

**HOUSE BILL No. 2395**

By Committee on Taxation

2-17

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

6  
7 *Be it enacted by the Legislature of the State of Kansas:*

8 New Section 1. The provisions of sections 1 through 10, and  
9 amendments thereto, shall be part of and supplemental to the Kansas  
10 retailers' sales tax act.

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

12 (a) "Act" means sections 1 through 10, and amendments thereto.

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

15 (1) Has an ownership interest of more than 5%, whether direct or  
16 indirect, in the other person; or

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

21 (c) "Cumulative gross receipts" means gross receipts as defined in  
22 K.S.A. 79-3602, and amendments thereto, and includes the gross receipts  
23 received by the marketplace facilitator from such facilitator's own direct  
24 sales combined with the gross receipts received from sales such facilitator  
25 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  
32 persons in any of the following:

33 (i) Transmitting or otherwise communicating the offer or acceptance  
34 between 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;

1 (iii) providing a virtual currency that buyers are allowed or required  
2 to use to purchase products from the marketplace seller; or

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

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

- 9 (i) Payment processing services;
- 10 (ii) fulfillment, delivery or storage services;
- 11 (iii) listing products for sale;
- 12 (iv) setting prices;
- 13 (v) branding sales as those of the marketplace facilitator;
- 14 (vi) order taking;
- 15 (vii) advertising or promotion; or
- 16 (viii) providing customer service or accepting or assisting with  
17 returns or exchanges.

18 (2) A "marketplace facilitator" does not include a person who:

19 (A) Provides internet advertising services, including listing products  
20 for sale, so long as the person does not also engage in any of the activities  
21 described in subsection (e)(1)(A) in addition to any of the activities  
22 described in subsection (e)(1)(B); or

23 (B) with respect to rental of rooms, lodgings, accommodations,  
24 homes, apartments, cabins, residential dwelling units or hotel rooms in a  
25 hotel, as defined in K.S.A. 36-501, and amendments thereto, operates a  
26 marketplace or a portion of a marketplace that enables consumers to rent  
27 rooms, lodgings, accommodations, homes, apartments, cabins, residential  
28 dwelling units or hotel rooms in a hotel, as defined in K.S.A. 36-501, and  
29 amendments thereto, or acts as an accommodation broker as defined in  
30 K.S.A. 12-1692, and amendments thereto.

31 (3) The exclusion in subsection (e)(2)(B) does not apply to a  
32 marketplace facilitator or that portion of a marketplace facilitator that  
33 facilitates the sale of the rental of rooms, lodgings, accommodations,  
34 homes, apartments, cabins, residential dwelling units or hotel rooms in  
35 hotels, as defined in K.S.A. 36-501, and amendments thereto, or acts as an  
36 accommodation broker as defined in K.S.A. 12-1692, and amendments  
37 thereto, who also engages in any of the activities described in subsection  
38 (e)(1)(A) in addition to any of the activities described in subsection (e)(1)  
39 (B).

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

1 (g) "Sale" or "sales" means the same as defined in K.S.A. 79-  
2 3602(kk), and amendments thereto, whether or not such sales qualify for a  
3 sales tax exemption.

4 (h) "Seller" means the same as defined in K.S.A. 79-3602(mm), and  
5 amendments thereto, and includes marketplace facilitators, whether  
6 making sales in the seller's own right or on behalf of marketplace sellers.

7 (i) "Tax" means the sales tax imposed under K.S.A. 79-3603, and  
8 amendments thereto, or the use tax imposed under K.S.A. 79-3703, and  
9 amendments thereto.

10 (j) Definitions of words and phrases in K.S.A. 79-3602, and  
11 amendments thereto, apply to this act, unless the context requires a  
12 different meaning.

13 New Sec. 3. (a) On and after July 1, 2021, any marketplace facilitator  
14 that meets the criteria in subsection (b) or that has a physical presence in  
15 this state, must collect and remit retail sales or use tax on all taxable retail  
16 sales made or facilitated by the marketplace facilitator into this state  
17 pursuant to this act. Marketplace facilitators must begin collecting state  
18 and local retail sales or use taxes on taxable retail sales made or facilitated  
19 by the marketplace facilitator sourced to this state beginning on the first  
20 day of the next calendar month that is at least 30 days from the date that  
21 the marketplace facilitator met the threshold described in subsection (b).

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

23 (1) (A) For the period beginning on January 1, 2021, through June 30,  
24 2021, the marketplace facilitator had cumulative gross receipts from retail  
25 sales sourced to this state; or

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

29 (2) (A) For any marketplace facilitator who satisfies the provisions of  
30 subsection (b)(1)(A), such retailer shall not be required to collect and remit  
31 any taxes from sales occurring prior to July 1, 2021.

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

37 New Sec. 4. (a) In addition to other applicable recordkeeping  
38 requirements, the department may require a marketplace facilitator to  
39 provide or make available to the department any information the  
40 department determines is reasonably necessary to enforce the provisions of  
41 this act, the Kansas retailers' sales tax act and the Kansas compensating tax  
42 act. Such information may include documentation of sales made by  
43 marketplace sellers through the marketplace facilitator's physical or

1 electronic marketplace. The department may prescribe by rules and  
2 regulations the form and manner for providing this information.

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

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

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

33 (e) The department shall solely audit the marketplace facilitator for  
34 sales made by the marketplace seller but facilitated by the marketplace  
35 facilitator. The department shall not audit marketplace sellers for sales  
36 facilitated by a marketplace facilitator except to the extent the marketplace  
37 facilitator seeks relief under subsection (b) or (c).

38 New Sec. 5. (a) Except as otherwise provided in this act, taxes  
39 imposed under the Kansas retailers' sales tax act or the Kansas  
40 compensating tax act and payable by a consumer directly to the  
41 department are due, on returns prescribed by the department, as prescribed  
42 by those acts.

43 (b) Nothing in this act affects the obligation of any purchaser from

1 this state to remit retail sales or use tax as to any applicable taxable sale in  
2 which the seller does not collect and remit retail sales or use tax.

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

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

16 New Sec. 7. (a) A marketplace seller or a marketplace facilitator that  
17 is obligated to collect and remit the taxes imposed under this act, the  
18 Kansas retailers' sales tax act or the Kansas compensating tax act shall also  
19 collect and remit transient guest taxes pursuant to K.S.A. 12-1697, and  
20 amendments thereto, and 911 fees pursuant to K.S.A. 2020 Supp. 12-5369,  
21 12-5370 and 12-5371 and amendments thereto.

22 (b) Beginning on and after July 1, 2021, the collection and remittance  
23 obligations of a marketplace facilitator under this act also apply to any  
24 other taxes and fees, as defined under this section, that are imposed on a  
25 retail sale made or facilitated by the marketplace facilitator, whether in its  
26 own right or as an agent of a marketplace seller, regardless of whether the  
27 marketplace seller has a tax collection obligation.

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

33 New Sec. 9. The secretary of revenue shall adopt such rules and  
34 regulations as deemed necessary for the administration of this act.

35 New Sec. 10. If any provision of this act or the application thereof to  
36 any person or circumstance is held invalid, the invalidity shall not affect  
37 other provisions or applications of the act that can be given effect without  
38 the invalid provision or application, and to this end, the provisions of this  
39 act are severable.

40 Sec. 11. K.S.A. 79-3702 is hereby amended to read as follows: 79-  
41 3702. For the purposes of this act:

42 (a) "Purchase price" means the consideration paid or given or  
43 contracted to be paid or given by any person to the seller of an article of

1 tangible personal property for the article purchased. The term shall  
2 include, in addition to the consideration paid or given or contracted to be  
3 paid or given, the actual cost of transportation from the place where the  
4 article was purchased to the person using the same in this state. If a cash  
5 discount is allowed and taken on the sale it shall be deducted in arriving at  
6 the purchase price.

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

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

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

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

32 (f) "Property used in processing" means:

33 (1) Any tangible personal property ~~which~~ *that*, when used in  
34 fabrication, compounding, manufacturing or germination, becomes an  
35 integral part of the new article resulting from such fabrication,  
36 compounding, manufacturing, or germination, and intended to be sold  
37 ultimately at retail; and

38 (2) fuel ~~which~~ *that* is consumed in creating power, heat, or steam for  
39 processing or for generating electric current.

40 (g) "Retailer" means every person engaged in the business of selling  
41 tangible personal property for use within the meaning of this act, except  
42 that, when in the opinion of the director it is necessary for the efficient  
43 administration of this act to regard any salesperson, representatives,

1 truckers, peddlers or canvassers as the agents of the dealers, distributors,  
2 supervisors, employers or persons under whom they operate or from whom  
3 they obtain the tangible personal property sold by them, irrespective of  
4 whether they are making sales on their own behalf or on behalf of such  
5 dealers, distributors, supervisors, employers, or persons, the director may  
6 so regard them and may regard the dealers, distributors, supervisors,  
7 employers, or persons as retailers for the purposes of this act.

8 (h) (1) "Retailer doing business in this state" or any like term, means:

9 (A) Any retailer maintaining in this state, permanently, temporarily,  
10 directly or indirectly through a subsidiary, agent or representative, an  
11 office, distribution house, sales house, warehouse or other place of  
12 business;

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

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

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

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

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

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

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

36 (i) Sells the same or a substantially similar line of products as the  
37 retailer and does so under the same or a substantially similar business  
38 name;

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

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

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

3 (v) facilitates the retailer's delivery of property to customers in the  
4 state by allowing the retailer's customers to pick up property sold by the  
5 retailer at an office, distribution facility, warehouse, storage place or  
6 similar place of business maintained by the person in the state;

7 (vi) has a franchisee or licensee operating under its trade name if the  
8 franchisee or the licensee is required to collect the tax under the Kansas  
9 retailers' sales tax act; or

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

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

18 (C) The retailer enters into an agreement with one or more residents  
19 of this state under which the resident, for a commission or other  
20 consideration, directly or indirectly ~~refers potential customers, whether by~~  
21 ~~a link or an internet website, sells tangible personal property or services~~  
22 *for or on behalf of the retailer* by telemarketing, by an in-person oral  
23 presentation; or otherwise, ~~to the retailer, if the cumulative gross receipts~~  
24 ~~from sales by the retailer to customers in the state who are referred to the~~  
25 ~~retailer by all residents with this type of an agreement with the retailer is in~~  
26 ~~excess of \$10,000 during the preceding 12 months.~~ This presumption may  
27 be rebutted by submitting proof that the residents with whom the retailer  
28 has an agreement did not engage in any activity within the state that was  
29 significantly associated with the retailer's ability to establish or maintain  
30 the retailer's market in the state during the preceding 12 months. Such  
31 proof may consist of sworn written statements from all of the residents  
32 with whom the retailer has an agreement stating that they did not engage in  
33 any solicitation in the state on behalf of the retailer during the preceding  
34 year, provided that such statements were provided and obtained in good  
35 faith. This subparagraph shall take effect 90 days after the enactment of  
36 this statute and shall apply to sales made and uses occurring on or after the  
37 effective date of this subparagraph and without regard to the date the  
38 retailer and the resident entered into the agreement described in this  
39 subparagraph. The term "preceding 12 months" as used in this  
40 subparagraph includes the 12 months commencing prior to the effective  
41 date of this subparagraph.

42 (D) The presumptions in subparagraphs (A) and (B) may be rebutted  
43 by demonstrating that the activities of the person or affiliated person in the



1 state are not significantly associated with the retailer's ability to establish  
2 or maintain a market in this state for the retailer's sales.

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

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

8 (j) ~~As used in this section, "Affiliated person" means any person that~~  
9 ~~is a member of the same "controlled group of corporations" as defined in~~  
10 ~~section 1563(a) of the federal internal revenue code as the retailer or any~~  
11 ~~other entity that, notwithstanding its form of organization, bears the same~~  
12 ~~ownership relationship to the retailer as a corporation that is a member of~~  
13 ~~the same "controlled group of corporations" as defined in section 1563(a)~~  
14 ~~of the federal internal revenue code the same as defined in section 2, and~~  
15 ~~amendments thereto.~~

16 Sec. 12. K.S.A. 79-3702 is hereby repealed.

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