

**HOUSE BILL No. 2173**

By Committee on Taxation

1-28

1 AN ACT concerning taxation; relating to marketplace facilitators;  
2 requiring the collection and remittance for sales, compensating use and  
3 transient guest taxes and prepaid wireless 911 fees made on platforms;  
4 providing nexus for certain retailers and removing click-through nexus  
5 provisions; amending K.S.A. 79-3702 and repealing the existing  
6 section.

7  
8 *Be it enacted by the Legislature of the State of Kansas:*

9 New Section 1. As used in sections 1 through 4, and amendments  
10 thereto:

11 (a) "Department" means the department of revenue.

12 (b) (1) "Marketplace facilitator" means a person, including any  
13 affiliate of the person, that:

14 (A) Contracts or otherwise agrees with marketplace sellers to  
15 facilitate for consideration, regardless of whether deducted as fees from  
16 the transaction, the sale of the marketplace seller's products or rooms,  
17 lodgings or accommodations through a physical or electronic marketplace  
18 operated, owned or otherwise controlled by the person; and

19 (B) either directly or indirectly through contracts, agreements or other  
20 arrangements with third parties, collects the payment from the purchaser  
21 and transmits all or part of the payment to the marketplace seller.

22 (2) A "marketplace facilitator" includes a person that provides a  
23 platform through which unaffiliated third parties offer to rent to and collect  
24 consideration from occupants for rental, for a period of less than 29  
25 consecutive days, of rooms, lodgings, accommodations, homes,  
26 apartments, cabins or residential dwelling units that are intended to be  
27 used as a room, lodging or sleeping accommodation by one person or by  
28 two or more persons maintaining a common household, to the exclusion of  
29 all others. A person is not a marketplace facilitator with respect to the sale  
30 or charges for rooms, lodgings or sleeping accommodations, if such  
31 rooms, lodgings or sleeping accommodations are provided by a lodging  
32 establishment as described in K.S.A. 36-501, and amendments thereto, and  
33 the lodging establishment provides the rooms, lodgings or sleeping  
34 accommodations for occupancy under a brand belonging to such person or  
35 the person facilitates sales or charges on behalf of the lodging  
36 establishment.

1 (3) A "marketplace facilitator" does not include:

2 (A) A platform or forum that exclusively provides advertising  
3 services, including listing products for sale, so long as the advertising  
4 service platform or forum does not also engage directly or indirectly  
5 through one or more affiliated persons in the activities described in section  
6 1(b)(1)(A) or (b)(1)(B), and amendments thereto;

7 (B) a person whose principal activity with respect to marketplace  
8 sales is to provide payment processing services between two parties; or

9 (C) a derivatives clearing organization, designated contract market,  
10 foreign board of trade or swap execution facility, registered with the  
11 commodity futures trading commission, and any clearing members, futures  
12 commission merchants or brokers when using the services of the  
13 commodity futures trading commission.

14 (c) "Marketplace seller" means a seller that makes sales through any  
15 physical or electronic marketplace operated, owned or controlled by a  
16 marketplace facilitator.

17 (d) "Tax" means:

18 (1) The retailers' sales tax imposed under K.S.A. 79-3603, and  
19 amendments thereto;

20 (2) the compensating use tax imposed under K.S.A. 79-3703, and  
21 amendments thereto; or

22 (3) the transient guest tax imposed under K.S.A. 12-1693 or 12-1697,  
23 and amendments thereto, or any applicable city or county resolution or  
24 ordinance.

25 New Sec. 2. (a) Any marketplace facilitator selling or facilitating the  
26 sale of property or services subject to tax in this state shall be required to  
27 collect and remit such taxes and follow all applicable procedures and  
28 requirements provided by law for the collection and remittance of such  
29 taxes. A marketplace facilitator shall only be required to collect and remit  
30 such taxes if the following criteria are satisfied in the previous calendar  
31 year:

32 (1) The marketplace facilitator makes sales of property or services  
33 otherwise subject to tax in the state in an amount exceeding \$100,000; or

34 (2) if a marketplace facilitator makes or facilitates the sale of property  
35 or services subject to tax in the state, on its own behalf or on behalf of one  
36 or more marketplace sellers, for delivery into this state in an amount  
37 exceeding \$100,000.

38 (b) The department may grant a waiver from the requirements of this  
39 section if a marketplace facilitator demonstrates, to the satisfaction of the  
40 department, that substantially all of its marketplace sellers already are  
41 collecting and remitting taxes to the department. If such waiver is granted,  
42 the taxes levied shall be collectible from the marketplace seller. The  
43 department shall promulgate rules and regulations that establish:

- 1 (1) The criteria for obtaining a waiver pursuant to this section;  
2 (2) the process and procedure for a marketplace facilitator to apply  
3 for a waiver; and  
4 (3) the process for providing notice to an affected marketplace  
5 facilitator and marketplace seller of a waiver obtained pursuant to this  
6 subsection.

7 (c) Nothing in this section shall prohibit the marketplace facilitator  
8 and the marketplace seller from contractually agreeing to have the  
9 marketplace seller collect and remit all applicable taxes and fees if the  
10 marketplace seller:

11 (1) Has annual gross sales in the United States over \$1,000,000,000,  
12 including the gross sales of any related entities, and, in the case of  
13 franchised entities, including the combined sales of all franchisees of a  
14 single franchisor;

15 (2) provides evidence to the marketplace facilitator that the  
16 marketplace seller is registered pursuant to K.S.A. 79-3608, and  
17 amendments thereto; and

18 (3) notifies the department in the manner prescribed by the  
19 department that the marketplace seller will collect and remit all applicable  
20 taxes and fees on sales through the marketplace and is liable for failure to  
21 collect or remit applicable taxes and fees on such sales.

22 (d) Prior to July 1, 2022, if a marketplace facilitator sells or facilitates  
23 the sale of prepaid wireless service, the provider of such prepaid wireless  
24 service is not liable for collection or payment of the prepaid wireless fees  
25 imposed under K.S.A. 12-5371, and amendments thereto, unless such  
26 prepaid wireless provider is a marketplace seller collecting taxes under the  
27 provisions of a waiver granted in subsection (b).

28 (e) On and after July 1, 2022, any marketplace facilitator that is  
29 obligated to collect the taxes imposed under this act, shall also collect and  
30 remit to the department applicable prepaid wireless 911 fees imposed  
31 under K.S.A. 12-5371, and amendments thereto.

32 New Sec. 3. (a) Except as provided in section 2(b) or (c), and  
33 amendments thereto, a marketplace facilitator doing business in this state  
34 under section 2, and amendments thereto, shall collect and remit the taxes  
35 on all taxable sales made by the marketplace facilitator or facilitated for  
36 marketplace sellers to customers in this state, regardless of whether the  
37 marketplace seller for whom sales are facilitated has registered to collect  
38 taxes or would have been required to collect taxes if the sale had not been  
39 facilitated by the marketplace facilitator. A marketplace facilitator has the  
40 same rights and duties as a seller to collect and remit all such taxes.  
41 Marketplace facilitators and marketplace sellers may enter into agreements  
42 with each other regarding fulfillment of the requirements of this section,  
43 but the marketplace facilitator remains the party that is liable to the state

1 for fulfilling such requirements.

2 (b) A marketplace facilitator shall either:

3 (1) Report the tax imposed pursuant to subsection (a) separately from  
4 any taxes collected on taxable sales made directly by the marketplace  
5 facilitator, or affiliates of the marketplace facilitator, to customers in this  
6 state using a separate form to be published by the department; or

7 (2) report the tax imposed pursuant to subsection (a) combined with  
8 any taxes collected on taxable sales made directly by the marketplace  
9 facilitator, or affiliates of the marketplace facilitator.

10 (c) No class action may be brought against a marketplace facilitator  
11 in any court of this state on behalf of customers arising from or in any way  
12 related to an overpayment of tax collected on sales facilitated by the  
13 marketplace facilitator, regardless of whether that claim is characterized as  
14 a tax refund claim. Nothing in this subsection affects a customer's right to  
15 seek a refund as provided under K.S.A. 79-3650, and amendments thereto.

16 (d) Nothing in this section affects the obligation of any consumer to  
17 remit the tax for any taxable transaction for which a marketplace facilitator  
18 or seller does not collect and remit the tax.

19 (e) The department shall solely audit the marketplace facilitator for  
20 sales made by marketplace sellers but facilitated by the marketplace  
21 facilitator, except with respect to transactions that are subject to section  
22 2(b) or (c), and amendments thereto. The department shall not audit or  
23 otherwise assess tax against marketplace sellers for sales facilitated by a  
24 marketplace facilitator except to the extent that the marketplace facilitator  
25 seeks relief under subsection (f) or with respect to transactions that are  
26 subject to section 2(b) or (c), and amendments thereto.

27 (f) A marketplace facilitator shall be relieved of liability under this  
28 section for failure to collect and remit the correct amount of tax to the  
29 extent that the error was due to incorrect or insufficient information on the  
30 nature of the product or service given to the marketplace facilitator by the  
31 marketplace seller, if the marketplace facilitator can demonstrate a  
32 reasonable effort to obtain correct and sufficient information from the  
33 marketplace seller. This subsection shall not apply if the marketplace  
34 facilitator and the marketplace seller are under common ownership and  
35 control.

36 (g) The department may waive penalties and interest if a marketplace  
37 facilitator seeks liability relief and the department determines that  
38 reasonable cause exists.

39 (h) A marketplace facilitator shall be relieved of liability under this  
40 section if it can prove, to the satisfaction of the department, that the tax  
41 levied on a sale facilitated by the marketplace facilitator was paid to the  
42 department by the marketplace seller.

43 New Sec. 4. A marketplace facilitator shall not be required to collect

1 and remit any taxes from sales occurring prior to July 1, 2021.

2 Sec. 5. K.S.A. 79-3702 is hereby amended to read as follows: 79-  
3 3702. For the purposes of this act: (a) "Purchase price" means the  
4 consideration paid or given or contracted to be paid or given by any person  
5 to the seller of an article of tangible personal property for the article  
6 purchased. ~~The term shall include~~ "Purchase price" includes, in addition to  
7 the consideration paid or given or contracted to be paid or given, the actual  
8 cost of transportation from the place where the article was purchased to the  
9 person using the same in this state. If a cash discount is allowed and taken  
10 on the sale ~~it~~, *such cash discount* shall be deducted in arriving at the  
11 purchase price.

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

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

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

28 (e) "Storage" and "use" do not include the keeping, retaining or  
29 exercising of any right or power over tangible personal property shipped or  
30 brought into this state for the purpose of subsequently transporting it  
31 outside the state for use thereafter solely outside the state, or for the  
32 purpose of being processed, fabricated, or manufactured into, attached to  
33 or incorporated into, other tangible personal property to be transported  
34 outside the state and thereafter used solely outside the state.

35 (f) "Property used in processing" means: (1) Any tangible personal  
36 property ~~which~~ *that*, when used in fabrication, compounding,  
37 manufacturing or germination, becomes an integral part of the new article  
38 resulting from such fabrication, compounding, manufacturing, or  
39 germination, and intended to be sold ultimately at retail; and (2) fuel ~~which~~  
40 *that* is consumed in creating power, heat, or steam for processing or for  
41 generating electric current.

42 (g) "Retailer" means every person engaged in the business of selling  
43 tangible personal property for use within the meaning of this act, except

1 that, when in the opinion of the director it is necessary for the efficient  
2 administration of this act to regard any salesperson, representatives,  
3 truckers, peddlers or canvassers as the agents of the dealers, distributors,  
4 supervisors, employers or persons under whom they operate or from whom  
5 they obtain the tangible personal property sold by them, irrespective of  
6 whether they are making sales on their own behalf or on behalf of such  
7 dealers, distributors, supervisors, employers, or persons, the director may  
8 so regard them and may regard the dealers, distributors, supervisors,  
9 employers, or persons as retailers for the purposes of this act.

10 (h) (1) "Retailer doing business in this state" or any like term, means:  
11 (A) Any retailer maintaining in this state, permanently, temporarily,  
12 directly or indirectly through a subsidiary, agent or representative, an  
13 office, distribution house, sales house, warehouse or other place of  
14 business;

15 (B) any retailer utilizing an employee, independent contractor, agent,  
16 representative, salesperson, canvasser, solicitor or other person operating  
17 in this state either permanently or temporarily, for the purpose of selling,  
18 delivering, installing, assembling, servicing, repairing, soliciting sales or  
19 the taking of orders for tangible personal property;

20 (C) any retailer, including a contractor, repair person or other service  
21 provider, who enters this state to perform services that are enumerated in  
22 K.S.A. 79-3603, and amendments thereto, and who is required to secure a  
23 retailer's sales tax registration certificate before performing those services;

24 (D) any retailer deriving rental receipts from a lease of tangible  
25 personal property situated in this state;

26 (E) any person regularly maintaining a stock of tangible personal  
27 property in this state for sale in the normal course of business; ~~and~~

28 (F) any retailer who has any other contact with this state that would  
29 allow this state to require the retailer to collect and remit tax under the  
30 provisions of the constitution and laws of the United States; *and*

31 (G) (i) *for any retailer that does not satisfy any of the requirements*  
32 *contained in subparagraphs (A) through (F), such retailer shall be a*  
33 *retailer doing business in this state, if:*

34 (a) *For the period beginning on January 1, 2021, through June 30,*  
35 *2021, the retailer had in excess of \$100,000 of cumulative gross receipts*  
36 *from sales by the retailer to customers in this state; or*

37 (b) *during the current or immediately preceding calendar year, the*  
38 *retailer had in excess of \$100,000 of cumulative gross receipts from sales*  
39 *by the retailer to customers in this state.*

40 (ii) (a) *For any retailer who satisfies the provisions of subparagraph*  
41 *(G)(i), such retailer shall not be required to collect and remit any taxes*  
42 *from sales occurring prior to July 1, 2021.*

43 (b) *For any retailer who satisfies the provisions of subparagraph (G)*

1 (i)(b) for sales in the current calendar year for the first time, such retailer  
2 shall be required to collect and remit the tax on any sales in excess of  
3 \$100,000 of cumulative gross receipts from sales in the current calendar  
4 year by the retailer to customers in this state.

5 (2) A retailer shall be presumed to be doing business in this state if  
6 any of the following occur:

7 (A) Any person, other than a common carrier acting in its capacity as  
8 such, that has nexus with the state sufficient to require such person to  
9 collect and remit taxes under the provisions of the constitution and laws of  
10 the United States if such person were making taxable retail sales of  
11 tangible personal property or services in this state and such person:

12 (i)(A) Sells the same or a substantially similar line of products as the  
13 retailer and does so under the same or a substantially similar business  
14 name;

15 (ii)(B) maintains a distribution house, sales house, warehouse or  
16 similar place of business in Kansas that delivers or facilitates the sale or  
17 delivery of property sold by the retailer to consumers;

18 (iii)(C) uses trademarks, service marks, or trade names in the state  
19 that are the same or substantially similar to those used by the retailer;

20 (iv)(D) delivers, installs, assembles or performs maintenance services  
21 for the retailer's customers within the state;

22 (v)(E) facilitates the retailer's delivery of property to customers in the  
23 state by allowing the retailer's customers to pick up property sold by the  
24 retailer at an office, distribution facility, warehouse, storage place or  
25 similar place of business maintained by the person in the state;

26 (vi)(F) has a franchisee or licensee operating under its trade name if  
27 the franchisee or the licensee is required to collect the tax under the  
28 Kansas retailers' sales tax act; or

29 (vii)(G) conducts any other activities in the state that are significantly  
30 associated with the retailer's ability to establish and maintain a market in  
31 the state for the retailer's sales.

32 (B) Any affiliated person conducting activities in this state described  
33 in subparagraph (A) or (C) has nexus with this state sufficient to require  
34 such person to collect and remit taxes under the provisions of the  
35 constitution and laws of the United States if such person were making  
36 taxable retail sales of tangible personal property or services in this state.

37 (C) The retailer enters into an agreement with one or more residents  
38 of this state under which the resident, for a commission or other  
39 consideration, directly or indirectly refers potential customers, whether by  
40 a link or an internet website, by telemarketing, by an in-person oral  
41 presentation, or otherwise, to the retailer, if the cumulative gross receipts  
42 from sales by the retailer to customers in the state who are referred to the  
43 retailer by all residents with this type of an agreement with the retailer is in

1 excess of \$10,000 during the preceding 12 months. This presumption may  
2 be rebutted by submitting proof that the residents with whom the retailer  
3 has an agreement did not engage in any activity within the state that was  
4 significantly associated with the retailer's ability to establish or maintain  
5 the retailer's market in the state during the preceding 12 months. Such  
6 proof may consist of sworn written statements from all of the residents  
7 with whom the retailer has an agreement stating that they did not engage in  
8 any solicitation in the state on behalf of the retailer during the preceding  
9 year, provided that such statements were provided and obtained in good  
10 faith. This subparagraph shall take effect 90 days after the enactment of  
11 this statute and shall apply to sales made and uses occurring on or after the  
12 effective date of this subparagraph and without regard to the date the  
13 retailer and the resident entered into the agreement described in this  
14 subparagraph. The term "preceding 12 months" as used in this  
15 subparagraph includes the 12 months commencing prior to the effective  
16 date of this subparagraph.

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

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

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

26 (j) ~~As used in this section, "affiliated person" means any person that~~  
27 ~~is a member of the same "controlled group of corporations" as defined in~~  
28 ~~section 1563(a) of the federal internal revenue code as the retailer or any~~  
29 ~~other entity that, notwithstanding its form of organization, bears the same~~  
30 ~~ownership relationship to the retailer as a corporation that is a member of~~  
31 ~~the same "controlled group of corporations" as defined in section 1563(a)~~  
32 ~~of the federal internal revenue code.~~

33 Sec. 6. K.S.A. 79-3702 is hereby repealed.

34 Sec. 7. This act shall take effect and be in force from and after its  
35 publication in the statute book.