

Clearinghouse Rule 22-017

PROPOSED ORDER OF THE DEPARTMENT OF REVENUE RENUMBERING AND REPEALING AND RECREATING RULES

The Wisconsin Department of Revenue proposes an order to: **renumber** Tax 11.55 (3) to 11.30 (1) (b), 11.30 (1) (b) to 11.30 (1) (c) 2., and 11.55 (4) to 11.30 (1) (c) 1., **repeal and recreate** Tax 11.55 (1) and (2) and 11.88 (6), **relating to** sales and use tax provisions.

The scope statement for this rule, SS 042-20, was approved by the Governor on May 7, 2020, published in Register No. 773A3 on May 18, 2020, and approved by the Secretary of Revenue on August 24, 2020.

Analysis by the Department of Revenue

Statutes interpreted:

Tax 11.55 – ss. 77.51 (7i), (7j), (11d), (13), (13g), (13gm), (14) (n) 7., and (17) (g), 77.52 (3m) and (14) (c), 77.523, and 77.585 (1g) and (11), Stats.

Tax 11.88 – ss. 77.51 (2), (7i), (7j), (11d), (12m) (b) 7., (13), (14) (n) 7., and (15) (b) 7., (17) (g), 77.52 (2) (a) 1., 77.523, 77.53 (17) and (18), 77.54 (7), (31), and (36), 77.61 (1) (a) and (c), 101.91 (2), (10), (11), and (12), 218.10 (1g), (7), and (9), and 340.01 (29) and (48r), Stats.

Statutory authority: Sections 66.0615, 77.51 (7i), (7j), (13) (a), (p) 7., and (q), (13g), (13gm), (14) (n) 7., (14g) (f), and (17) (g), 77.52 (1), (2), and (3m), 77.523, 77.53 (3), 77.65 (3), 77.585 (1g), (5), and (11), 77.982 (1), 77.991, 77.9951, and 227.11 (2), Stats.

Explanation of agency authority:

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 ..."

Sections 77.52 (1) and (2) and 77.53 (3), Stats., provide the authority to impose a sales or use tax on retailers for the privilege of selling, licensing, leasing, or renting at retail tangible personal property and items, property, and goods under s. 77.52 (1) (b), (c), and (d), Stats., and taxable services in Wisconsin (taxable products).

Section 77.51 (7i) and (7j), Stats., defines a "marketplace provider" and "marketplace seller."

Section 77.51 (13) (a), (c), (p) 7., and (q) and (17) (g), Stats., defines a "retailer" and "seller" required to collect and remit Wisconsin sales or use tax to include a person selling on behalf of a seller and gives the department authority to determine that marketplace providers are agents of marketplace sellers for purposes of collecting and remitting Wisconsin sales or use tax.

Section 77.51 (14) (n) 7., Stats., defines "sale" to include the transfer of ownership, title, possession, or enjoyment of a taxable product regardless of whether on behalf of another seller.

Sections 77.52 (3m), 77.523, and 77.585 (11), Stats., place liability for the sales and use tax imposed on taxable products on the marketplace provider unless (a) the department grants a waiver to certain providers or (b) finds the marketplace seller gave incorrect information to the provider. Only in such cases may the department impose the liability to collect and remit sales or use tax on the marketplace seller.

Section 77.585 (1g), Stats., allows the marketplace provider to claim deductions for bad debts on sales facilitated on behalf of a marketplace seller.

Section 77.51 (14g) (f), Stats., defines that a sale does not include repossession of taxable products when the only consideration is cancellation of the purchaser's obligation to pay the remaining balance of the purchase price.

Section 77.585 (5), Stats., provides that a retailer may not reduce its taxable sales by credit sales of property repossessed unless the sales price is returned to the purchaser or the retailer recognizes a bad debt.

Sections 77.51(13g), Stats., defines "retailer engaged in business in this state."

Section 77.51(13gm), Stats., provides an exception from the definition of "retailer engaged in business in this state" for an out-of-state retailer that has annual gross sales of \$100,000 or less in both the previous or current calendar year.

Sections 66.0615, 77.982 (2), 77.991, and 77.9951, Stats., apply the marketplace provisions in ch. 77, subchs. III and V, to the local exposition district taxes and state vehicle rental fees administered by the Department of Revenue.

Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule: The department estimates it will take approximately 100 hours to develop the rule.

Related statute or rule: There are no other applicable statutes or rules.

Plain language analysis: The rule (1) moves a section to an appropriate existing rule and (2) reflects the marketplace provisions in 2019 Wisconsin Act 10.

a. Repossessions - Section Tax 11.30 (1) (b) is renumbered 11.30 (1) (c) 2.; 11.55 (4) is renumbered 11.30 (1) (c) 1.

b. Enforcement of liens - Section Tax 11.55 (3) is renumbered 11.30 (1) (b).

c. Marketplace providers and sellers - Section Tax 11.55 is repealed and recreated to explain the requirements to collect and remit sales or use tax by all types of sellers that facilitate sales of all types of taxable products on behalf of other sellers, as provided by 2019 Wisconsin Act 10.

d. Consignment sales - Section Tax 11.88 (6) is repealed and recreated to reflect the marketplace provisions in 2019 Wisconsin Act 10 and explain the sales and use tax treatment of consignment sales of recreational vehicles.

Summary of, and comparison with, existing or proposed federal regulation: The department is unaware of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

Comparison with rules in adjacent states: Minnesota, Iowa, Illinois and Michigan have similar marketplace provider laws and regulations as Wisconsin. In addition, the majority of states that impose a sales and use tax have similar marketplace laws and regulations as Wisconsin. The Streamlined Sales Tax Governing Board maintains a [Marketplace Facilitator State Guidance](#) web page to track marketplace laws and regulations in all states.

Summary of factual data and analytical methodologies: [2019 Wisconsin Act 10](#) made changes to Wisconsin's sales and use tax laws. The department has created this proposed rule order to reflect these statutory changes as well as provide needed clarification and correction as described above. No other data or analytical methodologies were used in the preparation of this proposed rule order or analysis.

Analysis and supporting documents used to determine effect on small business: This proposed rule does not expand the authority already provided in current law. There is no effect on small business.

Anticipated costs incurred by private sector: This proposed rule does not have a fiscal effect on the private sector.

Effect on small business: This proposed rule does not expand the authority already provided in current law. There is no effect on small business.

Agency contact person: Contact Jen Olson at (608) 266-8253 or Jennifer.Olson@wisconsin.gov with 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. Information as to the place, date, and time of the public hearing, as well as the deadline for submitting comments, will be published in the Wisconsin Administrative Register.

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SECTION 1. Tax 11.30 (1) (b) is renumbered 11.30 (1) (c) 2.

SECTION 2. Tax 11.55 (3) is renumbered 11.30 (1) (b).

SECTION 3. Tax 11.55 (4) is renumbered 11.30 (1) (c) 1.

SECTION 4. Tax 11.55 is repealed and recreated to read:

Tax 11.55 **Marketplace providers and sellers.** (1) DEFINITIONS. In this section:

(a) "Marketplace provider" has the meaning given in s. 77.51 (7i), Stats.

(b) "Marketplace seller" has the meaning given in s. 77.51 (7j), Stats.

(c) "Retailer" has the meaning given in s. 77.51 (13), Stats.

(2) GENERAL. Except as provided in sub. (4), a marketplace provider is required to collect and remit Wisconsin sales or use tax on all sales of taxable products and services that the marketplace provider facilitates on behalf of a marketplace seller. The amount subject to tax is the entire amount charged to the purchaser, including any amount charged by the marketplace provider for facilitating the sale.

(3) NOTIFICATION AND LIABILITY. (a) A marketplace provider is required to notify the marketplace seller that it is collecting and remitting the tax on all taxable sales in Wisconsin. The department does not prescribe a required form or method for such notification.

(b) Only the marketplace provider can be audited and held liable for Wisconsin sale or use tax on sales facilitated on behalf of a marketplace seller, unless one of the following applies:

1. The marketplace provider has been granted a waiver by the department from collecting and remitting the tax, as provided in subd. 4.

2. The marketplace provider can demonstrate to the satisfaction of the department that the error in collecting and remitting the tax is due to insufficient or incorrect information provided by the marketplace seller. This paragraph does not apply if the marketplace provider and marketplace seller are related entities, as defined in s. 71.01 (9am), Stats.

(c) If a marketplace provider demonstrates that par. (b) 2. applies, the marketplace seller providing the insufficient or incorrect information may be audited and held liable for the tax.

(4) WAIVERS. (a) A marketplace provider may apply for a waiver from collecting and remitting Wisconsin sales or use tax if its only activities are facilitating sales of products or services on behalf of marketplace sellers that are operating under a hotel, motel, or restaurant brand name shared with the marketplace provider.

(b) The waiver may be granted if the department is satisfied that the marketplace seller will collect and remit the tax on the entire amount charged to the purchaser.

(c) The department may grant waivers to other types of marketplace providers if there is evidence that the marketplace sellers have a history of reliably collecting and remitting to the

department or there is other evidence that the marketplace sellers will reliably collect and remit the tax to the department.

(d) Marketplace providers shall apply to the department using Form S-102, "Application for Marketplace Provider Waiver", and the application must contain the following:

1. The name and address of all marketplace sellers selling or furnishing tangible personal property or services in Wisconsin that the marketplace provider is requesting the waiver.

2. Each marketplace seller's Wisconsin sales or use tax permit number and any other information necessary to ensure the entire amount of tax will be collected and remitted by the marketplace seller.

(e) Within 60 days from a written request from the department, a marketplace provider that is granted a waiver must submit updated information provided in subd. (d) (1) and (2) for all marketplace sellers selling or furnishing such tangible personal property or services in Wisconsin. The department can require the marketplace provider to provide any other information to ensure the tax is being collected and remitted on the entire amount charged to the purchaser by the marketplace sellers.

(f) If a waiver is granted, the department may require the marketplace provider to notify each marketplace seller that the marketplace seller is liable for the tax on the entire sales price charged to the purchaser for taxable products and services in Wisconsin through that marketplace provider.

(g) The department may regard the marketplace seller as a retailer required to collect and remit the tax for sales facilitated on its behalf by a marketplace provider, when it determines that it is necessary for the efficient administration of Wisconsin sales and use taxes, pursuant to ss. 77.52 (3m) (c) and 77.51 (13) (c), Stats. The department may require the marketplace seller to notify each marketplace provider that the marketplace seller is liable for the tax on the entire sales price charged to the purchaser for taxable products and services in Wisconsin made through that marketplace provider.

(5) PHYSICAL MARKETPLACE. A marketplace provider includes a person that facilitates a sale on behalf of a seller at a storefront or other physical location. Brokers, dealers, consignors, and other persons that operate a physical location, advertise or list a seller's product for sale, and process the payment are marketplace providers.

Examples: 1) A convenience store sells admission tickets to a concert for another organization. Customers of the convenience store purchase the tickets at the register in the convenience store. The convenience store forwards all money received from ticket sales to the other organization. The convenience store is a marketplace provider that is required to collect and remit sales tax on the admission tickets.

2) An antique store displays and sells antiques in its store that are owned by the antique store and by others. When making sales of antiques owned by other persons, the antique store collects the money from the purchaser and provides the sale amount, less a commission, to the owner of the antiques. The antique store is a marketplace provider that is required to collect and remit the sales tax on the entire sales price charged to the purchaser from the sale of the antiques.

(6) REPORTING AND OTHER PROVISIONS. (a) *Filing tax returns.* 1. A marketplace provider reports its own sales, and the sales it facilitates on behalf of marketplace sellers, on its sales and use tax return.

2. A marketplace seller shall include all of its sales, including sales facilitated on its behalf by a marketplace provider, in total sales on its sales and use tax return. The marketplace seller may claim a deduction on its return for sales amounts that are made through the marketplace provider and for which the marketplace seller received notification under s. 77.523 (2), Stats.

(b) *Exemption certificates.* A marketplace provider is required to obtain and maintain fully completed exemption certificates from purchasers claiming an exemption from Wisconsin sales or use tax for sales facilitated on behalf of a marketplace seller. The marketplace provider is also required to obtain and maintain exemption certificates for sales made on its own behalf.

(c) *Bad debt deduction.* 1. A marketplace provider is allowed to claim a bad debt deduction on a sales transaction if it collects and remits Wisconsin sales or use tax on behalf of the marketplace seller, and either the marketplace provider or marketplace seller is eligible to claim the deduction under section 166 of the Internal Revenue Code for the worthless amount of the transaction.

2. For an eligible bad debt deduction under subd. 1., a marketplace provider shall claim the bad debt deduction on its Wisconsin sales and use tax return for the period in which the marketplace provider or marketplace seller writes off the amount as uncollectible in its books and records.

3. A marketplace seller may not claim a bad debt deduction on a sales transaction if the marketplace provider claims a bad debt deduction on that same transaction.

(d) *Small seller exception.* A marketplace provider or marketplace seller with no physical presence or activities in Wisconsin other than making sales into Wisconsin may qualify for the small seller exception under s. 77.51 (13gm), Stats. A retailer that qualifies for the small seller exception may, but is not required to, collect and remit Wisconsin sales and use tax. In determining the annual gross sales amount for purposes of the small seller exception, the following apply:

1. Gross sales includes both taxable and nontaxable sales.

2. A marketplace provider's gross sales include sales made into Wisconsin on its own behalf or on behalf of other sellers.

3. A marketplace seller's gross sales includes sales made into Wisconsin on its own behalf and made on its behalf by a marketplace provider.

(e) *Nonprofit occasional sales.* 1. A marketplace provider is required to collect and remit Wisconsin sales or use tax on taxable sales it facilitates on behalf of a nonprofit organization. Although the nonprofit organization's own sales may be an exempt occasional sale under s. 77.54 (7m), Stats., the exemption does not apply or extend to sales by a marketplace provider, unless the marketplace provider is a nonprofit organization that qualifies for the occasional sales exemption.

2. A nonprofit organization does not include sales facilitated by a marketplace provider in determining if it is engaged in a trade or business for purposes of the occasional sales exemption.

Note: Section Tax 11.55 interprets s. 77.51 (7i), (7j), (11d), (13), (13g), (13gm), (14) (n) 7., and (17) (g), 77.52 (3m) and (14) (c), 77.523, 77.54 (7m), and 77.585 (1g) and (11), Stats.

Note: The interpretations in s. Tax 11.55 became effective January 1, 2020, pursuant to 2019 Wis. Act 10.

SECTION 5. Tax 11.88 (6) is repealed and recreated to read:

Tax 11.88 (6) CONSIGNMENT SALES. When a recreational vehicle dealer displays and sells a recreational vehicle on behalf of another person, the dealer is a marketplace provider and responsible for collecting and remitting tax on the transaction if the dealer directly or indirectly, through agreements or arrangements with third parties, processes the payment from the purchaser for the retail sale, regardless of whether the dealer receives compensation or other consideration in exchange for the services provided by the dealer.

Note: For information regarding marketplace providers and sellers, see s. Tax 11.55.

Note: Section Tax 11.88 interprets ss. 77.51 (2), (7i), (7j), (11d), (12m) (b) 7., (13), (14) (n) 7., and (15b) (b) 7., (17) (g), 77.52 (2) (a) 1., 77.523, 77.53 (17) and (18), 77.54 (7), (31), and (36), 77.61 (1) (a) and (c), 101.91 (2), (10), (11), and (12), 218.10 (1g), (7), and (9), and 340.01 (29) and (48r), Stats.

Note: The interpretations in s. Tax 11.88 are effective under the general sales and use tax law on and after September 1, 1969, except: (a) Nonretailer sales of mobile homes became taxable effective August 1, 1977, pursuant to Chapter 29, Laws of 1977; (b) Nonretailer sales of mobile homes exceeding 45 feet in length became exempt effective July 1, 1978, pursuant to Chapter 418, Laws of 1977; (c) Rental of a mobile home that is personal property for lodging for a continuous period of one month or more became exempt effective July 1, 1984, pursuant to 1983 Wis. Act 341, clarified effective April 1, 1986, pursuant to 1985 Wis. Act 149; (d) Gross receipts from a used mobile home became exempt effective January 1, 1987, pursuant to 1985 Wis. Act 29; (e) Thirty-five percent of the gross receipts from the sale of new mobile homes became exempt January 1, 1987, pursuant to 1985 Wis. Act 29; (f) The exemption from use tax of mobile homes purchased 90 or more days before moving to Wisconsin became effective August 1, 1987, pursuant to 1987 Wis. Act 27; (g) The exemption for transfers to in-laws became effective August 15, 1991, pursuant to 1991 Wis. Act 39; (h) The exemption for certain new mobile homes transported in two unattached sections became effective October 1, 1991, pursuant to 1991 Wis. Act 39; (i) The changes in terminology related to “mobile homes,” “manufactured homes,” and “recreational vehicles,” became effective January 1, 2008, pursuant to 2007 Wis. Act 11; (j) The change of the term “gross receipts” to “sales price” became effective October 1, 2009, pursuant to 2009 Wis. Act 2; and (k) The marketplace provider provisions became effective January 1, 2020, pursuant to 2019 Wis. Act 10.

SECTION 6. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

DEPARTMENT OF REVENUE

Dated: _____

By: _____

Peter W. Barca
Secretary of Revenue