

Florida Tax Views: State Should Act On Wayfair

By **Robert Goldman and French Brown** (June 18, 2019, 4:24 PM EDT)

As states around the nation scurry to address *South Dakota v. Wayfair Inc.* with legislation or regulations, Florida has been strangely silent. The nation's third most populous state and fourth largest state economy has not provided any guidance to out-of-state businesses, nor has the state taken steps to protect its in-state retailers.

As many know, the overall issue in *Wayfair* concerns sales to in-state customers by out-of-state sellers (remote sellers) who do not collect use taxes for the customers' states on those sales. Although the purchaser owes the tax, it is rarely paid when the seller does not collect it. Remote vendors sell products via the internet, telephone and mail. Before *Wayfair*, the U.S. Supreme Court had held that a remote seller lacking a physical presence in the taxing state could not constitutionally be required to collect the tax due and remit it to the state.

Florida's Long-Standing Sales Tax Laws Applicable to Remote Sellers

Florida has a number of statutes relevant to the collection responsibility of remote sellers, including its "mail order nexus" statute in Florida Statutes Section 212.0596.[1] Originally enacted in 1987, this law sets forth the activities which would require a remote seller to collect the Florida use tax on "mail order sales" (defined as sales "by mail or other means of communication" where the order is received in another state and the property is delivered in Florida). The statute then lists the conditions which purport to require a seller (the statutory term is "dealer") to collect the tax on such sales. The list is long, including Florida domicile, a physical presence, advertising and being a member of an affiliated group with a member that has nexus, as alternative predicates for the collection responsibility.

Florida's general use tax, which can be traced to the original enactment of the sales tax in 1949, also identifies the conditions that create "dealer" status and therefore require collection of the tax.[2] Although not specifically targeting remote sales, this list bears similarities to the one in the mail order statute, and also includes alternatives that do not require physical presence.

The two statutes are similar, however, in that both of them have been out of sync with the constitutional law as established in *National Bellas Hess v. Department of Revenue*[3] and *Quill Corp. v.*



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North Dakota[4] because they include provisions that literally would impose the collection responsibility on sellers without a physical presence in Florida. The Florida Department of Revenue did not attempt to apply these provisions to such sellers, in recognition that under *Bellas Hess* and *Quill* it could not constitutionally do so.

The physical presence criterion, although not expressed in the statutes as an essential condition for imposing the collection responsibility, was effectively treated as a “gloss” embedded within them.

Treating the physical presence rule as an implicit element of the Florida statutes imposing the collection responsibility was relatively easy because of the “bright line” nature of the rule. At its edges the “line” was less “bright” than its moniker would suggest, prompting occasional disputes over what constituted a sufficient physical presence (such as Florida’s Department of Revenue v. *Share International*).[5] However, these marginal situations did not prevent the rule from providing a clear guidepost for the department and remote sellers generally. A seller with no physical presence could not be required to collect the tax.

Florida Post-Wayfair

Wayfair discarded the physical presence rule that the department had used as its benchmark and sustained instead an economic nexus concept based on the level of sales activity into the state. But neither Section 212.0596 nor Section 212.06(2) contains such an economic nexus criterion. This omission is of a different nature than physical presence and is not susceptible to being treated as a statutory gloss. Unlike the “bright line” characteristic of physical presence, economic nexus is essentially quantitative in nature and no particular measure of economic activity can be treated as implicit in the existing Florida nexus statutes. Thus, the department and remote sellers presently have no benchmark.

It is possible to maintain that a single sale is sufficient to create nexus for the seller, as South Dakota and the United States argued in *Wayfair*. By neither accepting nor rejecting this contention, the court arguably left open the possibility that a single sale would suffice. Thus, Florida could conceivably decide to test the limits of economic nexus and assert such a position. But the question of how far Florida will extend the use tax collection duty in the new constitutional environment can only be answered properly with legislation.

Why Florida Needs to Act

Reasons the Florida Legislature should act in the wake of *Wayfair* include the desirability of removing the competitive disadvantage created for Florida “brick and mortar” retailers; the state’s practical inability to collect legally owed use taxes directly from consumers; and the merits of resolving the inequity between Floridians who voluntarily pay the tax on remote sales and those who do not. These fairness issues could not adequately be addressed in the past because of the physical presence rule. *Wayfair* has now removed that obstacle.

Another compelling reason for legislative action involves a new fairness issue that ironically results from *Wayfair*. In this regard, consider the plight of remote sellers and the Department of Revenue after *Wayfair* in the absence of legislative guidance. As discussed above, none of the Florida laws touching upon the use tax collection responsibility is susceptible to a gloss based on economic nexus. One may reasonably ask how remote sellers and the department can be expected to apply these statutes now that economic presence has replaced physical presence as the constitutional nexus criterion. The statutory status quo places them all in a difficult if not untenable position.

Another possible consequence of legislative inaction is inconsistent treatment, with different department audit and enforcement personnel employing different ideas of what constitutes economic nexus. Remote sellers may also devise their own nexus criteria. With all these actors deciding nexus standards independently, confusion and litigation are likely, with the situation at odds with Florida's aspiration to evenhanded tax administration.

Even if the 1949 Legislature intended to impose the collection responsibility without a physical presence, the law has not been applied that way for the better part of a century and its literal text is hardly evidence of what the Legislature intends to be Florida's tax policy now. The department cannot simply decide on its own to revert to the literal text. Even rulemaking would, at best, be effective to declare that the existing statutes, with no sales thresholds and no physical presence requirement, would henceforth be applied literally and a single sale would trigger the obligation to collect tax.

The Florida Department of Revenue could not use rulemaking to adopt economic nexus standards as it has no authority to do so under Florida's Administrative Procedures Act. Adopting Wayfair thresholds is a policy decision for legislators and it is nearly certain that any administrative attempt to adopt such standards through rulemaking or otherwise would survive a challenge.

The Florida Senate's Wayfair Attempt

During the 2019 regular Legislative Session, Sen. Joe Gruters, R-Sarasota, filed Senate Bill 1112. One of the authors of this article was involved in drafting the legislation in cooperation with Gruters' office. This bill would have modified the mail order statute to clearly apply to remote sellers exceeding \$100,000 in retail sales or 200 retail transactions. The legislation also would have enacted tax registration, collection and remittance requirements for marketplace facilitators, as adopted in other states. The goals of these proposals were to:

- Level the playing field for Florida's in-state retailers;
- Give clear guidance for out-of-state businesses;
- Adequately protect small remote sellers;
- Reduce the collection and remittance burdens for in-state and out-of-state retailers that choose to sell through marketplaces; and
- Increase compliance with the use tax and shielding Florida's consumers from unknowingly violating the law.

As a certified public accountant, Gruters understands the intricacies and obligations of the use tax. The proposal is not a new tax.

An official fiscal analysis of the remote seller and marketplace facilitator provisions in Senate Bill 1112 concluded that Florida could generate \$700 million in the next state fiscal year. Said another way, this fiscal analysis suggested Florida is currently losing \$700 million a year in use tax noncompliance. However, this large fiscal impact ultimately concerned some legislators.

As a solution, S.B. 1112 proposed to use the additional revenue to significantly reduce other taxes. One proposal would have reduced the Florida sales tax on commercial leases from 5.7% to 3.5%. Florida is

the only state in the nation to levy a sales and use tax on a lease or license to use commercial real property. Historically, the state tax rate was 6% but extensive lobbying by Florida's business community and commercial real estate agents have convinced the Legislature over the last two years to whittle down the tax to 5.7%.

The main obstacle to reduction of this unique tax was never the policy, but the estimated \$1.8 billion of revenue the tax generates each year. A \$700 million offset created a prime opportunity to significantly reduce that tax. Other proposals included reduction of the state's extremely high communications services tax, which averages more than 14.2% or using the revenues for additional environmental funding.

While S.B. 1112 was heard and approved unanimously by the Senate Commerce and Tourism Committee and Senate Finance and Tax Committee, ultimately the bill failed to pass when the Legislature adjourned. No House of Representatives bill regarding Wayfair was introduced during the 2019 regular session.

Only time will tell if the Florida Legislature provides Wayfair guidance. The list of states that have not acted is growing shorter every day. The only certainty is the state's indecision creates risks and concerns for businesses.

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Disclosure: Brown was involved in drafting Senate Bill 1112 in cooperation with Sen. Gruters' office.

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[1] Florida Statutes Section 212.0596.

[2] See Section 212.06(2).

[3] Nat'l Bellas Hess v. Dep't of Revenue, 386 U.S. 753, 87 S. Ct. 1389 (1967)

[4] Quill Corp. v. North Dakota, 504 U.S. 298, 112 S. Ct. 1904 (1992)

[5] Department of Revenue v. Share International, 676 So.2d 1362 (Fla. 1996), cert denied, 519 U.S. 1056 (1997).