

## HOUSE BILL No. 2225

By Committee on Taxation

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

5  
6 *Be it enacted by the Legislature of the State of Kansas:*

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

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

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

12 (b) "Affiliated person" means a person that, with respect to another  
13 person: (1) Has an ownership interest of more than 5%, whether direct or  
14 indirect, in the other person; or (2) is related to the other person because a  
15 third person, or group of third persons who are affiliated persons with  
16 respect to each other, holds an ownership interest of more than 5%,  
17 whether direct or indirect, in the related persons.

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

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

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

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

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

32 (ii) owning or operating the infrastructure, electronic or physical, or  
33 technology that brings buyers and marketplace sellers together;

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

36 (iv) software development or research and development activities

1 related to any of the activities described in this subsection, if such  
2 activities are directly related to a physical or electronic marketplace  
3 operated by the person or an affiliated person; and

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

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

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

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

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

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

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

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

43 (h) "Referral" means the transfer by a referrer of a potential customer

1 to a seller or marketplace seller that advertises or lists products for sale on  
2 the referrer's platform.

3 (i) (1) "Referrer" means a person, other than a person engaging in the  
4 business of printing a newspaper or publishing a newspaper, who contracts  
5 or otherwise agrees with a seller or marketplace seller to list or advertise  
6 for sale one or more items in any medium, including a website or catalog;  
7 receives a commission, fee or other consideration from the seller for the  
8 listing or advertisement; transfers, via telephone, internet link, or other  
9 means, a purchaser to a seller, marketplace seller or an affiliated person to  
10 complete the sale; and does not collect receipts from the purchasers for the  
11 transaction.

12 (2) "Referrer" does not include a person that:

13 (A) Provides internet advertising services; and

14 (B) does not ever provide either the seller's or marketplace seller's  
15 shipping terms or advertise whether the seller or marketplace seller  
16 charges sales tax.

17 (j) "Sale" or "sales" means the same as defined in K.S.A. 79-  
18 3602(kk), and amendments thereto, whether or not such sales qualify for a  
19 sales tax exemption.

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

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

26 (m) "Transaction" means a sale of tangible personal property or a  
27 service by a marketplace seller including, but not limited to, all such  
28 marketplace seller's transactions for tangible personal property or a  
29 service, however consummated, including transactions completed on a  
30 website operated by: (1) The marketplace seller; (2) an affiliated person; or  
31 (3) a contract party, including a marketplace facilitator.

32 (n) As used in this act, the words and phrases set out in K.S.A. 79-  
33 3602, and amendments thereto, shall have the means respectively ascribed  
34 to them unless the context requires a different meaning.

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

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

2 (1) (A) For the period beginning on January 1, 2021, through June 30,  
 3 2021, the marketplace facilitator had cumulative gross receipts from retail  
 4 sales sourced to this state; or

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

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

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

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

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

33 (c) Except as otherwise provided in this section, a marketplace seller  
 34 obligated to collect the taxes imposed under this act is not required to  
 35 collect such taxes on all taxable retail sales through a marketplace operated  
 36 by a marketplace facilitator if the marketplace seller entered into an  
 37 agreement with the marketplace facilitator indicating that the marketplace  
 38 facilitator is registered with the department and will collect all applicable  
 39 taxes due under this act, the Kansas retailers' sales tax act or the Kansas  
 40 compensating tax act on all taxable retail sales made on behalf of the  
 41 marketplace seller through the marketplace operated by the marketplace  
 42 facilitator. This subsection does not relieve a marketplace seller from  
 43 liability for uncollected taxes due under this act, the Kansas retailers' sales

1 tax act or the Kansas compensating tax act resulting from a marketplace  
2 facilitator's failure to collect the proper amount of tax due when the error  
3 was due to incorrect or insufficient information given to the marketplace  
4 facilitator by the marketplace seller.

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

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

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

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

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

34 New Sec. 7. (a) A marketplace seller or a marketplace facilitator that  
35 is obligated to collect and remit the taxes imposed under this act, the  
36 Kansas retailers' sales tax act or the Kansas compensating tax act shall also  
37 collect and remit transient guest taxes pursuant to K.S.A. 12-1697, and  
38 amendments thereto, and 911 fees pursuant to K.S.A. 2020 Supp. 12-5369,  
39 12-5370 and 12-5371 and amendments thereto.

40 (b) Beginning on and after July 1, 2021, the collection and remittance  
41 obligations of a marketplace facilitator under this act also apply to any  
42 other taxes and fees, as defined under this section, that are imposed on a  
43 retail sale made or facilitated by the marketplace facilitator, whether in its

1 own right or as an agent of a marketplace seller, regardless of whether the  
2 marketplace seller has a tax collection obligation.

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

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

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

15 Sec. 11. K.S.A. 79-3702 is hereby amended to read as follows: 79-  
16 3702. For the purposes of this act: (a) "Purchase price" means the  
17 consideration paid or given or contracted to be paid or given by any person  
18 to the seller of an article of tangible personal property for the article  
19 purchased. The term shall include, in addition to the consideration paid or  
20 given or contracted to be paid or given, the actual cost of transportation  
21 from the place where the article was purchased to the person using the  
22 same in this state. If a cash discount is allowed and taken on the sale it  
23 shall be deducted in arriving at the purchase price.

24 ~~(b) The meaning ascribed to words and phrases in K.S.A. 79-3602,~~  
25 ~~and amendments thereto, insofar as is practicable, shall be applicable~~  
26 ~~herein unless otherwise provided.~~ *As used in this act, the words and phrases*  
27 *set out in K.S.A. 79-3602, and amendments thereto, shall have the*  
28 *meanings respectively ascribed to them unless the context requires a*  
29 *different meaning.* The provisions of K.S.A. 79-3601 ~~to~~ through 79-3625,  
30 ~~inclusive, 79-3650, K.S.A. 79-3693 and 79-3694, and amendments thereto,~~  
31 relating to enforcement, collection and administration, insofar as  
32 practicable, shall have full force and effect with respect to taxes imposed  
33 under the provisions of this act.

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

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

43 (e) "Storage" and "use" do not include the keeping, retaining or

1 exercising of any right or power over tangible personal property shipped or  
2 brought into this state for the purpose of subsequently transporting it  
3 outside the state for use thereafter solely outside the state, or for the  
4 purpose of being processed, fabricated, or manufactured into, attached to  
5 or incorporated into, other tangible personal property to be transported  
6 outside the state and thereafter used solely outside the state.

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

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

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

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

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

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

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

43 (F) any retailer who has any other contact with this state that would

1 allow this state to require the retailer to collect and remit tax under the  
2 provisions of the constitution and laws of the United States; and

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

6 (a) For the period beginning on January 1, 2021, through June 30,  
7 2021, the retailer had cumulative gross receipts from sales by the retailer  
8 to customers in this state; or

9 (b) during the current or immediately preceding calendar year, the  
10 retailer had cumulative gross receipts from sales by the retailer to  
11 customers in this state.

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

15 (b) For any retailer who satisfies the provisions of subparagraph  
16 (G)(i)(b) for sales in the current calendar year for the first time, such  
17 retailer shall be required to collect and remit the tax on the cumulative  
18 gross receipts from sales in the current calendar year by the retailer to  
19 customers in this state.

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

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

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

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

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

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

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

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



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

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

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

32 (D) The presumptions in subparagraphs (A) and (B) may be rebutted  
33 by 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  
35 or maintain a market in this state for the retailer's sales.

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

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

41 (j) As used in this section, ~~"affiliated person" means any person that~~  
42 ~~is a member of the same "controlled group of corporations" as defined in~~  
43 ~~section 1563(a) of the federal internal revenue code as the retailer or any~~

1 other entity that, notwithstanding its form of organization, bears the same  
2 ownership relationship to the retailer as a corporation that is a member of  
3 the same "controlled group of corporations" as defined in section 1563(a)  
4 of the federal internal revenue code "cumulative gross receipts" means  
5 gross receipts as defined in K.S.A. 79-3602, and amendments thereto, and  
6 includes the gross receipts received by the retailer from its own direct  
7 sales combined with the gross receipts from sales facilitated on  
8 behalf of the retailers by a marketplace facilitator or marketplace  
9 facilitators, as defined in section 2, and amendments thereto.

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

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