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TO: Adam W. Smith , Chair
House Committee on Taxation

FROM: Michael Hale, Attorney
Kansas Department of Revenue

RE: SB 50

DATE: March 23, 2021

The Department of Revenue would note the following deficiencies in SB 50 as it is currently written.

SB 50 does not apply to gross sales, just "sales." Thus, "exempt" sales would not be counted in calculating the $100,000 limit. SB 50 only includes "sales of property or services otherwise subject to tax in the state in an amount exceeding $100,000…"

SB 50 allows a marketplace facilitator to contract away its obligation to collect and remit with a market-place seller. This appears to be directed, primarily at the food delivery companies and hotel/lodging booking companies. However, this notion tends to run head-long into the very concept of what many states are doing with facilitators: requiring one facilitator to collect and remit rather than having dozens, hundreds or even thousands of individual sellers. Furthermore, there is no valid, cogent reason to not have these facilitators collect and remit. They have all the information, so it should be simple for them to comply with the collect and remit of other facilitators.

Currently, it does not appear that booking companies are collecting sales tax or hotel occupancy tax on the full price that customers are paying to them for Kansas hotel rooms. Nor are food delivery companies collecting sales tax on the full selling price for food delivered to consumers. Kansas and local governments are not receiving sales tax on the full amount that customers are paying the booking companies and food delivery companies. It is important to bear in mind that the Kansas sales tax is a gross receipts tax. By excising, for example, hotel booking companies and food delivery companies out of the equation, the fees they add on would be eliminated from calculation for sales tax purposes. The consumer most assuredly pays these fees,

which is the essence of gross receipts, by statutory definition. Thus, adopting SB 50 language misses the mark of the intent of the Kansas sales tax being a gross receipts tax.

SB 50 is a narrower definition of facilitator. A broader definition would better serve Kansas for this reason: no one knows what technology or new business models have in store for the market, and it is far easier to administer a broader definition as technology changes than it is to continually try to update narrow statutes in a piece-meal manner to accommodate new sales activities as technology evolves. A statute of broader application will also adhere to the Tax Foundation's general principle of broadening the Kansas sales tax base.

It is unclear why the need to have a $1 billion exception in SB 50. It is our understanding the certain telecoms may be pushing for this. There seem to be several salient reasons to not have this type of exception in place. First, we are unaware of any facilitator that sells telecommunication services on behalf of telecoms.

Second, ostensibly the telecoms originally wanted this because they must collect 911 fees, universal access fees, etc. so they would end up with a MPF collecting and remitting the sales tax, and the telecom would still have to remit the 911 fees (among other state and/or local fees) on the same transaction. However, SB 50 picks up the 911 fees, so this provision would seem to be unnecessary.

SB 50 also excepts out derivative clearing houses, foreign boards of trade or swap execution facilities and several other business models whose services are not subject to Kansas sales tax. It is unclear why these business models are even referenced in SB 50, and this section should be eliminated.

In its December 2019 publication "Kansas Tax Modernization," the Tax Foundation and Kansas Chamber espoused on multiple pages the need to broaden the Kansas sales tax base as a means to provide either rate reduction or other reforms in the tax code. See, pages 93, 95, 109 and 110.

SB 50 only requires collection and remittance of tax if a *de minimus* threshold is satisfied in the previous year: "A marketplace facilitator shall only be required to collect and remit such taxes if the following criteria are satisfied *in the previous calendar year*. See, SB 50, page 2, New Section 2, lines 28-30. Emphasis added.

This means that if a MPF reaches a *de minimus* threshold in February, they get March, April, May, June, etc. throughout that year "free", and do not have to register and collect until the

next year. The businesses in your local community do not get that kind of grace period. They have to start collecting on day one. Again, this elevates these large out-of-state corporations over businesses in your local communities.

A broader based market-place facilitator statute than the one contemplated in SB 50 can achieve a greater and consistent means to pay any tax relief if such relief is ultimately deemed prudent at this time.

It should be noted that HB 2395 also imposes a collect and remit requirement on market-place facilitator. The language used in that bill received limited opposition from the business community centered around a *de minimus* threshold. Local units of government generally supported HB 2395. And, HB 2395 has none of the deficiencies in SB 50 noted here.

As noted in my prior, detailed testimony in HB 2395, the Department urges the Committee to favorably consider HB 2395 instead of SB 50. It accomplishes all that both SB 50 seeks to accomplish, but HB 2395 stays truer to the tenets of the Retailers' Sales Tax Act, provides cleaner, more concise language, eliminates unnecessary sections that do not apply, and enhances the collection of legally due taxes, all of which is supported by the Tax Foundation and Chamber.