

Legislative Analysis



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

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House Bill 4540 as introduced
Sponsor: Rep. Lynn Afendoulis

House Bill 4541 as introduced
Sponsor: Rep. Joe Tate

House Bill 4542 as introduced
Sponsor: Rep. Michael Webber

House Bill 4543 as introduced
Sponsor: Rep. Tenisha Yancey

Committee: Tax Policy
Complete to 5-21-19

SUMMARY:

House Bills 4540, 4541, 4542, and 4543 would amend the General 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 effective beginning October 1, 2018.¹

House Bill 4540 would amend the General Sales Tax Act. Under the bill, a *marketplace facilitator* that sold or facilitated the sale of tangible personal property or services subject to sales tax in Michigan would be presumed to be engaged in the business of making retail sales of personal property or taxable services in the state, would be subject to the sales tax, would have to include the gross proceeds from these sales in the gross proceeds of its business for purposes of calculating the sales tax due, would have to collect and remit applicable sales tax, and would have to follow all applicable procedures and requirements of the act if the facilitator made or facilitated sales of more than \$100,000 or in 200 or more separate transactions in either the previous or current calendar year.

A *marketplace facilitator* would mean a person that does all of the following:

- Contracts with marketplace sellers to facilitate the sale of the seller’s products through a physical or electronic marketplace, whether or not the facilitator charges a fee.
- Engages in communicating the offer and acceptance between a purchaser and a seller, either directly or indirectly through its affiliates.
- Collects the purchaser’s payment and transfers it to the seller, either directly or indirectly through arrangements with third parties.

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

However, a marketplace facilitator would not include the following:

- A person who operates a platform or forum that provides internet advertising services, including listing products for sale, if the person does not also engage directly or indirectly in the activities described above.
- A person who rents out rooms, lodgings, or accommodations for hotels, motels, or other facilities for temporary inhabitation.

A marketplace facilitator would be required to collect and remit the sales tax on all sales it made in Michigan regardless of whether the facilitator was required to have a license for doing business under the act or would have been required to collect or remit sales tax if the sale had not been facilitated by the facilitator. However, this provision would not interfere with the ability of a facilitator and seller to enter into agreements with each other regarding the fulfillment of the requirements of the bill.

Waiver

The Department of Treasury could grant a waiver from the above provisions if either of the following requirements were met:

- A marketplace facilitator demonstrated, to the satisfaction of the department, that substantially all of its marketplace sellers had a current and valid license under section 3 of the act.
- A marketplace seller had sufficient nexus within Michigan to require licensure under section 3 and the department determined that the collection of sales tax by the seller for transactions facilitated by the facilitator would result in the appropriate and efficient collection of tax under the act.

Should the department grant a waiver, the sales tax levied on sales facilitated by the facilitator for a seller would have to be collected from the seller. The seller would then have to include the gross proceeds from such sales in the gross proceeds of its business for the purpose of calculating the total sales tax. The Department of Treasury would have to promulgate rules establishing the criteria for obtaining a waiver, the process for applying for a waiver, and the process for notifying an entity that a waiver has been obtained.

A marketplace facilitator would also have to report sales it facilitated separately from sales made directly by the facilitator or its affiliates to Michigan purchasers by filing a separate marketplace facilitator return on a form prescribed by the Department of Treasury.

Tax Liability

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

In addition, a facilitator would be relieved of liability for failure to collect and remit the correct amount of tax if the failure was due to incorrect or insufficient information given to it by a seller, unless the seller were an affiliate of the facilitator in question.

The bill would also relieve marketplace facilitators of liability under this section if the facilitator demonstrated to the department's satisfaction that the tax levied was paid to the department by the marketplace seller.

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 collect and remit sales tax.

Finally, if a marketplace facilitator were presumed to be engaged in retail sales in Michigan, the Department of Treasury would solely audit the facilitator for sales it facilitated made by marketplace sellers. The department would not audit a marketplace seller for sales facilitated by a facilitator unless a waiver was granted to the facilitator or the facilitator was seeking relief from tax liability due to incorrect or insufficient information given to it by a seller.

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.

Proposed MCL 205.95c

House Bills 4540 and 4541 would take effect 90 days after being enacted into law. An obligation to collect sales or use tax under the bills would not apply retroactively.

House Bills 4542 and 4543 would amend the General Sales Tax Act and the Use Tax Act, respectively, to require out-of-state retailers to remit sales and use tax. Specifically, the bills would state that a seller of tangible personal property is presumed to be engaged in the business of making sales of that property in Michigan if the seller meets one of the following:

- The seller's total cumulative gross receipts in Michigan exceeded \$100,000 during the immediately preceding 12 months.
- The seller sold tangible property in Michigan in 200 or more separate transactions during the immediately preceding 12 months.

The bills would apply regardless of whether the seller had a physical presence in Michigan.

House Bills 4542 and 4543 would apply to transactions occurring on or after October 1, 2018. The 12 months before October 1, 2018, would be included as part of the immediately preceding 12-month period in the criteria described above.

Proposed MCL 205.52c (HB 4542)

Proposed MCL 205.95b (HB 4543)

FISCAL IMPACT:

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 \$80.0 million to \$120.0 million on a full fiscal year basis.

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■ 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.