

Legislative Analysis



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

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4540 (proposed substitute H-1)
Sponsor: Rep. Lynn Afendoulis

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

House Bill 4541 (proposed substitute H-1)
Sponsor: Rep. Joe Tate

House Bill 4542 (proposed substitute H-1)
Sponsor: Rep. Michael Webber

House Bill 4543 (proposed substitute H-1)
Sponsor: Rep. Tenisha Yancey

Committee: Tax Policy
Complete to 6-19-19

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 sells tangible personal property at retail locations in this state would have to remit the applicable sales tax for all sales made through the facilitator whether or not the seller using the facilitator has nexus within the state.

A *marketplace facilitator* would mean a person engaged in the business of making retail sales for the purpose of the act regardless of whether the facilitator makes only facilitated sales for marketplace sellers or a combination of direct and facilitated sales. A marketplace facilitator would have all the rights and duties of a taxpayer under the act.

A marketplace facilitator would not include the following:

- A person who operates a platform or forum that provides internet, print, electronic, or any other form of advertising services, including listing tangible personal property 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.

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

A marketplace facilitator would have 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.

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 was an affiliate of the facilitator in question.

The bill would also relieve marketplace facilitators of liability under this provision 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, the Department of Treasury would 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 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:

- A. The seller's total cumulative gross receipts in Michigan exceeded \$100,000 during the previous calendar year.
- B. The seller had 200 or more separate transactions into this state in the previous calendar year.

These requirements 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 option B. These requirements would not eliminate or alter the obligation of a seller that had a physical presence in Michigan or was presumed to be engaged in retail sales in the state.

The bills would further clarify that a marketplace facilitator would need to include its direct sales and sales by marketplace sellers on its marketplace while determining its gross receipts (for option A) or its total number of transactions (for option B). Marketplace sellers would need to follow the same protocol in regard to sales made through marketplace facilitators in assessing their own gross receipts or total transactions.

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

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.