

# STATEMENT OF SCOPE

## Department of Revenue

Rule No.: Section Tax 11.97

Relating to: Sales and use tax provisions

Rule Type: Emergency and Permanent

This scope statement was approved by the Governor on July 5, 2018.

### 1. Detailed description of the objective of the proposed rule:

The objective of the rule is to amend guidance for out-of-state sellers without a physical presence in Wisconsin (remote sellers) making Wisconsin sales to be consistent with the June 21, 2018, U.S. Supreme Court decision in *South Dakota v. Wayfair, Inc.* Wisconsin will begin its enforcement on October 1, 2018. This rule is being promulgated as an emergency rule in order to preserve the public welfare and promptly provide needed clarity to out-of-state sellers.

### 2. Description of existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Previously, an out-of-state seller was not required to collect Wisconsin sales or use taxes unless the seller had a physical presence in Wisconsin based on prior U.S. Supreme Court decisions (*Quill Corp. v. North Dakota* and *National Bellas Hess, Inc. v. Department of Revenue of Ill.*). *Wayfair* overruled these decisions. New standards to enforce sales tax laws on remote sellers will be developed in the rule, consistent with *Wayfair*, which approved a small seller exception for remote sellers who do not have annual sales of products and services into the state of more than \$100,000 or 200 or more separate transactions.

### 3. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Federal law limits Wisconsin's ability to impose sales and use tax upon remote sellers, as is explicitly mentioned in at least one statute (Section 77.51(13g), Stats.). The department will interpret the provisions of sales and use tax statutes enforced by it and codify its discretion in this area, to better define what "retailers" are subject to tax, consistent with *Wayfair*.

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), Stats., provides the authority to impose a sales tax on retailers for the privilege of selling, licensing, leasing, or renting at retail tangible personal property and items, property, and goods under sec. 77.52 (1) (b), (c), and (d), Stats., and taxable services.

Section 77.53 (3), Stats., provides the authority to impose a use tax on retailers engaged in business in this state on sales of tangible personal property and items, property, and goods under sec. 77.52 (1) (b), (c), and (d), Stats., and taxable services.

Sections 77.51 (13) and (13g), Stats., define "retailer" and "retailer engaged in business in this state." Section 77.51 (13g) (c), Stats., provides that "retailer engaged in business in this state" includes any retailer making sales of taxable products and services "unless otherwise limited by federal law."

**4. 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.

**5. List with description of all entities that may be affected by the proposed rule:**

- Out-of-state sellers making sales in Wisconsin and practitioners who represent such persons.
- Wisconsin residents purchasing items from out-of-state sellers.

**6. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:**

Although there is no existing or proposed federal regulation that is intended to address the activities to be regulated by the rule, *Wayfair* provides guidance that addresses the activities regulated by the proposed rule.

**7. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):**

Wisconsin businesses, especially Wisconsin small businesses, will no longer be operating at a competitive disadvantage to out-of-state competitors that will now be required to collect tax.

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