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NOTICE 21-24

MARKETPLACE FACILITATORS LODGING

(JANUARY 7, 2022)

During the 2021 Legislative Session Senate Bill 50 was passed and signed into law. New Sections 1 through 4 of the Bill address marketplace facilitator platforms and requires the collection and remittance of certain taxes by marketplace facilitators.

As defined in the Bill, marketplace facilitators include entities that sell products or provide lodging. This Notice addresses marketplace facilitators that provide lodging. For information regarding marketplace facilitators that sell products, please see Notice 21-14.

Generally

Sections 1 through 4 of Senate Bill 50 are the first provisions in Kansas law to recognize marketplace facilitator platforms. Under these provisions, entities that are determined to be marketplace facilitators are subject to different requirements for the collection, remittance, and reporting of sales and use tax than entities determined not to be marketplace facilitators. It is important to note an entity may be **both** a marketplace facilitator facilitating sales for marketplace sellers **and** a direct seller making sales on its own behalf. When acting as marketplace facilitator an entity is subject to the provision of Sections 1 through 4 of Senate Bill 50. When acting as direct seller (i.e., a retailer making direct sales to Kansas customers) an entity **is not** a marketplace facilitator, and its direct sales to customers are subject to traditional sales tax law.

The specific provisions set forth in Sections 1 through 4 of Senate Bill 50 supersede any requirements regarding registering, collecting, remitting, and reporting established by the Kansas sales tax act (see K.S.A. 79-3601, *et seq*). Otherwise, marketplace facilitators with Kansas nexus, whether physical or economic, are subject to the provisions of K.S.A. 79-3601.

For purposes of registration, the type of tax to be collected and remitted does not depend upon the location of the marketplace facilitator. A marketplace facilitator located in Kansas will register for, collect, and remit Kansas retailers' sales and transient guest tax. A marketplace facilitator located outside of Kansas will also collect and remit Kansas retailers' sales and transient guest tax. The location of a marketplace seller who is selling through the marketplace facilitator's platform does not affect the type of tax to be collected and remitted.

Definitions

Generally

New Section 1 of the bill defines the terms "Department", "marketplace facilitator", "marketplace seller" and "tax". The term "marketplace facilitator" includes entities that contract with sellers to facilitate the sale of products or lodgings through a physical or electronic marketplace operated, owned, or otherwise controlled by the entity and either directly or indirectly collect the payment from the purchaser and transmit all or part of the payment to the marketplace seller. The definition excludes platforms that exclusively provide advertising services or principally provide payment processing services.

Statutory Language

New Section 1(b) provides:

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

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

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

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

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

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

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

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

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

(d) "Tax" means:

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

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

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

Application of Sections 1 through 4 of Senate Bill 50

The provisions of Sections 1 through 4 of Senate Bill 50 only apply to marketplace facilitators. In accordance with Section 1(b)(2), a person that, "*provides a platform through which unaffiliated third parties offer to rent to and collect consideration from occupants for rental, for a period of less than 29 consecutive days, of rooms, lodgings, accommodations, homes, apartments, cabins or residential dwelling units that are intended to be used as a room, lodging or sleeping accommodation by one person or by two or more persons maintaining a common household, to the exclusion of all others"* is a marketplace facilitator.

However, a person is **not** a marketplace facilitator, "*with respect to the sale or charges for rooms, lodgings or sleeping accommodations, if such rooms, lodgings or sleeping accommodations are provided by a hotel as described in K.S.A. 36-501, and amendments thereto, and the hotel provides the rooms, lodgings or sleeping accommodations for occupancy under a brand belonging to such person or the person facilitates sales or charges on behalf of the hotel."* In other words, a person or entity that facilitates the sale, rental, or charges for hotel rooms is **not** a marketplace facilitator.

Hotel Rooms

Because, by statutory definition found in New Section 1(b)(2), a person or entity that facilitates the sale, rental, or charges for hotel rooms is **not** a marketplace facilitator that person or entity will not collect, report, and remit sales or transient guest tax on behalf of the hotel (seller). Instead, the hotel (seller) will collect, report, and remit sales and transient guest tax on the amount it receives for the sale, rental, or charges it makes for the hotel room, as well as any additional charges such as additional guest fee, charges for pets, additional bedding/linen, no-show charges, etc. The hotel (seller) may receive payment for the hotel room and any additional charges from the person or entity that facilitates the sale and/or from the person (purchaser) who occupies the hotel room.

Section 1(b)(2) of Senate Bill 50 specifically references K.S.A. 36-501, the Lodging Inspection Act, which defines the term "hotel" as well as several related terms. Subsection (b) of the statute provides:

> (b) As used in the lodging inspection act, the following words and phrases shall have the following meanings:
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> (1) "Hotel" means every building or other structure that is kept, used, maintained, advertised or held out to the public as a place where sleeping accommodations are offered for pay primarily to transient guests and in which four or more rooms are used for the accommodation of such guests, regardless of whether such building or structure is designated as a cabin camp, tourist cabin, motel or other type of lodging unit.
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> (2) "Rooming house" means every building or other structure that is kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests and in which eight or more guests may be accommodated, but that does not maintain common facilities for the serving or preparation of food for such guests.
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> (3) "Boarding house" means every building or other structure that is kept, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests and in which eight or more guests may be accommodated, and that maintains common facilities for the serving or preparation of food for such guests. The term "boarding house" shall not include facilities licensed under K.S.A. 2015 Supp. 75-3307b(a)(5), prior to its repeal, or facilities licensed by the Kansas department for aging and disability services that are: (A) Facilities for developmentally disabled persons receiving assistance through the department and that receive or have received after June 30, 1967, any state or federal funds; or (B) facilities where developmentally disabled persons who require supervision or limited assistance with the taking of medication reside.
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> (4) "Lodging establishment" means a hotel, rooming house, guest house or boarding house.
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> (6) "Guest house" means every building or other structure that is kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests. A guest house shall accommodate no more than seven guests in no more than three rooms furnished with sleeping accommodations, regardless of whether common facilities for the serving or preparation of food are maintained.

"Rooms" Other Than Hotel Rooms

In accordance with New Section 1(b)(2), a person or entity that facilitates the sale, rental, or charges for rooms that are **not** hotel rooms **is** a marketplace facilitator. As a marketplace facilitator, the person or entity that facilitates the sale, rental, or charges for "rooms, lodgings, accommodations, homes, apartments, cabins or residential dwelling units that are intended to be

used as a room, lodging or sleeping accommodation" that are not hotel rooms must collect, report, and remit sales and transient guest tax on the transaction between the owner of the property (marketplace seller) and the guest renting the property (purchaser). This also includes any additional charges made by the owner (marketplace seller) such as additional guest fee, charges for pets, additional bedding/linen, no-show charges, etc.

De Minimis Threshold Measurements

Starting Date

New Section 2 of the bill requires the collection and remittance of sales and compensating use tax by marketplace facilitators beginning July 1, 2021. All calculations required under the marketplace facilitator provisions start from this date and apply to all marketplace facilitators whether they are located within or outside of Kansas.

De Minimis Threshold

Only taxable sales are included in determining whether the de minimis threshold has been met. Sales of property or services that are exempt from tax are not included.

For purposes of determining whether a marketplace facilitator is above or below the de minimis threshold established in New Section 2, the term "cumulative gross receipts" is used. It is very important to note the term "cumulative gross receipts" is used only in the context of determining whether a marketplace facilitator is above or below the de minimis threshold established in New Section 2. The term is not used to determine whether, or to what extent, a particular transaction is subject to Kansas sales or use tax. As used for sales and use tax purposes, the term "gross receipts" is a term of art with a specific meaning and application.

The collection and remittance requirements established by New Section 2 apply to marketplace facilitators with calendar year sales sourced into Kansas in excess of $100,000 of "cumulative gross receipts". For purposes of calculating the de minimis threshold for marketplace facilitators, "cumulative gross receipts" includes both the marketplace facilitator's sales of its own services and the sales it facilitates on its platform.

Calendar Year Sales Below De Minimis Threshold

A marketplace facilitator that does not meet the $100,000 de minimis threshold is not required to register, collect, and remit Kansas tax. However, for the benefit of the marketplace sellers for whom they facilitate sales the marketplace facilitator may voluntarily do so. A marketplace facilitator who chooses not to voluntarily collect the tax should consider advising the marketplace sellers for whom they facilitate sales that they, the marketplace sellers, are responsible for paying tax directly to the state of Kansas.

Calendar Year Sales Above De Minimis Threshold - Initial Year

The statutory language of New Section 2(a)(1) makes it clear a marketplace facilitator whose calendar year sales sourced into Kansas are in excess of $100,000 is not required to collect and remit tax on the first $100,000 of sales made to customers in Kansas during the first year the marketplace facilitator is required to collect and remit tax. This does not mean these sales are exempt from tax, only that the marketplace facilitator is not required to collect the tax.

Though not required to collect tax due to the first year de minimis requirement, for the benefit of the marketplace sellers for whom they facilitate sales a marketplace facilitator may voluntarily collect tax on the first $100,000 of sales during this first year. A marketplace facilitator who chooses not to voluntarily collect the tax should consider advising the marketplace sellers for whom they facilitate sales that they, the marketplace sellers, are responsible for paying tax directly to the state of Kansas.

Calendar Year Sales Above De Minimis Threshold - Subsequent Year(s)

Once a marketplace facilitator has made sales to Kansas customers equal to or in excess of the $100,000 threshold they must collect and remit sales and transient guest tax on any additional sales to Kansas customers. The marketplace facilitator must collect and remit sales and transient guest tax on all sales made to Kansas customers in the following year. By way of example, if a marketplace facilitator has sales to Kansas customers in excess of $100,000 in Year One, they must collect and remit sales and transient guest tax on all sales to Kansas customers in excess of the threshold in Year One, and on all sales made to Kansas customers during Year Two, regardless of the amount of those sales.

Calendar Year Sales Fall Below De Minimis Threshold - Subsequent Year(s)

The requirement that a marketplace facilitator collect and remit Kansas tax ends if the amount of sales to Kansas customers falls below $100,000 in the preceding year. To continue the example, if a marketplace facilitator has sales to Kansas customers in excess of $100,000 in Year Three, the marketplace facilitator must collect and remit sales and transient guest tax on all sales to Kansas customers during Year Four. But, if all sales made to Kansas customers during Year Four total less than $100,000, there is no requirement to collect and remit tax for sales made in Year Five, or any subsequent year, until sales made in a given year exceed $100,000. If that occurs, collecting and remitting tax would be required for all sales to Kansas customers in excess of $100,000 during that year, and for all sales to Kansas customers during the following year.

Statutory Language

New Section 2(a) provides:

(a)(1) Any marketplace facilitator selling or facilitating the sale of property or services subject to tax in this state shall be required to collect and remit such taxes and follow all applicable procedures and requirements provided by law for the collection and remittance of such taxes. A marketplace facilitator shall only be required to collect and remit such taxes if the following criteria are satisfied during the current or immediately preceding calendar year:

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

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

(2) For any marketplace facilitator who satisfies the provisions of this subsection for sales in the current calendar year for the first time, such marketplace facilitator shall be required to collect and remit the tax on any sales in excess of $100,000 of cumulative gross receipts from sales in the current calendar year for delivery into this state.

Departmental Waiver of Obligation to Collect and Remit Tax

Generally

New Section 2 of the bill authorizes the Department of Revenue to waive the obligation of a marketplace facilitator to collect and remit taxes upon a showing by the marketplace facilitator that substantially all of its marketplace sellers are already collecting and remitting all applicable taxes. For purposes of obtaining a waiver from the Department, the phrase "substantially all" means 95% or more. The bill also allows marketplace facilitators to contract with marketplace sellers that have at least $1.0 billion of annual gross sales in the United States to require the marketplace seller to collect and remit all applicable taxes and fees.

Statutory Language

New Section 2 (b) and (c) provide:

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

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

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

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

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

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

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

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

Obligation to Collect and Remit Tax in Absence of Waiver

Generally

A marketplace facilitator is responsible for the collection and remittance of tax regardless of whether the marketplace seller for whom a sale is facilitated has, or would have been required to be, registered to collect tax if the sale had not been facilitated by the marketplace facilitator. In this role, the marketplace facilitator has the same rights and duties as a seller. It is also subject to audit by the Department, as any seller would be.

Statutory Language

New Section 3 provides:

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

(b) A marketplace facilitator shall either:

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

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

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

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

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

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

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

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

Registration

A marketplace facilitator is required to begin collecting and remitting tax on sales in excess of the $100,000 threshold as soon as they cross the threshold. In other words, a marketplace facilitator is required to register, collect, and remit tax on the next transaction after meeting or exceeding the threshold.

Because each marketplace facilitator will meet or exceed the threshold at a different time, each marketplace facilitator will establish its own date for when registration, collection, and remittance requirements begin. It is important to note that, regardless of when registration and remittance of tax actually occur, responsibility for collecting tax begins with the next transaction after meeting or exceeding the threshold. By way of example, if a marketplace facilitator's first transaction is $105,000, responsibility for collecting tax does not begin until the next transaction,

regardless of the amount of that transaction. If a marketplace facilitator has multiple transactions that total $99,950 and then has a $100 transaction, responsibility for collecting tax does not begin until the next transaction. And if a marketplace facilitator has multiple transactions that total $99,950 and then has a $100,000 transaction, responsibility for collecting tax still does not begin until the next transaction.

A marketplace facilitator should register with the Department not later than thirty (30) days after their sales for the calendar year exceed $100,000. At the time of registration, the type of registration (i.e. sales tax or retailers' compensating use) will be determined. For purposes of registration, the type of tax to be collected and remitted depends upon the location of the marketplace facilitator. A marketplace facilitator located in Kansas (i.e. physical nexus) will register for, collect, and remit Kansas retailers' sales tax. A marketplace facilitator located outside of Kansas (i.e. economic nexus) will collect and remit Kansas retailers' compensating use tax. Both will register for, collect, and remit Kansas transient guest tax.

A marketplace facilitator that makes both direct and facilitated sales may choose to report sales separately or on one return. If sales will be reported separately it will be necessary for the marketplace facilitator to have two accounts; one for its sales and one for facilitated sales. In addition, each marketplace facilitator's reporting and remittance schedule will be determined, based on the total amount of tax collected. More information regarding the registration process and filing frequency is available in Publication KS-1510 Kansas Sales & Compensating Use Tax, which is available through the Department's website at: www.ksrevenue.org.

As an alternative to registering directly with the Department, marketplace facilitators may register through the Streamlined Sales Tax Registration System. Additional information is available through their website at: https://www.streamlinedsalestax.org/for-businesses/sales-tax-registration-sstrs.

Additional Information

For additional information regarding lodging and related services, see the Department's Publication KS-1540 Business Taxes for Hotels, Motels and Restaurants, which is available through the Department's website at www.ksrevenue.org.

In addition to the new provisions related to marketplace facilitators, Section 14 of Senate Bill 50 also amends K.S.A. 79-3702 to repeal the "click-through" nexus provisions for affiliated persons related to sales and use tax collections. Section 14 also amends the definition of "retailer doing business in this state" found in K.S.A 79-3702 to establish a de minimis threshold of $100,000 in gross sales to customers in Kansas for non-Kansas retailers. For additional information in this regard, see Notice 21-23 Click-Through Nexus Eliminated and Notice 21-17 Remote Sellers, both of which are available through the Department's website at: www.ksrevenue.org.

TAXPAYER ASSISTANCE

Additional copies of this notice, forms or publications are available from our web site, www.ksrevenue.org. If you have questions about this Notice, please contact:

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