

Senate Committee on Assessment and Taxation

Testimony in Support of Senate Bill 369

Presented by Eric Stafford, Vice President of Government Affairs

Monday, March 16, 2020

Madam Chair and members of the committee, my name is Eric Stafford, Vice President of Government Affairs for the Kansas Chamber. The Kansas Chamber represents small, medium and large businesses of all industry segments across the state, and also serves as the state affiliate of the National Retail Federation through our Kansas Retail Council.

The Kansas Chamber appreciates the opportunity to testify in support of Senate Bill 369, which would require marketplace facilitators to collect and remit sales tax to the State of Kansas when annual sales into the state exceed \$100,000. As you'll see on the map below, Kansas is one of a handful of states who are still left who still need to take legislative action on this matter.

If you recall, in June 2018, the U.S. Supreme Court case *South Dakota v. Wayfair* was a monumental decision that granted states the ability to collect sales tax for online purchases, with some restrictions. The Court provided a checklist of factors present in South Dakota law that strongly suggested why it would be constitutional under this standard:

1. Safe harbor: Exclude "those who transact only limited business" in the state. (South Dakota's is \$100,000 in sales or 200 transactions.) **(SB 369 only contains the \$100,000 in sales threshold)**
2. No retroactive collection.
3. Single state-level administration of all sales taxes in the state.
4. Uniform definitions of products and services.
5. Simplified tax rate structure. (South Dakota requires the same tax base between state and local sales tax, has only three sales tax rates, and limited exemptions from the tax.)
6. Software: access to sales tax administration software provided by the state.
7. Immunity: sellers who use the software are not liable for errors derived from relying on it.

(Items three through seven are accomplished as Kansas is a participating state of the streamlined sales tax agreement)

In August 2019, Governor Kelly issued an Executive Order effective October 1, 2019, requiring all out-of-state retailers to collect and remit sales tax to the state. Lacking from this executive order is item #1 from the Wayfair checklist- a safe harbor provision for those conducting limited business in the state. Upon the announcement of the Executive Order, the Tax Foundation wrote:

"Kansas just unveiled the most aggressive remote sales tax collections regime in the country, and it did so without adopting any new, post-Wayfair legislation. The new requirements, set out in a [Department of Revenue notice](#), obligate all remote sellers with any transactions in Kansas to begin collecting and remitting sales taxes by October, no matter how small the company or how few Kansas sales they have. The new guidance challenges the emerging consensus on remote sales tax collections and raises legal issues most states have been eager to avoid."

SB 369 addresses the compliance issue which Kansas potentially faces without legislative action. The bill before you is a slightly different version of marketplace facilitator legislation than what we've had in the past and complies with the Court's Wayfair checklist. The bill is largely based off model language from the National Conference of State Legislators (NCSL), which has been adopted and supported by the retail industry, as well as the telecom industry.

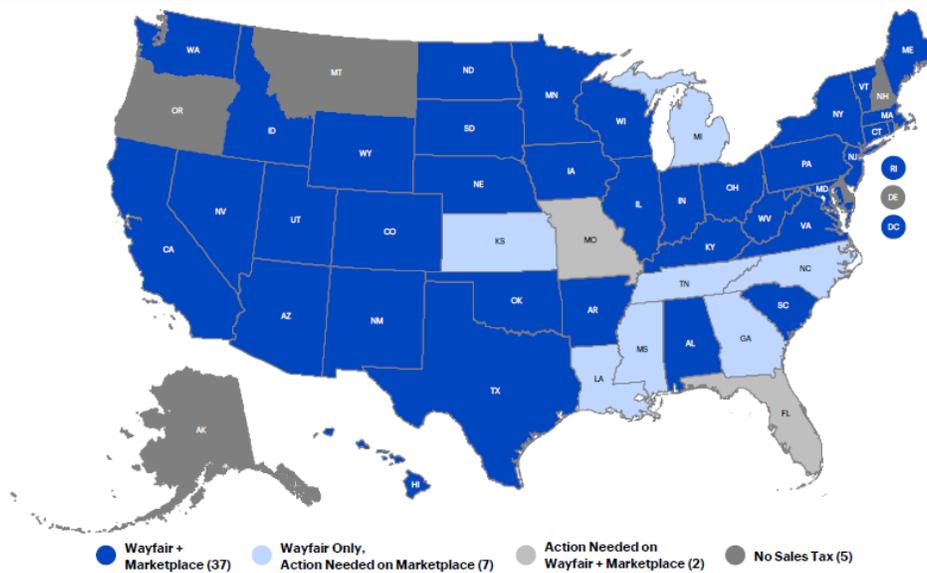
The variation of language from the NCSL model bill included in SB 369 was the inclusion of language dealing with transient guest taxes for app-based services such as Airbnb, and VRBO. Kansas law requires collection of sales tax on the rental of rooms or lodging, or other sleeping accommodations. According to the Department of Revenue website, "The guest tax applies when there are more than two bedrooms furnished for the accommodations of guests and when the room is rented for 28 consecutive days or less." HB 2513 extends existing Kansas law to short-term, app-based rental services, much like the rest of the bill applies sales tax to remote sellers. This bill is not imposing a new tax.

However, SB 369 includes language similar to House Bill 2537 which changes the definition of retailer doing business in the state to anyone who has \$100,000 worth of sales in the state, dating back to 2019. We would request if this bill moves forward, it be amended to match HB 2513 and strike Section 5 of the bill while also add language to eliminate the "click through nexus" statutes which were passed in 2013 as this issue was gaining attention nationally. HB 2513 addresses the click through nexus provisions as we know our members have signed off on HB 2513 for support.

In closing, while we expect this bill to generate new revenue for the state, like last year, our preference is to keep this proposal revenue neutral and buy down rates with revenue generated by online sales. We appreciate the opportunity to testify in support of Senate Bill 369, and I am happy to answer any questions at the appropriate time.

Wayfair and Marketplace Implementation

as of 10/1/19



HOUSE BILL No. 2513

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 made on platforms; removing click through nexus
4 provisions; amending K.S.A. 79-3702 and repealing the existing
5 section.

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

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

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

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

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

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

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

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

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

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

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

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

16 (d) "Tax" means:

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

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

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

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

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

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

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

43 (1) The criteria for obtaining a waiver pursuant to this section;

1 (2) the process and procedure for a marketplace facilitator to apply
2 for a waiver; and

3 (3) the process for providing notice to an affected marketplace
4 facilitator and marketplace seller of a waiver obtained pursuant to this
5 subsection.

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

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

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

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

21 New Sec. 3. (a) Except as provided in section 2(b) or (c), and
22 amendments thereto, a marketplace facilitator doing business in this state
23 under section 2, and amendments thereto, shall collect and remit the taxes
24 on all taxable sales made by the marketplace facilitator or facilitated for
25 marketplace sellers to customers in this state, regardless of whether the
26 marketplace seller for whom sales are facilitated has registered to collect
27 taxes or would have been required to collect taxes if the sale had not been
28 facilitated by the marketplace facilitator. A marketplace facilitator has the
29 same rights and duties as a seller to collect and remit all such taxes.
30 Marketplace facilitators and marketplace sellers may enter into agreements
31 with each other regarding fulfillment of the requirements of this section,
32 but the marketplace facilitator remains the party that is liable to the state
33 for fulfilling such requirements.

34 (b) A marketplace facilitator shall either:

35 (1) Report any taxes collected on taxable sales made directly by the
36 marketplace facilitator, or affiliates of the marketplace facilitator, to
37 customers in this state using a separate form to be published by the
38 department; or

39 (2) report the amount of taxes owed and the amount of taxes actually
40 collected on taxable sales made directly by the marketplace facilitator, or
41 affiliates of the marketplace facilitator.

42 (c) No class action may be brought against a marketplace facilitator
43 in any court of this state on behalf of customers arising from or in any way

1 related to an overpayment of tax collected on sales facilitated by the
2 marketplace facilitator, regardless of whether that claim is characterized as
3 a tax refund claim. Nothing in this subsection affects a customer's right to
4 seek a refund as provided under K.S.A. 79-3650, and amendments thereto.

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

8 (e) The department shall solely audit the marketplace facilitator for
9 sales made by marketplace sellers but facilitated by the marketplace
10 facilitator, except with respect to transactions that are subject to section
11 2(c) or (d), and amendments thereto. The department shall not audit or
12 otherwise assess tax against marketplace sellers for sales facilitated by a
13 marketplace facilitator except to the extent that the marketplace facilitator
14 seeks relief under subsection (f) or with respect to transactions that are
15 subject to section 2(c) or (d), and amendments thereto.

16 (f) A marketplace facilitator shall be relieved of liability under this
17 section for failure to collect and remit the correct amount of tax to the
18 extent that the error was due to incorrect or insufficient information on the
19 nature of the product or service given to the marketplace facilitator by the
20 marketplace seller, if the marketplace facilitator can demonstrate a
21 reasonable effort to obtain correct and sufficient information from the
22 marketplace seller. This subsection shall not apply if the marketplace
23 facilitator and the marketplace seller are under common ownership and
24 control.

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

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

32 New Sec. 4. A marketplace facilitator shall not be required to collect
33 and remit any taxes from sales occurring prior to July 1, 2020.

34 Sec. 5. K.S.A. 79-3702 is hereby amended to read as follows: 79-
35 3702. For the purposes of this act: (a) "Purchase price" means the
36 consideration paid or given or contracted to be paid or given by any person
37 to the seller of an article of tangible personal property for the article
38 purchased. ~~The term shall include~~ "Purchase price" includes, in addition to
39 the consideration paid or given or contracted to be paid or given, the actual
40 cost of transportation from the place where the article was purchased to the
41 person using the same in this state. If a cash discount is allowed and taken
42 on the sale ~~it~~, *such cash discount* shall be deducted in arriving at the
43 purchase price.

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

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

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

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

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

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

42 (h) (1) "Retailer doing business in this state" or any like term, means:
43 (A) Any retailer maintaining in this state, permanently, temporarily,

1 directly or indirectly through a subsidiary, agent or representative, an
2 office, distribution house, sales house, warehouse or other place of
3 business;

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

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

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

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

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

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

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

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

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

1 (vii)(G) 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.

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

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