

MEMORANDUM

TO: Governor's Council on Tax Reform

FROM: Michael Hale, Attorney
Kansas Department of Revenue

RE: Marketplace Facilitator Proposal

DATE: December 3, 2019

I. SUMMARY OF PROPOSAL

As the Council is aware, K.S.A. 79-3705c allows Kansas to require out-of-state retailers to register and collect and remit use tax on sales made into the State of Kansas. However, the existing statutory scheme does not allow Kansas to require marketplace facilitators to do the same. A marketplace facilitator is a person who facilitates sales by an internet retailer through a physical or electronic marketplace. Kansas is one of only five states that has not enacted a marketplace facilitator provision. The House and Senate have previously approved one version of the legislation.

II. SUMMARY OF LEGISLATION

The proposed legislation, a copy of which is attached, would require marketplace facilitators to register and begin collecting retail sales and compensating use taxes on sales to Kansas customers. A marketplace facilitator is a person who, pursuant to an agreement with a retailer, facilitates sales by such retailer through a physical or electronic marketplace operated by the person, and:

- (i) engages directly or indirectly, through one or more affiliated persons in any of the following:
 - (1) transmitting or otherwise communicating the offer or acceptance between a buyer and retailer;
 - (2) owning or operating the infrastructure, electronic or physical, or technology that brings buyers and retailers together;
 - (3) providing a virtual currency that buyers are allowed or required to use to purchase products from the retailer; or
 - (4) software development or research and development activities related to any of the activities described herein, if such activities are directly related to a physical or electronic marketplace operated by the person or an affiliated person; and

- (ii) engages in any of the following activities with respect to the retailer's products:
 - (1) payment processing services;
 - (2) fulfillment, delivery or storage services;
 - (3) listing products for sale;
 - (4) setting prices;
 - (5) branding sales as those of the marketplace facilitator;
 - (6) order taking;
 - (7) advertising or promotion; or
 - (8) providing customer service or accepting or assisting with returns or exchanges.

III. FISCAL NOTE

It is estimated that the enactment of the marketplace facilitator legislation would increase receipts by \$32 Million annually.

1 2020

2 BILL NO. _____

3
4 By Committee on Assessment and Taxation

5
6 AN ACT concerning taxation; relating to sales and compensating use tax, imposition of
7 tax, nexus, marketplace facilitators, amending K.S.A. 2019 Supp. 79-3602, 79-3702, 79-
8 3703 and 79-3710 and repealing the existing sections.

9
10 *Be it enacted by the Legislature of the State of Kansas:*

11
12 New Section 1. Sections 1 through 11, and amendments thereto, shall be
13 supplemental to and a part of the Retailers' Sales Tax Act.

14 New Sec. 2. As used in this act:

15 (a) "Act" means the Kansas main street parity act.

16 (b) "Affiliated person" means a person that, with respect to another person:

17 (1) Has an ownership interest of more than 5%, whether direct or indirect, in
18 the other person; or (2) is related to the other person because a third person,
19 or group of third persons who are affiliated persons with respect to each other,
20 holds an ownership interest of more than 5%, whether direct or indirect, in the
21 related persons.

22 (c) "Cumulative gross receipts" means gross receipts as defined in K.S.A.
23 79-3602, and amendments thereto, and includes the gross receipts received by
24 the marketplace facilitator from its own direct sales combined with the gross
25 receipts received from sales it facilitates for sellers or marketplace sellers.

26 (d) "Department" means the Kansas department of revenue.

27 (e) (1) "Marketplace facilitator" means a person that, pursuant to an
28 agreement with a marketplace seller, facilitates sales by such marketplace
29 seller through a physical or electronic marketplace operated by the person,
30 and:

31 (A) Engages directly or indirectly, through one or more affiliated persons in
32 any of the following:

33 (i) Transmitting or otherwise communicating the offer or acceptance between
34 a buyer and marketplace seller;

35 (ii) Owning or operating the infrastructure, electronic or physical, or
36 technology that brings buyers and marketplace sellers together;

37 (iii) Providing a virtual currency that buyers are allowed or required to use to

1 purchase products from the marketplace seller; or
2 (iv) software development or research and development activities related to
3 any of the activities described in this subsection, if such activities are directly
4 related to a physical or electronic marketplace operated by the person or an
5 affiliated person; and

6 (B) Engages in any of the following activities with respect to the marketplace
7 seller's products:

8 (i) Payment processing services;

9 (ii) Fulfillment, delivery or storage services;

10 (iii) Listing products for sale;

11 (iv) Setting prices;

12 (v) Branding sales as those of the marketplace facilitator;

13 (vi) Order taking;

14 (vii) Advertising or promotion; or

15 (viii) Providing customer service or accepting or assisting with returns or
16 exchanges.

17 (2) A "market place facilitator" does not include a person who: (A) Provides
18 internet advertising services, including listing products for sale, so long as the
19 person does not also engage in any of the activities described in (e)(1)(A) of
20 this subsection in addition to any of the activities described in (e)(1)(B) of this
21 subsection; or (B) a person with respect to the rental of rooms, lodgings,
22 accommodations, homes, apartments, cabins, residential dwelling units or
23 hotel rooms in a hotel as defined in K.S.A. 36-501, and amendments thereto,
24 or acts as an accommodation broker as defined in K.S.A. 12-1692, and
25 amendments thereto, or the operation of a marketplace or that portion of a
26 marketplace that enables consumers to rent rooms, lodgings, accommodations,
27 homes, apartments, cabins, residential units or hotel rooms in a hotel, as
28 defined in K.S.A. 36-501, and amendments thereto, or other residential
29 dwelling unit, or acts as an accommodation broker as defined in K.S.A. 12-
30 1692, and amendments thereto.

31 (C) The exclusion in subsection (e)(2)(B) does not apply to a marketplace
32 facilitator or that portion of a marketplace facilitator that facilitates the sale of
33 the rental of rooms, lodgings, accommodations, homes, apartments, cabins,
34 residential dwelling units or hotel rooms in hotels as defined in K.S.A. 36-501,
35 and amendments thereto, or acts as an accommodation broker as defined in

1 K.S.A. 12-1692, and amendments thereto, who also engages in any of the
2 activities described in (e)(1)(A) of this subsection in addition to any of the
3 activities described in (e)(1)(B) of this subsection.

4 (f) "Marketplace seller" means a seller that makes retail sales through any
5 physical or electronic marketplaces operated by a marketplace facilitator
6 regardless of whether the seller is required to be registered with the
7 department.

8 (g) "Platform" means an electronic or physical medium, including a website
9 or catalog, operated by a referrer.

10 (h) "Referral" means the transfer by a referrer of a potential customer to a
11 seller or marketplace seller that advertises or lists products for sale on the
12 referrer's platform.

13 (i) "Referrer" means a person, other than a person engaging in the business of
14 printing a newspaper or publishing a newspaper, who contracts or otherwise
15 agrees with a seller or marketplace seller to list or advertise for sale one or
16 more items in any medium, including a website or catalog; receives a
17 commission, fee or other consideration from the seller for the listing or
18 advertisement; transfers, via telephone, internet link, or other means, a
19 purchaser to a seller, marketplace seller or an affiliated person to complete the
20 sale; and does not collect receipts from the purchasers for the transaction.

21 (j) "Referrer" does not include a person that: (1) Provides internet advertising
22 services; and (2) does not ever provide either the seller's or marketplace
23 seller's shipping terms or advertise whether the seller or marketplace seller
24 charges sales tax.

25 (k) "Sale" or "sales" shall have the same meaning as defined in K.S.A. 79-
26 3602(kk), and amendments thereto, whether or not such sales qualify for a
27 sales tax exemption.

28 (l) "Seller" shall have the same meaning as defined in K.S.A. 79-3602(mm),
29 and amendments thereto, and includes marketplace facilitators, whether
30 making sales in the seller's own right or on behalf of marketplace sellers.

31 (m) "Tax" means the sales tax imposed under K.S.A. 79-3603, and
32 amendments thereto, or the use tax imposed under K.S.A. 79-3703, and
33 amendments thereto.

34 (n) "Transaction" means a sale of tangible personal property or a service
35 by a marketplace seller including, but not limited to, all such marketplace

1 seller's transactions for tangible personal property or a service, however
2 consummated, including transactions completed on a website operated by: (1)
3 The marketplace seller; (2) an affiliated person; or (3) a contract party,
4 including a marketplace facilitator.

5 (o) The meaning ascribed to words and phrases in K.S.A. 79-3602, and
6 amendments thereto, insofar as practicable, shall be applicable herein unless
7 otherwise provided.

8 New Sec. 3. (a) On and after July 1, 2020, any marketplace facilitator that
9 meets the criteria in subsection (b) or that has a physical presence in this state,
10 must collect and remit retail sales or use tax on all taxable retail sales made or
11 facilitated by the marketplace facilitator into this state pursuant to this act.
12 Marketplace facilitators must begin collecting state and local retail sales or
13 use taxes on taxable retail sales made or facilitated by the marketplace
14 facilitator sourced to this state beginning on the first day of the next calendar
15 month that is at least 30 days from the date that the marketplace facilitator met
16 the threshold described in subsection (b).

17 (b) A marketplace facilitator is subject to subsection (a) if:

18 (1) (A) For the period beginning on January 1, 2020, through June 30, 2020,
19 the marketplace facilitator had cumulative gross receipts from retail sales
20 sourced to this state; or

21 (B) during the current or immediately preceding calendar year, the
22 marketplace facilitator had cumulative gross receipts from retail sales sourced
23 to this state.

24 (2) (A) For any marketplace facilitator who satisfies the provisions of
25 subsection (b)(1)(A), such retailer shall not be required to collect and remit
26 any taxes from sales occurring prior to June 30, 2020.

27 (B) For any marketplace facilitator who satisfies the provisions of subsection
28 (b)(1)(B) for sales in the current calendar year for the first time, such
29 marketplace facilitator shall be required to collect and remit the tax on the
30 cumulative gross receipts from sales in the current calendar year by the
31 marketplace facilitator to customers in this state.

32 New Sec. 4. (a) In addition to other applicable recordkeeping requirements,
33 the department may require a marketplace facilitator or referrer to provide or
34 make available to the department any information the department determines
35 is reasonably necessary to enforce the provisions of this act, the Kansas

1 retailers' sales tax act and the Kansas compensating tax act. Such information
2 may include documentation of sales made by marketplace sellers through the
3 marketplace facilitator's physical or electronic marketplace. The department
4 may prescribe by rules and regulations the form and manner for providing this
5 information.

6 (b) A marketplace facilitator is relieved of liability under this act for failure to
7 collect the correct amount of tax to the extent that the marketplace facilitator
8 can show to the department's satisfaction that the error was due to incorrect
9 information given to the marketplace facilitator by the marketplace seller,
10 unless the marketplace facilitator and marketplace seller are affiliated persons.
11 When the marketplace facilitator is relieved of liability under this subsection,
12 the marketplace seller is solely liable for the amount of uncollected tax due.

13 (c) Except as otherwise provided in this section, a marketplace seller
14 obligated to collect the taxes imposed under this act is not required to collect
15 such taxes on all taxable retail sales through a marketplace operated by a
16 marketplace facilitator if the marketplace seller entered into an agreement
17 with the marketplace facilitator indicating that the marketplace facilitator is
18 registered with the department and will collect all applicable taxes due under
19 this act, the Kansas retailers' sales tax act or the Kansas compensating tax act
20 on all taxable retail sales made on behalf of the marketplace seller through the
21 market place operated by the marketplace facilitator. This subsection does not
22 relieve a marketplace seller from liability for uncollected taxes due under this
23 act, the Kansas retailers' sales tax act or the Kansas compensating tax act
24 resulting from a marketplace facilitator's failure to collect the proper amount
25 of tax due when the error was due to incorrect information given to the
26 marketplace facilitator by the marketplace seller.

27 (d) No class action may be brought against a marketplace facilitator in any
28 court of this state on behalf of purchasers arising from or in any way related
29 to an overpayment of sales or use tax collected by the marketplace facilitator
30 or referrer, regardless of whether that claim is characterized as a tax refund
31 claim. Nothing in this subsection affects a purchaser's right to seek a refund
32 from the department as provided by the Kansas retailers' sales tax act.

33 New Sec. 5. (a) Except as otherwise provided in this act, taxes imposed under
34 the Kansas retailers' sales tax act or the Kansas compensating tax act and
35 payable by a consumer directly to the department are due, on returns

1 prescribed by the department, as prescribed by those acts. (b) Nothing in this
2 act affects the obligation of any purchaser from this state to remit retail sales
3 or use tax as to any applicable taxable transaction in which the seller does not
4 collect and remit retail sales or use tax.

5 New Section 6. (a) A marketplace facilitator that is subject to section 3, and
6 amendments thereto, and is complying with the requirements of the Kansas
7 retailers' sales tax act or the Kansas compensating tax act may only seek a
8 recovery of retail sales and use taxes, penalties or interest from the department
9 by following the recovery procedures established under the Kansas retailers'
10 sales tax act. However, no claim may be granted on the basis that the taxpayer
11 lacked a physical presence in this state and complied with the tax collection
12 provisions of the Kansas retailers' sales tax act or the Kansas compensating
13 tax act voluntarily.

14 (b) Neither the state nor any marketplace facilitator who collects and remits
15 retail sales or use tax under section 3, and amendments thereto, is liable to a
16 purchaser that claims that the retail sales or use tax has been over-collected
17 because a provision of this act is later deemed unlawful.

18 New Sec. 7. A marketplace seller, or a marketplace facilitator that is
19 obligated to collect the taxes imposed under this act, the Kansas retailers' sales
20 tax act or the Kansas compensating tax act must also collect all other
21 applicable taxes and fees in effect as of the effective date of this section. For
22 purposes of this section, "taxes and fees" means any monetary exaction,
23 regardless of its label, imposed on a buyer and that the marketplace seller or
24 marketplace facilitator is required to collect and pay over to the department.
25 Beginning on and after July 1, 2020, the collection and remittance obligations
26 of a marketplace facilitator under this act also applies to any other taxes and
27 fees, as defined under this section, that are imposed on a retail sale made or
28 facilitated by the marketplace facilitator, whether in its own right or as an
29 agent of a marketplace seller, regardless of whether the marketplace seller has
30 a tax collection obligation.

31 New Sec. 8. Except as otherwise provided in this act, the provisions of K.S.A.
32 79-3601 through 79-3696, and amendments thereto, relating to enforcement,
33 collection and administration, insofar as practicable, shall have full force and
34 effect with respect to taxes imposed under the provisions of this act.

35 New Sec. 9. The secretary of revenue shall adopt such rules and regulations

1 as deemed necessary for the administration of this act.

2 New Sec. 10. If any provision of this act or the application thereof to any
3 person or circumstance is held invalid, the invalidity shall not affect other
4 provisions or applications of the act that can be given effect without the
5 invalid provision

6 Sec. 11 K.S.A. 2019 Supp. 79-3702 is hereby amended to read as follows: 79-
7 3702.

8 For the purposes of this act: (a) "Purchase price" means the consideration paid
9 or given or contracted to be paid or given by any person to the seller of an
10 article of tangible personal property for the article purchased. The term shall
11 include, in addition to the consideration paid or given or contracted to be paid
12 or given, the actual cost of transportation from the place where the article was
13 purchased to the person using the same in this state. If a cash discount is
14 allowed and taken on the sale it shall be deducted in arriving at the purchase
15 price.

16 (b) The meaning ascribed to words and phrases in K.S.A. 2019 Supp. 79-
17 3602, and amendments thereto, insofar as is practicable, shall be applicable
18 herein unless otherwise provided. The provisions of K.S.A. 2019 Supp. 79-
19 3601 ~~to through 79-3625, inclusive, 79-3650, and amendments thereto, and~~
20 K.S.A. 2019 Supp. 79-3693 and 79-3694, and amendments thereto, relating
21 to enforcement, collection and administration, insofar as practicable, shall
22 have full force and effect with respect to taxes imposed under the provisions
23 of this act.

24 (c) "Use" means the exercise within this state by any person of any right or
25 power over tangible personal property incident to the ownership of that
26 property, except that it shall not include processing, or the sale of the property
27 in the regular course of business, and except storage as hereinafter defined.

28 (d) "Storage" means any keeping or retaining in this state for any purpose
29 except sale in the regular course of business or subsequent use solely outside
30 this state of tangible personal property purchased from a retailer.

31 (e) "Storage" and "use" do not include the keeping, retaining or exercising of
32 any right or power over tangible personal property shipped or brought into
33 this state for the purpose of subsequently transporting it outside the state for
34 use thereafter solely outside the state, or for the purpose of being processed,

1 fabricated, or manufactured into, attached to or incorporated into, other
2 tangible personal property to be transported outside the state and thereafter
3 used solely outside the state.

4 (f) "Property used in processing" means: (1) Any tangible personal property
5 which, when used in fabrication, compounding, manufacturing or germination,
6 becomes an integral part of the new article resulting from such fabrication,
7 compounding, manufacturing, or germination, and intended to be sold
8 ultimately at retail; and (2) fuel which is consumed in creating power, heat,
9 or steam for processing or for generating electric current.

10 (g) "Retailer" means every person engaged in the business of selling tangible
11 personal property for use within the meaning of this act, except that, when in
12 the opinion of the director it is necessary for the efficient administration of
13 this act to regard any salesperson, representatives, truckers, peddlers or
14 canvassers as the agents of the dealers, distributors, supervisors, employers or
15 persons under whom they operate or from whom they obtain the tangible
16 personal property sold by them, irrespective of whether they are making sales
17 on their own behalf or on behalf of such dealers, distributors, supervisors,
18 employers, or persons, the director may so regard them and may regard the
19 dealers, distributors, supervisors, employers, or persons as retailers for the
20 purposes of this act.

21 (h)(1) "Retailer doing business in this state" or any like term, means: (A) Any
22 retailer maintaining in this state, permanently, temporarily, directly or
23 indirectly through a subsidiary, agent or representative, an office, distribution
24 house, sales house, warehouse or other place of business; (B) any retailer
25 utilizing an employee, independent contractor, agent, representative,
26 salesperson, canvasser, solicitor or other person operating in this state either
27 permanently or temporarily, for the purpose of selling, delivering, installing,
28 assembling, servicing, repairing, soliciting sales or the taking of orders for
29 tangible personal property; (C) any retailer, including a contractor, repair
30 person or other service provider, who enters this state to perform services that
31 are enumerated in K.S.A. 79-3603, and amendments thereto, and who is
32 required to secure a retailer's sales tax registration certificate before
33 performing those services; (D) any retailer deriving rental receipts from a
34 lease of tangible personal property situated in this state; (E) any person

1 regularly maintaining a stock of tangible personal property in this state for
2 sale in the normal course of business; ~~and~~ (F) any retailer who has any other
3 contact with this state that would allow this state to require the retailer to
4 collect and remit tax under the provisions of the constitution and laws of the
5 United States; (G)(i) *and for any retailer that does not satisfy any of the*
6 *requirements contained in subparagraphs (A) through (F), such retailer shall*
7 *be a retailer doing business in this state, if : (a) for the period beginning on*
8 *January 1, 2020, through June 30, 2020, the retailer had cumulative gross*
9 *receipts from sales by the retailer to customers in this state; (b) during the*
10 *current or immediately preceding calendar year, the retailer had cumulative*
11 *gross receipts from sales by the retailer to customers in this state.*

12 *(ii)(a) For any retailer who satisfies the provisions of subparagraph (G)(i),*
13 *such retailer shall not be required to collect and remit any taxes from sales*
14 *occurring prior to July 1, 2020. (b) For any retailer who satisfies the*
15 *provisions of subparagraph (G)(i)(b) for sales in the current calendar year*
16 *for the first time, such retailer shall be required to collect and remit the tax*
17 *on the cumulative gross receipts from sales in the current calendar year by*
18 *the retailer to customers in this state.*

19 (2) A retailer shall be presumed to be doing business in this state if any of the
20 following occur: (A) Any person, other than a common carrier acting in its
21 capacity as such, that has nexus with the state sufficient to require such person
22 to collect and remit taxes under the provisions of the constitution and laws of
23 the United States if such person were making taxable retail sales of tangible
24 personal property or services in this state: (i) Sells the same or a substantially
25 similar line of products as the retailer and does so under the same or a
26 substantially similar business name; (ii) maintains a distribution house, sales
27 house, warehouse or similar place of business in Kansas that delivers or
28 facilitates the sale or delivery of property sold by the retailer to consumers;
29 (iii) uses trademarks, service marks, or trade names in the state that are the
30 same or substantially similar to those used by the retailer; (iv) delivers,
31 installs, assembles or performs maintenance services for the retailer's
32 customers within the state; (v) facilitates the retailer's delivery of property to
33 customers in the state by allowing the retailer's customers to pick up property
34 sold by the retailer at an office, distribution facility, warehouse, storage place
35 or similar place of business maintained by the person in the state; (vi) has a

1 franchisee or licensee operating under its trade name if the franchisee or the
2 licensee is required to collect the tax under the Kansas retailers' sales tax act;
3 or (vii) conducts any other activities in the state that are significantly
4 associated with the retailer's ability to establish and maintain a market in the
5 state for the retailer's sales.(B) Any affiliated person conducting activities in
6 this state described in subparagraph (A) or ~~(C)~~ (D) has nexus with this state
7 sufficient to require such person to collect and remit taxes under the provisions
8 of the constitution and laws of the United States if such person were making
9 taxable retail sales of tangible personal property or services in this state. (C)
10 The retailer enters into an agreement with one or more residents of this state
11 under which the resident, for a commission or other consideration, directly or
12 indirectly refers potential customers, whether by a link or an internet
13 website, by telemarketing, by an in-person oral presentation, or otherwise,
14 to the retailer, if the cumulative gross receipts from sales by the retailer
15 to customers in the state who are referred to the retailer by all residents with
16 this type of an agreement with the retailer is in excess of \$10,000 during
17 the preceding 12 months. This presumption may be rebutted by submitting
18 proof that the residents with whom the retailer has an agreement did not
19 engage in any activity within the state that was significantly associated
20 with the retailer's ability to establish or maintain the retailer's market in
21 the state during the preceding 12 months. Such proof may consist of
22 sworn written statements from all of the residents with whom the retailer
23 has an agreement stating that they did not engage in any solicitation in
24 the state on behalf of the retailer during the preceding year, provided that
25 such statements were provided and obtained in good faith. This subparagraph
26 shall take effect 90 days after the enactment of this statute and shall apply to
27 sales made and uses occurring on or after the effective date of this
28 subparagraph and without regard to the date the retailer and the resident
29 entered into the agreement described in this subparagraph. The term
30 "preceding 12 months" as used in this subparagraph includes the 12 months
31 commencing prior to the effective date of this subparagraph.

32 (D) The presumptions in subparagraphs (A) and (B) may be rebutted by
33 demonstrating that the activities of the person or affiliated person in the
34 state are not significantly associated with the retailer's ability to establish or
35 maintain a market in this state for the retailer's sales.

1 (3) The processing of orders electronically, by fax, telephone, the internet or
2 other electronic ordering process, does not relieve a retailer of responsibility
3 for collection of the tax from the purchaser if the retailer is doing business in
4 this state pursuant to this section.

5 (i) "Director" means the director of taxation.

6 (j) As used in this section, ~~"affiliated person" means any person that is a~~
7 ~~member of the same "controlled group of corporations" as defined in~~
8 ~~section 1563(a) of the federal internal revenue code as the retailer or any~~
9 ~~other entity that, notwithstanding its form of organization, bears the same~~
10 ~~ownership relationship to the retailer as a corporation that is a member of~~
11 ~~the same "controlled group of corporations" as defined in section 1563(a)~~
12 ~~of the federal internal revenue code.~~ *"cumulative gross receipts" means gross*
13 *receipts as defined in K.S.A. 79-3602, and amendments thereto, and includes*
14 *the gross receipts received by the retailer from its own direct sales combined*
15 *with the gross receipts from sales facilitated on behalf of the retailers by*
16 *a marketplace facilitator or marketplace facilitators, as defined in section*
17 *2, and amendments thereto.*

18 Sec. 12. K.S.A. 2019 Supp. 79-3702 is hereby repealed.

19 Sec. 13. This act shall take effect and be in force from and after its
20 publication in the statute book.

21