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House Bill 4540 (Substitute H-1 as passed by the House)
House Bill 4541 (Substitute H-2 as passed by the House)
House Bill 4542 (Substitute H-2 as passed by the House)
House Bill 4543 (Substitute H-2 as passed by the House)
Sponsor: Representative Lynn Afendoulis (H.B. 4540)
Representative Joe Tate (H.B. 4541)
Representative Michael Webber (H.B. 4542)
Representative Tenisha Yancey (H.B. 4543)

House Committee: Tax Policy
Ways and Means

Senate Committee: Finance

Date Completed: 11-6-19

CONTENT

House Bill 4540 (H-1) would amend the General Sales Tax Act to do the following:

- **Require a marketplace facilitator engaged in the business of making sales at retail of tangible personal property in Michigan to remit sales tax on all taxable sales made by the marketplace facilitator or facilitated for marketplace sellers to a purchaser in Michigan.**
- **Require a marketplace facilitator to report its direct sales and the sales it facilitated to purchasers in Michigan in a manner prescribed by the Department of Treasury.**
- **Prohibit a class action from being brought against a marketplace facilitator in any Michigan court on behalf of purchasers arising from or in any way related to an overpayment of sales tax remitted on sales facilitated by the marketplace facilitator.**
- **Create provisions regarding the Department auditing a marketplace seller.**
- **Specify when a marketplace facilitator would be relieved of its liability under the bill.**

House Bill 4541 (H-2) would amend the Use Tax Act to make changes similar to those proposed under House Bill 4540 (H-1).

House Bill 4542 (H-2) would amend the General Sales Tax Act to do the following:

- **List the criteria under which a seller of tangible personal property would be engaged in the business of making sales at retail in Michigan.**
- **Specify that the bill would apply to transactions occurring on or after October 1, 2018.**
- **Require a person that was a marketplace facilitator to include sales by marketplace sellers on its marketplace and its direct sales in determining its gross receipts or its number of transactions.**
- **Require a person that was a marketplace seller to include its sales through a marketplace facilitator and its direct sales in determining its gross receipts or its number of transactions.**

- **Specify that a seller that made no sales at retail would not be required to obtain a license under the Act or file returns.**
- **Specify that a seller that made both sales at retail and sales for purposes of resale would have to obtain a license under the Act, file required returns, and remit tax as required by the Act.**

House Bill 4543 (H-2) would amend the Use Tax Act to do the following:

- **List the criteria under which a seller of tangible personal property or services subject to tax under the Use Tax Act would have nexus in Michigan and would have to register with the Department of Treasury and collect and remit use tax.**
- **Specify that the bill would apply to transactions occurring on or after October 1, 2018.**
- **Require a person that was a marketplace facilitator to include sales by marketplace sellers on its marketplace and its direct sales in determining its gross receipts or its number of transactions.**
- **Require a person that was a marketplace seller would have to include its sales through a marketplace facilitator and its direct sales in determining its gross receipts or its number of transactions.**
- **Specify that a seller that only made sales for purposes of resale would not be required to register for the use tax.**
- **Specify that a seller that made both sales that it was required to collect and remit tax on under the Act and sales for purposes of resale would have to register under the Act, file required returns, and remit tax as required by the Act.**

House Bill 4540 (H-1) and 4541 (H-2) would be severable as provided for in Section 5 of Revised Statute 1 of 1846 (which states that if any portion of an act or the application to any person or circumstance is found to be invalid by a court, such invalidity may not affect the remaining portions or applications of the act.)

House Bills 4540 (H-1) and 4541 (H-2) would take effect on January 1, 2020, and an obligation to collect sales and use tax under the bills would not apply retroactively.

House Bill 4540 (H-1)

Under the bill, notwithstanding anything contrary to the General Sales Tax Act, a marketplace facilitator engaged in the business of making sales at retail of tangible personal property in Michigan would have to remit sales tax on all taxable sales made by the marketplace facilitator or facilitated for marketplace sellers to a purchaser in Michigan regardless of whether the marketplace seller for whom sales were facilitated had nexus with Michigan.

"Marketplace facilitator" would mean a person who facilitated a retail sale by a marketplace seller by listing or advertising for sale by a marketplace seller in a marketplace, tangible personal property and either directly or indirectly through agreements or arrangements with third parties or its affiliates collecting payment from the customer and transmitting that payment to the marketplace seller for consideration. The term would not include a person who operated a platform or forum that provided internet, print, electronic, or any other form of advertising services, including listing tangible personal property for sale, if the person did not also engage directly or indirectly, through one or more affiliates in the activities described above.

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

A marketplace facilitator would be a person engaged in the business of making sales at retail for purposes of the Act regardless of whether it made only facilitated sales for marketplace sellers or a combination of direct and facilitated sales and had all the rights and duties of a taxpayer under the Act.

A marketplace facilitator would have to report its direct sales and the sales it facilitated to purchasers in Michigan in a manner prescribed by the Department of Treasury.

A class action could not be brought against a marketplace facilitator in any Michigan court on behalf of purchasers arising from or in any way related to an overpayment of sales tax remitted on sales facilitated by the marketplace facilitator, regardless of whether that claim was characterized as a tax refund claim.

Nothing in the bill would affect the obligation of a purchaser to remit use tax under the Use Tax Act for a taxable transaction on which a marketplace facilitator or marketplace seller did not remit sales tax.

Except as otherwise provided, if a marketplace facilitator were required to remit tax, the Department would have to audit only the facilitator for sales made by marketplace sellers that were facilitated by the marketplace facilitator. The Department could not audit a marketplace seller for sales facilitated by a marketplace facilitator required to remit tax under the bill unless the seller failed to provide the facilitator with sufficient information to the extent that the facilitator was not liable under the following provision.

A marketplace facilitator would be relieved of liability under the bill for failure to remit the correct amount of tax to the extent that the facilitator demonstrated, to the satisfaction of the Department, that the failure was due to incorrect or insufficient information given to the marketplace facilitator by the marketplace seller. This relief would not apply if the marketplace seller were an affiliate of the marketplace facilitator.

A marketplace facilitator would be relieved of liability under the bill if it demonstrated, to the satisfaction of the Department, that the tax levied under the General Sales Tax Act on a sale facilitated by the marketplace facilitator was paid to the Department by the marketplace seller or provided a claim of exemption provided by the marketplace seller's purchaser.

A marketplace seller would not be liable for the tax imposed under the Act on sales made through a marketplace facilitator required to remit tax under the bill unless the seller failed to provide the facilitator with sufficient information to the extent that the facilitator was not liable.

The bill would apply regardless of whether the marketplace facilitator had a physical presence in the State.

House Bill 4541 (H-2)

The bill would amend the Use Tax Act to reflect generally the same proposed changes found under House Bill 4540 (H-1) for the General Sales Tax Act. However, under House Bill 4541 (H-2), a person would not be considered a "marketplace facilitator" with respect to the following:

- The sale of or changes for rooms, lodgings, or accommodations described in Section 3a of the Use Tax Act (which addresses the sale of telecommunications services) if the rooms, lodgings, or accommodations were provided by a hotelkeeper, motel operator, or other person that was registered under the Act or licensed under the General Sales Tax Act.

-- The sale of telecommunications services as described under Section 3a of the Use Tax Act.

House Bill 4542 (H-2)

Under the bill, a seller of tangible personal property would be engaged in the business of making sales at retail in Michigan if the seller met either of the following conditions:

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

The bill's provisions would apply regardless of whether the seller had a physical presence in Michigan or was presumed to be engaged in the business of making sales at retail in the State as described under the General Sales Tax Act. This would not eliminate or alter the obligation of the seller to remit the tax levied under the Act.

The bill would apply to transactions occurring on or after October 1, 2018.

A person that was a marketplace facilitator would have to include sales by marketplace sellers on its marketplace and its direct sales in determining its gross receipts or its number of transactions.

A person that was a marketplace seller would have to include its sales through a marketplace facilitator and its direct sales in determining its gross receipts or its number of transactions.

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

House Bill 4543 (H-2)

Under the bill, a seller of tangible personal property or services subject to tax under the Use Tax Act would have nexus in Michigan and would have to register with the Department of Treasury and collect and remit use tax if the seller met either of the following conditions:

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

The bill's provisions would apply regardless of whether the seller had a physical presence in Michigan or had nexus in Michigan under Section 5a of the Act (which specifies when a seller is presumed to have nexus in Michigan). This would not eliminate or alter the obligation of the seller to collect remit use tax.

The bill would apply to transactions occurring on or after October 1, 2018.

A person that was a marketplace facilitator under Section 5c of the Act (which specifies when a seller is presumed to have nexus in Michigan) would have to include sales by marketplace sellers on its marketplace and its direct sales in determining its gross receipts or its number of transactions.

A person that was a marketplace seller under Section 5c would have to include its sales through a marketplace facilitator and its direct sales in determining its gross receipts or its number of transactions.

A seller that only made sales for purposes of resale would not be required to register for the use tax. A seller that made both sales that it was required to collect and remit tax on under the Act and sales for purposes of resale would have to register under the Act, file required returns, and remit tax as required by the Act.

Proposed MCL 205.52d (H.B. 4540)
Proposed MCL 205.95c (H.B. 4541)
Proposed MCL 205.52c (H.B. 4542)
Proposed MCL 205.95b (H.B. 4543)

Legislative Analyst: Drew Krogulecki

FISCAL IMPACT

House Bills 4542 and 4543 would have no fiscal impact on State or local revenue, as the bills codify existing guidance and practice from the Michigan Department of Revenue.

House Bills 4540 and 4541 would increase State sales and use tax revenue by approximately \$90 million per fiscal year once taxpayers were fully compliant with the changes. The bills would make changes similar to those established by Revenue Administrative Bulletin (RAB) 2018-16, issued in the wake of the United States Supreme Court's *South Dakota v. Wayfair* decision. That decision validated certain state approaches to collecting sales and use taxes from out-of-state retailers with no physical presence in a state. The bills effectively extend the provisions of RAB 2018-16 to online marketplaces that serve to connect sellers to customers. Existing requirements under the RAB affect only individual sellers and many sellers on these online marketplaces fail to meet the thresholds necessary to generate tax liabilities, even though the combined activity of all sellers would surpass the thresholds. The bills would require those marketplaces to remit sales and use tax.

Although RAB 2018-16 was issued August 1, 2018, and was expected to eventually generate more than \$200 million per year fiscal year, there was a lag between when the RAB was issued and when taxpayer compliance improved enough that tax collections supported the revenue estimate. It is unknown how significant the compliance lag could be for the provisions of House Bills 4540 and 4541, but any lag likely would result in the fiscal year 2019-20 revenue impact being below the estimated partial fiscal-year impact of \$67.5 million.

The impact of House Bills 4540 and 4541 on General Fund and School Aid Fund revenue would depend on the split between collections under the sales tax and the use tax. For additional revenue collected under the sales tax, approximately 73.3% would be directed to the School Aid Fund, 10% would be directed to local units as a result of constitutional revenue sharing provisions, and almost all of the remaining revenue would be directed to the General Fund. For additional revenue collected under the use tax, one-third would be directed to the School Aid Fund and the remaining two-thirds would be directed to the School Aid Fund. Most of the additional revenue under the bills likely would be sales tax revenue.

Fiscal Analyst: David Zin

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.