as otherwise provided.

## B. SECTION DIRECTORY:

**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 amend legislative intent to apply the sales and use tax to remote sales.

**Section 4** amends s. 212.0596, F.S., to address the taxability of remote sales and to provide that a person who makes a substantial number of remote sales is a dealer for purposes of ch. 212, F.S.

**Section 5** creates s. 212.05965, F.S., which provides for the taxation of sales through marketplace providers.

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

**Section 7** 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 8** makes conforming changes to s. 212.18 F.S., to change the term “mail order sale” to “remote sale.”

**Section 9** reenacts s. 212.20(4), F.S.

**Section 10** makes conforming changes to s. 213.27(5), F.S., to clarify that s. 213.27(5), F.S., regarding contract auditing, applies to a person making or facilitating remote sales under s. 212.0596, F.S. or s. 212.05965, F.S.

**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 section 12 takes effect upon becoming law, and, except as otherwise provided, the bill takes effect July 1, 2021.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

The Revenue Estimating Conference (REC) estimated that the bill will have a positive recurring impact on General Revenue of \$1,079.6 million in FY 2021-22 growing to \$1,374.1 million in FY 2025-26. The REC also estimated the bill will have a positive recurring impact on state trust funds of \$3.6 million in FY 201-22 growing to \$3.8 million in FY 2025-26.

**2. Expenditures:**

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

The REC estimated that the bill will have a positive recurring impact on local government revenues of \$253.7 million in FY 2021-22 growing to \$317.8 million in FY 2025-26.

**2. Expenditures:**

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill will address a competitive disadvantage Florida businesses currently face when competing against out-of-state businesses that do not collect Florida sales tax on sales they make into Florida.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

**1. Applicability of Municipality/County Mandates Provision:**

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

**2. Other:**

None.

**B. RULE-MAKING AUTHORITY:**

The bill provides emergency rulemaking authority to the Department of Revenue.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

- Section 6 (Line 863) as currently drafted would include in the definition of “dealer” any business making a single remote sale into the state, thereby requiring registration, collection, and remittance of tax. The provision should be updated to clarify that the definition of dealer applies to a business making a substantial number of remote sales.
- Section 9 reenacts a provision that allows for a refund of tax on remote sales if the state’s remote sales statute is determined to be unconstitutional. The section should be revised so that

subsection (4) also allows for refunds for taxes collected under s. 212.05965 (marketplace providers), in the event state law is determined to be unconstitutional.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**