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Florida: Sales tax economic nexus, marketplace provider laws enacted

Florida Senate Bill 50 (signed into law by the governor on April 19, 2021) adopts economic nexus for remote sellers and marketplace providers.

KPMG observation

Prior to the enactment of this legislation, Florida was one of three states that had not changed their laws to reflect the holding in the *Wayfair* decision by the U.S. Supreme Court.

New nexus standard for remote sellers and marketplace providers

Senate Bill 50 requires out-of-state retailers and marketplace providers with no physical presence in Florida to collect Florida sales tax and local discretionary surtax on taxable items delivered in the state. These changes apply to sales made or facilitated beginning on or after July 1, 2021.

To accomplish these changes, Senate Bill 50 amends or provides the following definitions:

- “Retail sale” includes “a sale facilitated through a marketplace.”
- “Dealer” is redefined to include “[e]very person making a substantial number of remote sales.”
- “Substantial number of remote sales” is defined as “any number of taxable remote sales in the previous calendar year in which the sum of the sales prices ... exceeded \$100,000.” There is no transactions threshold.
- A “marketplace provider” is defined as “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 part of the payment to the marketplace seller, regardless of whether the marketplace provider receives compensation or other consideration in exchange for its services.”
- Certain persons are specifically excluded from the definition of a “marketplace provider”—
 - Any person who solely provides travel agency services

- o 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
- o A payment processor business whose sole activity with respect to marketplace sales is to handle payment transactions between two parties

Marketplace providers are required to certify to marketplace sellers that they are collecting and remitting tax on the seller's behalf. At that point, the marketplace seller must not collect and remit tax on a facilitated sale, but must collect and remit on any non-facilitated sales if it is considered a dealer.

A marketplace provider may be subject to audit for retail sales it facilitates. However, the legislation permits a marketplace provider and marketplace seller to agree, by contract, that the marketplace provider has the right to recover tax, penalties, and interest from the marketplace seller. Furthermore, a marketplace provider may be relieved of liability if it can show that the failure to collect and remit the correct amount of tax was due to the provision of incorrect or incomplete information by the marketplace seller.

While a marketplace provider is required to collect and remit the applicable taxes and fees on behalf of a marketplace seller, Senate Bill 50 provides that the obligation may be waived under certain circumstances.

- Effective April 1, 2022, a marketplace provider and marketplace seller may contractually agree to have the marketplace seller collect the applicable taxes and fees if the marketplace seller has annual U.S. gross sales of more than \$1 billion, provides evidence to the provider that they are registered in Florida, and has notified the Department of Revenue that the marketplace seller will collect and remit on its sales.
- Effective April 1, 2022, a marketplace provider is required to collect and remit the prepaid wireless "911 fee," waste tire fee, and lead-acid battery fee.

KPMG observation

Note that the marketplace provider and remote seller provisions apply to the sales and use tax only and do not extend to persons making sales of products and services subject to Florida's communications services tax.

Sales tax rate calculation – moving from bracket method to rounding algorithm

Senate Bill 50 revises Florida's method of determining applicable sales tax on a transaction from the prior "bracket" method to a rounding algorithm. In accordance with the legislation, the computation of tax "must be carried to the third decimal place" and "must be rounded to the whole cent using a method that rounds up to the next cent whenever the third decimal place is greater than four." The rounding algorithm may be applied to "the aggregate tax amount computed on all taxable items on an invoice or to the taxable amount on each individual item on the invoice."

To assist taxpayers in the transition, from July 1, 2021, through September 30, 2021, taxpayers may calculate tax due under either the bracket system or rounding algorithm method. Beginning October 1, 2021, only the rounding algorithm method may be used to calculate sales tax due.

Unemployment compensation trust fund and commercial rent sales tax rate reduction

Senate Bill 50 also dictates how revenues from remote and facilitated sales will be spent. Revenue generated from collection of tax associated with facilitated or remote sales will be paid into to the state's unemployment compensation trust fund at a specified rate until the balance of the fund reaches

\$4,071,519,600. After this occurs, the state tax on the rental or license of real property will be reduced from the current 5.5% rate to 2%.

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