

SALES AND USE TAXES FOR MARKETPLACE FACILITATORS AND OUT-OF-STATE RETAILERS

Phone: (517) 373-8080
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House Bill 4540 (H-1) as reported from committee
Sponsor: Rep. Lynn Afendoulis

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4541 (H-2) as reported
Sponsor: Rep. Joe Tate

House Bill 4542 (H-2) as reported
Sponsor: Rep. Michael Webber

House Bill 4543 (H-2) as reported
Sponsor: Rep. Tenisha Yancey

1st Committee: Tax Policy
2nd Committee: Ways and Means
Revised 10-16-19

BRIEF SUMMARY: House Bills 4540, 4541, 4542, and 4543 would amend the Sales Tax Act and the Use Tax Act to subject to the sales and use taxes marketplace facilitators (including websites such as Amazon and eBay) and out-of-state retailers that sell or facilitate the sale of goods in Michigan. House Bills 4542 and 4543 are substantially a codification of current practice as established by Department of Treasury Revenue Administrative Bulletin (RAB) 2018-16, entitled “Sales and Use Tax Nexus Standards for Remote Sellers,” which was approved August 1, 2018, and was effective beginning October 1, 2018.¹ House Bills 4540 and 4541 would extend that tax treatment to marketplace facilitators.

FISCAL IMPACT: Based on estimates of forgone sales and use taxes that remain after RAB 2018-16 became effective October 1, 2018, extending the same treatment to marketplace facilitators could increase sales tax revenue by \$80 million to \$120 million on a full-fiscal-year basis. (See **Fiscal Information**, below, for a detailed discussion of the bills.)

THE APPARENT PROBLEM:

Since the advent of online shopping services such as Amazon, eBay, and Etsy, an increasing number of consumers are choosing to shop on the internet instead of at physical retail locations. While billions of dollars in sales are made through these online marketplace facilitators, however, many states still do not apply sales and use taxes to them in the same way that they would to retail sellers. The effects of this discrepancy are twofold: state and local government entities lose revenue as retail sales are replaced with online shopping, and the remaining retail sellers are put at a disadvantage with their online competition due to their increased relative prices.

In the past, since it was unclear whether states could tax entities that did not have a physical presence in the state, such as a store, states largely could not charge online marketplace

¹ https://www.michigan.gov/documents/treasury/RAB_208-16_629240_7.pdf

facilitators sales and use taxes. However, since the *South Dakota v. Wayfair, Inc.* ruling of 2018, the U.S. Supreme Court has held that states do have the authority to apply sales and use taxes to out-of-state retailers. Legislation has been proposed to codify current practice regarding sales and use taxes for out-of-state retailers and to extend the collection of those taxes to marketplace facilitators.

THE CONTENT OF THE BILLS:

House Bill 4540 would amend the General Sales Tax Act to require a ***marketplace facilitator*** selling tangible personal property at retail in this state to remit the applicable sales tax for all sales made by the facilitator or facilitated for ***marketplace sellers*** to a purchaser in this state regardless of whether the seller using the facilitator had a physical presence in the state. A marketplace facilitator would have to report its direct and facilitated sales made to purchasers in this state in a manner prescribed by the Department of Treasury.

Marketplace facilitator would mean a person that facilitates a retail sale by a marketplace seller by listing or advertising in a marketplace tangible personal property for sale by a marketplace seller and directly or indirectly collecting payment from the customer and transmitting it to the seller for consideration. A marketplace facilitator could make facilitated sales only or a combination of facilitated and direct sales. A person operating a platform or forum that provides advertising services, including listing tangible personal property for sale, without also engaging directly or indirectly in the activities described above, would not be a marketplace facilitator. A marketplace facilitator would be subject to the provisions of the bill regardless of whether the facilitator had a physical presence in the state. The bill would provide that a marketplace facilitator has the rights and duties of a taxpayer under the act.

Marketplace seller would mean a person making retail sales through a physical or electronic marketplace operated by a marketplace facilitator.

The bill would not affect the obligation of a purchaser to remit use tax for a taxable transaction on which a marketplace facilitator or seller did not remit sales tax.

A marketplace facilitator would be relieved of liability for failure to collect and remit the correct amount of tax if the facilitator demonstrated to the satisfaction of the Department of Treasury that this failure was due to incorrect or insufficient information given to it by a seller that is not an affiliate of the marketplace facilitator. A marketplace facilitator would also be relieved of liability under the bill if the facilitator demonstrated to the department's satisfaction that the tax levied on a facilitated sale was paid by the marketplace seller or if the facilitator provided a claim of exemption from the purchaser.

A marketplace seller would not be liable for the tax on sales made through a facilitator unless the seller failed to provide the facilitator with sufficient information as described above.

The Department of Treasury could audit a marketplace facilitator only for sales by marketplace sellers that it facilitated. The department could not audit a seller for sales facilitated by a facilitator unless the seller failed to provide the facilitator with sufficient information as described above.

Finally, the bill would prohibit a class action from being brought in any Michigan court against a marketplace facilitator on behalf of purchasers that arises from or is related to an overpayment of sales tax remitted on sales facilitated by the facilitator, regardless of whether the claim is characterized as a tax refund claim. Purchasers could, however, seek a refund under section 12 of the act, if applicable.

Proposed MCL 205.52d

House Bill 4541 would amend the Use Tax Act to make changes regarding the use tax that are substantially the same as those proposed by HB 4540 regarding the sales tax.

The bill would also specify that a person is not a marketplace facilitator under the act with respect to the following:

- The sale of telecommunications services as described in section 3a of the act.
- The sale of, or charges for, rooms, lodgings, or accommodations described in section 3a if they are provided by a hotelkeeper, motel operator, or other person that is registered under section 5 of the act or licensed under section 3 of the Sales Tax Act.

Proposed MCL 205.95c

HBs 4540 and 4541 would take effect January 1, 2020, and the obligation to collect sales and use taxes that they impose would not apply retroactively.

House Bill 4542 would amend the General Sales Tax Act to require out-of-state retailers to remit sales tax. Specifically, under the bills, a seller of tangible personal property would be engaged in the business of making sales at retail in this state if the seller met either of the following:

- The seller's gross receipts from sales to purchasers in this state exceeded \$100,000 in the previous calendar year.
- The seller had 200 or more separate transactions into this state in the previous calendar year.

The above would apply regardless of whether the seller had a physical presence within the state or was presumed to be engaged in the business of making retail sales under section 2b of the act, and it would not eliminate or alter the obligation of those sellers (with a physical presence or falling under section 2b) to remit the tax levied under the act.

A marketplace facilitator would have to include both its direct sales and sales by marketplace sellers on its marketplace when determining its gross receipts or total number

of transactions. A marketplace seller would similarly have to include both its direct sales and its sales through a marketplace facilitator in making these determinations.

A seller making no sales at retail would not have to obtain a license under the act or file returns. A seller making both sales at retail and sales for purposes of resale would have to obtain a license, file required returns, and remit tax as required by the act.

Proposed MCL 205.52c

House Bill 4543 would amend the Use Tax Act to make changes regarding the use tax that are substantially the same as those proposed by HB 4542 regarding the sales tax.

Proposed MCL 205.95b

HBs 4542 and 4543 would apply to transactions occurring on or after October 1, 2018.

FISCAL INFORMATION:

House Bills 4542 and 4543 would codify the sales and use tax treatment for remote sellers outlined in the Department of Treasury's Revenue Administrative Bulletin (RAB) 2018-16. Based on the most recent consensus estimates, sales and use tax revenue is projected to increase by \$168.0 million in FY 2018-19, \$225.0 million in FY 2019-20, and \$240.0 million in FY 2020-21. It is assumed that vendors will remit the required payments as sales tax. Approximately 73% of all sales tax revenue is constitutionally earmarked to the School Aid Fund, and roughly an additional 10% is dedicated to constitutional revenue sharing. Most of the remainder accrues to the general fund.

House Bills 4540 and 4541 would extend the collection of sales and use tax revenue to marketplace facilitators that engage in or facilitate remote sales, with the same transaction and dollar value thresholds as outlined in RAB 2018-16. Based on estimates of forgone sales and use taxes that remain after RAB 2018-16 became effective October 1, 2018, extending the same treatment to marketplace facilitators could increase sales tax revenue by \$80 million to \$120 million on a full-fiscal-year basis.

ARGUMENTS:

For:

Supporters of the bills argued that they create an even playing field for retail sellers and online marketplace facilitators. They argued that without the bills, Michigan's sales and use tax system puts in-state retailers at an unfair disadvantage by increasing their prices relative to online marketplace facilitators; the bills would all retail sales fairly by not distinguishing based on how the sale was made.

Against:

Opponents of the bills argued that adding sales and use taxes to purchases made through marketplace facilitators will slow sales and have a negative effect on online consumption.

Some critics of HBs 4542 and 4543 argued that the threshold for tax liability established under the bills (sales of \$100,000 or 200 transactions) was too low when compared to thresholds used by other states and considering the size of this state's economy.

POSITIONS:

Representatives of the following entities testified in support of the bills (10-3-19):

- Department of Treasury
- Michigan Retailers Association
- Michigan Chamber of Commerce
- Michigan Cable Telecommunications Association

The following entities indicated support for the bills:

- Michigan League for Public Policy (10-8-19)
- Michigan Municipal League (6-19-19)
- Amazon (6-19-19)
- Small Business Association of Michigan (6-19-19)
- Michigan Association of Counties (10-3-19)
- Comcast (10-3-19)
- Michigan Association of School Boards (10-3-19)
- Michigan Association of Secondary School Principals (10-3-19)
- Barry, Branch, Calhoun, Jackson, Lenawee, and Monroe ISDs (10-3-19)
- Middle Cities Education Association (10-3-19)
- Michigan Association of Superintendents and Administrators (10-3-19)
- Walmart [indicated support for the H-1 substitutes of the bills as referred from the House Tax Policy Committee] (10-3-19)

Representatives of the following entities testified in support of House Bill 4541 (10-3-19):

- AT&T
- Verizon

The following entities indicated support for HB 4541:

- Michigan Restaurant and Lodging Association (10-8-19)
- Lansing Regional Chamber of Commerce (10-16-19)
- Grand Rapids Chamber (10-3-19)

Representatives of the following entities testified in opposition to HBs 4542 and 4543 (10-3-19):

- National Taxpayers Union
- Mackinac Center

Legislative Analyst: Nick Kelly
Fiscal Analyst: Jim Stansell

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.