



April 20, 2018

Rep. Representative Ron Ryckman, Speaker of the House
Kansas House of Representatives
Topeka, KS

RE: **Opposition to HB 2756 – Creating a New Tax on Marketplaces**

Dear Speaker Ryckman and members of the House of Representatives,

We ask that you not advance HB 2756 as it creates a new tax on Kansas residents and is unconstitutional.

HB 2756 will be seen by Kansas consumers as a new tax and could erode your ability to protect Kansas businesses from out-of-state tax collectors.

First, consider problems created by HB 2756's anticipated legal challenges:

- Will not go into effect for several years, if ever
- Will cost Kansas taxpayers in attorney's fees and court costs
- May be rendered irrelevant by other state lawsuits or Congressional action

Second, if the HB 2756 survives court challenges, it would:

- Reduce the ability of Kansas to protect its businesses from burdens imposed by other states
- Rely on new revenue extracted from Kansas residents – not from out-of-state businesses
- Generate only minimal new tax revenue
- Establish a new tax regime that is anything but equal, consistent, or fair

The new tax on online marketplaces is likely seen as a new tax by your constituents

HB 2756 requires marketplaces become liable for collecting taxes for sales on their platform residents – likely to be seen as a new tax by your constituents.

We polled Minnesota residents on a similar tax in that state, and by a 2-to-1 margin, Minnesotans consider this legislation a statewide tax increase. On the Minnesota tax burden on marketplaces, Grover Norquist, ATR President said, "It is rather simple. This bill puts shackles on any online marketplace looking to make Minnesota its home."

We would likely see similar results in a poll of Kansas citizens. (see Minnesota poll at NetChoice.org/MNPoll).

Of course, this tax burden on online marketplaces is like requiring the Oak Parks Mall to be responsible and liable for the sales tax on purchases made at stores in the mall. And since HB 2756 isn't likely to be applied to offline marketplaces like the Oak Parks Mall, HB 2756 is unconstitutional as violating the Federal Internet Tax Freedom Act (ITFA) discussed below.

HB 2756's tax on online marketplaces is likely to bring burdens on Kansas businesses from other states

HB 2756 creates a dangerous precedent for other state revenue departments to follow. While HB 2756 would apply only to remote sellers, it encourages other states to create similar laws that would impact Kansas sellers.

Passage of HB 2756 would erode state sovereignty

Advocates for HB 2756 claim that the purpose of this bill is to overturn the current physical presence standard.¹ Today, the physical presence standard stops tax collectors in California, New York, or Illinois from harassing Kansas businesses that have no physical presence in those states.

But passage of HB 2756 would reduce the ability of Kansas to protect its businesses from tax collectors across the country, forcing Kansas businesses to travel across the country to defend themselves in foreign state courts.

State tax collectors would be the true “winners” if HB 2756 succeeds in eroding the physical presence standard. Kansas citizens and Kansas businesses would be the losers.

No new money would come into Kansas

Any sales taxes collected as the result of HB 2756 would come from the pockets of Kansas residents -- not from out-of- state businesses.

Minimal tax revenue would be generated from HB 2756

Today, most of the top e-retailers already collect for Kansas. That includes Amazon, who accounted for 44% of online sales in 2017.²

Even the US General Accounting Office³ predict collections are, at best, less than half of what the often cited and outdated University of Tennessee study⁴ promises.

The question, is whether the minimal tax revenue extracted from Kansas citizens is enough to justify the legal costs, executive branch overreach, and erosion of state sovereignty?

HB 2756 is Unconstitutional as a violation of Supreme Court precedent established in *Quill v North Dakota*.

HB 2756 will generate no revenue for the state unless and until the US Supreme Court overturns a century of established federal doctrine.

Following enactment of the law, groups like NetChoice and ACMA will seek an injunction and challenge the law. Immediate injunction of HB 2756 is likely, since even the state of South Dakota⁵ stipulated that its similar “Kill Quill” law was unconstitutional.

¹ *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) further confirmed the physical presence standard for sales tax collection. It protected Quill, a Delaware corporation with offices and warehouses in Illinois, California, and Georgia, from North Dakota tax collectors and North Dakota tax rules – a state where Quill had no physical presence.

² Lauren Thomas, *Amazon grabbed 4 percent of all US retail sales in 2017, new study says*, CNBC (Jan. 3, 2018).

³ U.S. Government Accountability Office, *States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* (Nov. 2017)

⁴ William Fox, *An Analysis of Internet Sales Taxation and the Small Seller Exemption*, University of Tennessee (April 13, 2009)

⁵ See *South Dakota v. Wayfair Inc. et al*, Case No. 3:2016cv03019 (S.D. Dist. Ct. May 15, 2016).

On March 6, 2017, the State Circuit Court in South Dakota granted a motion for Summary Judgment against the state's 2016 law, finding:

"Because each of the Defendants lacks a physical presence in South Dakota... the State acknowledges that under *Quill Corp. v. North Dakota*, the State of South Dakota is prohibited from imposing sales tax collection and remittance obligations on the Defendants."

"The State further admits that this Court is required to grant summary judgment in Defendants' favor, because of the *Quill* ruling."

"This Court is duty bound to follow applicable precedent of the United States Supreme Court."

"This is true even when changing times and events clearly suggest a different outcome; it is simply not the role of a state circuit court to disregard a ruling from the United States Supreme Court."

If a similar injunction is obtained in Kansas, the state could not enforce HB 2756.

It is likely that the US Supreme Court will have already decided on the *Quill* question even before the HB 2756 makes its way through the courts. As noted above, courts already enjoined and are now reviewing the legality of a similar law in South Dakota⁶ and Indiana⁷ and regulation in Alabama.⁸ HB 2756 acts as a pile-on with no material benefit to Kansas -- while incurring litigation costs for the state.

HB 2756 is Unconstitutional as a violation of the federal Internet Tax Freedom Act

In 2016, a Republican-controlled congress and a Democratic president made permanent the Federal Internet Tax Freedom Act (ITFA). The ITFA prohibits states from imposing "any tax . . . on electronic commerce that is not generally imposed and legally collectible by such State."⁹ In addition, part of the legislative purpose of the ITFA was to prevent the same type of Internet e-commerce discrimination that HB 2756 seeks to create.

Of course, HB 2756 unfairly discriminates against online sales and would be a clear violation of the ITFA resulting in a swift injunction of the law.

Because of the creation of new taxes only on Kansas residents, harm to Kansas travel agents, and unconstitutional nature of the bill, we ask that you not advance HB 2756.

We appreciate your consideration of our views, and please let us know if we can provide further information.

Sincerely,

Tammy Cota
Executive Director
Internet Coalition

Caroline Joiner
Executive Director, Southeast
TechNet

Carl Szabo
Vice President and General
Counsel, NetChoice

⁶ See Sandra Guy, *South Dakota sues four big online retailers over sales taxes*, Internet Retailer (April 29, 2016).

⁷ Ind. Code § 34-14-1-1

⁸ See Chris Morran, *Newegg Challenges Alabama Over Collection Of Online Sales Tax*, Consumerist (June 14, 2016)

⁹ 47 U.S.C. § 151.