

NetChoice *Promoting Convenience, Choice, and Commerce on The Net*

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Analysis of NY Marketplace Tax Bill ([budget bill for 2018](#), pages 86-98)

1. The Governor and state lawmakers should not assume this law would generate any immediate tax revenue, since it will undoubtedly be challenged in court and likely would be stayed by an injunction.

The marketplace bill takes a radical approach to sales tax collection by assuming that a tax obligation can be assigned to an intermediary that merely facilitates a transaction. Under that approach, even credit card issuers and payment processors could be implicated and might join legal challenges if the bill were to become law.

Court challenges would likely question whether a marketplace provider performs activities in NY state that create substantial nexus. Another question is whether Due Process is violated if all of the marketplace functions are performed *outside* of NY.

2. State lawmakers should not assume that large e-commerce marketplaces can ease the burdens of collecting sales tax for sellers using their platforms. The complexity is not so much about computation as it is about *confusion*—because thousands of sellers with no knowledge of NY tax laws will need to properly categorize hundreds of their inventory items and be aware of exemptions and rules – such as New York City’s sales tax threshold of \$110 for clothing or footwear purchases.¹

3. State lawmakers should not assume this marketplace bill makes it easy for out-of-state small businesses to comply. In fact, this bill creates significant new burdens and audit risks for small businesses that use marketplaces for *any* of their sales. This is because remote sellers are still considered liable for their “off-marketplace” sales in New York. Small sellers would have to file quarterly sales tax returns that:

- List which of their sales were facilitated by marketplace providers who collect for NY, and
- Calculate and remit taxes for any sales made through channels other than the registered NY marketplaces. (e.g., sales through their own website, non-NY marketplaces, mail order, etc.)

While NY lawmakers may not be concerned if this law hurts small businesses in other states, they should beware of the risk that other states adopt similar approaches and impose tax and compliance burdens on NY businesses that survive only by serving customers outside the state, too.

4. State lawmakers should think twice about imposing “tattletale” reporting obligation on out-of-state sellers. Forcing sellers to give state tax collectors the name and address of New York buyers is likely to fail a court challenge, since no circuit court outside the 10th Circuit has found this forced reporting legal. Also, this forced disclosure of private information to the state will come as a privacy surprise to NY residents since polling has shown² that citizens oppose such forced disclosures.

¹ New York City Sales Tax page, at <http://www1.nyc.gov/nyc-resources/service/2389/sales-tax>

² Poll of Colorado voters finding 78% think state governments should *not* force businesses to turn over information on their internet purchases. at <https://netchoice.org/library/colorado-tattletale/>