HOUSE BILL No. 2395

By Committee on Taxation

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

Be it enacted by the Legislature of the State of Kansas:

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

New Sec. 2. As used in this act:
(a) "Act" means sections 1 through 10, and amendments thereto.
(b) "Affiliated person" means a person that, with respect to another person:
   (1) Has an ownership interest of more than 5%, whether direct or indirect, in the other person; or
   (2) is related to the other person because a third person, or group of third persons who are affiliated persons with respect to each other, holds an ownership interest of more than 5%, whether direct or indirect, in the related persons.
(c) "Cumulative gross receipts" means gross receipts as defined in K.S.A. 79-3602, and amendments thereto, and includes the gross receipts received by the marketplace facilitator from such facilitator's own direct sales combined with the gross receipts received from sales such facilitator facilitates for sellers or marketplace sellers.
(d) "Department" means the Kansas department of revenue.
(e) (1) "Marketplace facilitator" means a person that, pursuant to an agreement with a marketplace seller, facilitates sales by such marketplace seller through a physical or electronic marketplace operated by the person, and:
   (A) Engages directly or indirectly, through one or more affiliated persons in any of the following:
   (i) Transmitting or otherwise communicating the offer or acceptance between a buyer and marketplace seller;
   (ii) owning or operating the infrastructure, electronic or physical, or technology that brings buyers and marketplace sellers together;
(iii) providing a virtual currency that buyers are allowed or required
to use to purchase products from the marketplace seller; or
(iv) software development or research and development activities
related to any of the activities described in this subsection, if such
activities are directly related to a physical or electronic marketplace
operated by the person or an affiliated person; and
(B) engages in any of the following activities with respect to the
marketplace seller's products:
(i) Payment processing services;
(ii) fulfillment, delivery or storage services;
(iii) listing products for sale;
(iv) setting prices;
(v) branding sales as those of the marketplace facilitator;
(vi) order taking;
(vii) advertising or promotion; or
(viii) providing customer service or accepting or assisting with
returns or exchanges.

(2) A "marketplace facilitator" does not include a person who:
(A) Provides internet advertising services, including listing products
for sale, so long as the person does not also engage in any of the activities
described in subsection (e)(1)(A) in addition to any of the activities
described in subsection (e)(1)(B); or
(B) with respect to rental of rooms, lodgings, accommodations,
homes, apartments, cabins, residential dwelling units or hotel rooms in a
hotel, as defined in K.S.A. 36-501, and amendments thereto, operates a
marketplace or a portion of a marketplace that enables consumers to rent
rooms, lodgings, accommodations, homes, apartments, cabins, residential
dwelling units or hotel rooms in a hotel, as defined in K.S.A. 36-501, and
amendments thereto, or acts as an accommodation broker as defined in
K.S.A. 12-1692, and amendments thereto.

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

(f) "Marketplace seller" means a seller that makes retail sales through
any physical or electronic marketplaces operated by a marketplace
facilitator regardless of whether the seller is required to be registered with
the department.
(g) "Sale" or "sales" means the same as defined in K.S.A. 79-3602(kk), and amendments thereto, whether or not such sales qualify for a sales tax exemption.

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

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

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

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

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

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

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

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

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

New Sec. 4. (a) In addition to other applicable recordkeeping requirements, the department may require a marketplace facilitator to provide or make available to the department any information the department determines is reasonably necessary to enforce the provisions of this act, the Kansas retailers' sales tax act and the Kansas compensating tax act. Such information may include documentation of sales made by marketplace sellers through the marketplace facilitator's physical or
electronic marketplace. The department may prescribe by rules and regulations the form and manner for providing this information.

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

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

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

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

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

(b) Nothing in this act affects the obligation of any purchaser from
this state to remit retail sales or use tax as to any applicable taxable sale in which the seller does not collect and remit retail sales or use tax.

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) "Property used in processing" means:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) uses trademarks, service marks, or trade names in the state that are the same or substantially similar to those used by the retailer;
(iv) delivers, installs, assembles or performs maintenance services for the retailer's customers within the state;
(v) facilitates the retailer's delivery of property to customers in the state by allowing the retailer's customers to pick up property sold by the retailer at an office, distribution facility, warehouse, storage place or similar place of business maintained by the person in the state;
(vi) has a franchisee or licensee operating under its trade name if the franchisee or the licensee is required to collect the tax under the Kansas retailers' sales tax act; or
(vii) conducts any other activities in the state that are significantly associated with the retailer's ability to establish and maintain a market in the state for the retailer's sales.

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

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

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

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

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

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

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

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