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TO: Caryn Tyson, Chair
Senate Committee on Assessment and Taxation

FROM: Michael Hale, Attorney
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RE: SB 369

DATE: March 16, 2020

Senate Bill 369 has many features similar to House Bill 2513. The Department would like to note that there are also two bills, one in the House (HB 2657), and one in this Committee (SB 399), proposed by the Governor's Tax Council that likewise address Marketplace Facilitators.

While there are similarities between the Tax Council's proposed bills and HB 2513 and SB 369, there are several distinct differences.

The Department has had the opportunity to meet with representative of the Kansas Chamber of Commerce (Chambe and discuss the differences between the respective bills in the House, and in general, there has been a consensus of agreement. There are a couple of distinctions that have not been completely ironed out and I will note them in this testimony. However, if SB 399 is amended in a manner similar to what has been discussed between the Department and the Chamber in the House Versions, it would address many of the Chamber's expressed concerns and the Department's expressed concerns.

1) SB 369 does not define the following:

“Affiliated Person,” “Cumulative Gross Receipts,” “Sales,” “Seller,” “Transaction.”

Those terms are defined in SB 399 and they are critical to the act as a whole. The Chamber had no significant issue with following SB 399 language (which is the same as the language in HB 2657).

2) SB 369 definition of “Marketplace Facilitator” (MPF) is narrow, in the Department's view, in the following areas:

This definition appears to only require the marketplace to be directly or indirectly involved in the processing of the sale, and some companies are not necessarily involved, even indirectly, in such processing (i.e., the processing is done by a third party).

A company may collect under a narrow definition, but that is likely because the company still has some form of ownership relationship with the payment processor.

Some have suggested that it is possible that a Marketplace Facilitator could claim they don't do the payment processing if the Marketplace Seller's credit card processing firm handles the transactions.

Fundamentally, however, if a company brings buyers and sellers together to consummate sales – which sales occur on that company's website – then the company should be treated as a marketplace facilitator irrespective as to whether the company is involved in processing the sale. A company acting in this respect can say that it is agnostic about the details of the transaction, but if that is so, it is merely because it affirmatively chooses to be.

Not only are they bringing buyers and sellers together, but they are engaging in one or more of the activities listed in Sec. 2 (e)(1)(A) and (e)(1)(B). By engaging in these activities they are actively facilitating these transactions. They are in total control of these transactions they are facilitating.

I am not sure this is a significant difference, and the Department believes that the language in SB 399 is more inclusive.

SB 369 (lines 28-35, Page 1) omits travel related lodging companies from MPF from definition, but leaves in companies that facilitate lodgings of homes. This creates an Equal Protection under the law issue. Moreover, companies that facilitate lodgings of homes are registered and remitting. Under SB 369, they likely would cease, causing a negative effect to SGF of over \$2 million a year plus loss of local sales and transient guest taxes being collected. Finally, by omitting travel related lodging companies, the basis of our sales tax being a "gross receipts" tax is undermined. The current Retailers' Sales Tax Act (as virtually every sales tax act in the union) imposes tax on the total amount paid by the consumer. By omitting travel related lodging companies, the booking fees paid by the consumer are omitted from the tax base.

SB 399 employs the broader, more inclusive definition. All companies that bring buyers and sellers together are included. Travel companies would be required to collect and remit on the gross receipts, not just the net. This avoids Equal Protection problems and maintains consistency with the sales tax being a gross receipts tax.

Moreover, SB 399 allows the Secretary to provide rules and regulations to address (*i.e.* narrow where necessary) the broader more inclusive definition. SB 369 does not provide such a provision. However, a definition that is too narrow, given current and unknown future business models and technologies, cannot be broadened by mere rule or regulation.

It should be noted that Missouri is also moving forward with a bill nearly identical to SB 399.

Last, in general, the Chamber has no significant issue with how SB 399 addresses this point.

3) On page 2, lines 8-12, SB 369 excludes the following from MPF: derivatives clearing houses, designated contract market, foreign board of trade, swap execution facilities, and clearing members, merchants and brokers. It is unclear why this is in a bill related to sales taxes. None of those activities are subject to Kansas sales tax, and it is entirely unnecessary to include them.

SB 399 does not have this language, and the Chamber had no significant issue with omitting this language.

- 4) SB 369 does not apply the terms, definitions and provisions of the Retailers' Sales Tax Act to this bill. This is a glaring omission because it would leave to chance whether certain defined terms, refund processes, administration processes apply.

SB 399 applies the terms and statutes of the Retailers' Sales Tax Act to MPF unless expressly stated otherwise. This will treat MPF the same as in-state sellers and will make administration and compliance by the MPF much easier.

The Chamber expressed no issue with adding this language.

- 5) SB 369 limits the definition of marketplace seller to only those making sales through a physical or electronic marketplace. It omits key language that this should apply regardless of whether the seller is required to be registered.

SB 399 contains the language "regardless of whether the seller is required to be registered." This broadens the base to include sellers whose only connection with the state is through the MPF.

The Chamber expressed no issue with language similar to SB 399 in HB 2657 on this point.

- 6) SB 369 allows an entire year to lapse before a MPF is required to register, collect and remit (Page 2, lines 28-29).

SB 399 requires collect and remit as of a date certain (July 1, 2020) and does not provide an unnecessary continuation of a competitive advantage for an additional 365 days.

The Chamber expressed no issue with language similar to SB 399 in HB 2657 on this point.

- 7) SB 369 in three separate locations (Page 2, lines 37-41, Page 3, lines 6-20, and Page 4, lines 28-31) allow certain MPFs and their sellers to contract away their statutory obligation to collect and remit or avoid collection and remittance altogether. In addition to defeating the very purpose of this bill (to have a "single source of remittance for multiple sellers), it runs counter to the very notion of the sales tax itself, which is imposed on the buyer with the seller being required to collect and remit. This provision would also allow companies, such as food delivery companies to not collect and remit on the total price paid by the consumer (most have a delivery charge and mandatory gratuity, both of which have been part of the sales tax base for decades). By allowing the restaurant to remit, the tax base is eroded.

SB 369 also allows entities that have sales in excess of a billion dollars to omit using MPFs. There has been no clear, logical explanation for this exception. Anecdotally, the Department has been told the large telecoms wanted this provision for two primary reasons: fear that advertising would sweep them up into marketplace seller status, and fear that telecoms would have to continue to collect and remit non-sales tax fees (such as 911 fees), while another entity collects and remits sales taxes. This is their effort to avoid those scenarios.

SB 399 adheres to the long standing legislative intent that gross receipts be the tax base and avoids a food delivery company, for example, to skirt their responsibility to collect on the gross receipts paid by the consumer simply because they have an agreement with their restaurants, or that their restaurants are already registered.

Moreover, SB 399 excludes advertising, this would alleviate the telecom concerns on this point. SB 399 also requires that MPF collect all associated fees as well as taxes (this would include the 911 fees), so the telecoms' concern on this point is resolved. Lastly, the Department is unaware that any telecom services are being sold on MPF websites, or that the monthly telecom charges (including 911 fees, for example) are not being collected and remitted by MPFs.

One large marketplace facilitator has expressed concern with the language in SB 399 that requires MPFs collect all associated fees as well as taxes. The two primary fees and taxes this language addresses are transient guest taxes and 911 fees. The Department is unaware that those services and fees are sold on any traditional MPF platform.

- 8) SB 369 limits the Department from auditing the books and records of sellers. Those audits are necessary to tie to and verify the books and records of MPFs to insure all parties are adhering to state law.

SB 399 allows the Department the latitude necessary to assure compliance with state law by all parties.

The same, single marketplace facilitator has expressed concern with the language in SB 399 that allows the Department to review the books and records on those who sell on their platform.

- 9) SB 369 leaves "click through" nexus (Page 7, lines 28-34) in place. It should be noted that SB 399 also retains click through nexus.

This is an area that the Chamber expressed interest in deleting from the tax act. The Department generally agrees that the narrow click through language can be deleted as long as those portions of the same statute that apply to agreements between sellers and their representatives, whether telemarketers, or in-home "party plan" sellers is retained.

The Chamber and the Department are in agreement on this compromise.

- 10) SB 399 does continue to retain citations to "refer," "referrer", "referral".

This is another area that the Chamber has expressed concern, and to which the Department has generally agreed to strike from HB 2657, and would agree to do so in SB 399.

- 11) SB 399 does not contain a *de minimus* threshold, SB 369 has a \$100,000.00 threshold.

The Chamber has expressed significant concerns on this point, and The Department is of the understanding that ongoing discussions on this point are occurring.