

NetChoice Promoting Convenience, Choice, and Commerce on The Net

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Rep. Jim R. Trujillo, Chair
House Financial Committee
New Mexico House of Representatives
New Mexico State Capitol

February 9, 2018

RE: Opposition to HB 4 – Taxation

Dear Chair Trujillo and members of the committee:

We ask that you do not pass HB 4 and avoid making the same mistakes as South Dakota.

HB 4 will be seen by New Mexico consumers as a new tax and could erode your ability to protect New Mexico businesses from out-of-state tax collectors.

First, consider problems created by HB 4's anticipated legal challenges:

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

Second, if the HB 4 survives court challenges, it would:

- Reduce the ability of New Mexico to protect its businesses from burdens imposed by other states
- Rely on new revenue extracted from New Mexico residents – not from out-of-state businesses
- Would generate only minimal new tax revenue
- Establish a new tax regime that is anything but equal, consistent, or fair
- Empower the state to learn about the private purchases of New Mexico residents

Likely seen as a new tax by your constituents

New Mexico residents will likely see this as a new tax since any tax collected will come from the pockets of New Mexico citizens, not from out-of-state businesses.

We polled Tennessee residents on a similar tax in that state, and 56% said requiring them to pay tax on online purchases from out-of-state businesses would be a statewide tax increase. We would likely see similar results in a poll of New Mexico citizens. (see Tennessee poll at NetChoice.org/TNTaxPoll)

HB 4 is likely to bring burdens on New Mexico businesses from other states

Just by proposing HB 4, New Mexico creates a dangerous precedent for other state revenue departments to follow. While HB 4 would apply only to remote sellers, it encourages other states to create similar laws that would impact New Mexico sellers.

No revenue would be generated from HB 4 for several years, if ever. And HB 4 fritters away tax dollars on an unnecessary lawsuit.

HB 4 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 4 is likely, since even the state of South Dakota¹ stipulated that its similar “Kill Quill” law was unconstitutional.

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 New Mexico, the state could not enforce HB 4.

It is likely that the US Supreme Court will have already decided on the *Quill* question even before the HB 4 makes its way through the courts. As noted above, courts already enjoined and are now reviewing the legality of a similar law in South Dakota² and Indiana³ and regulation in Alabama.⁴ HB 4 acts as a pile-on with no material benefit to New Mexico -- while incurring litigation costs for the state.

Passage of HB 4 would erode state sovereignty

Advocates for HB 4 claim that the purpose of this bill is to overturn the current *Quill* standard⁵ of physical presence. Today, the *Quill* standard stops tax collectors in California, New York, or Illinois from harassing New Mexico businesses that have no physical presence in those states.

But passage of HB 4 would remove the protections of *Quill* and reduce the ability of New Mexico to protect its businesses from tax collectors across the country, forcing New Mexico businesses to travel across the country to defend themselves in foreign state courts.

State tax collectors would be the true “winners” if HB 4 succeeds in overturning the *Quill* standard. New Mexico citizens and New Mexico businesses would be the losers.

¹ See *South Dakota v. Wayfair Inc. et al*, Case No. 3:2016cv03019 (S.D. Dist. Ct. May 15, 2016).

² See Sandra Guy, *South Dakota sues four big online retailers over sales taxes*, Internet Retailer (April 29, 2016).

³ Ind. Code § 34-14-1-1

⁴ See Chris Morran, *Newegg Challenges Alabama Over Collection Of Online Sales Tax*, Consumerist (June 14, 2016)

⁵ *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.

No new money would come into New Mexico

Even if HB 4 survived a Supreme Court challenge, *no new money would flow into New Mexico*. Any sales taxes collected as the result of HB 4 would come from the pockets of New Mexico residents -- not from out-of-state businesses.

Minimal tax revenue would be generated from HB 4

Today, most of the top e-retailers already collect for New Mexico. That includes Amazon, who accounted for 44% of online sales in 2017.⁶

Some HB 4's advocates cite a 2009 University of Tennessee⁷ study to suggest a large windfall of uncollected sales taxes. However, the UT study is far out-of-date and fails to account for existing tax collection by Amazon and several other large e-retailers.

Even the US General Accounting Office⁸ predict collections are, at best, less than half of what the outdated University of Tennessee study promises.

The question, assuming HB 4 survives in court, is whether the minimal tax revenue extracted from New Mexico citizens is enough to justify the legal costs, executive branch overreach, and erosion of state sovereignty?

HB 4 creates a new tax that is not equal, consistent, or fair

Tax advocates justify HB 4 by saying it "creates a level playing field for all sellers." However, HB 4 foists disproportionate collection burdens on catalog and online retailers. When a customer enters a gift shop in Santa Fe, the store does not ask for that customer's home address, so she can look-up the tax rate and later remit the tax to the customer's home state.

But HB 4 would impose the burden of look-up, tax filing, and audit -- if the sale occurs through a phone call, mail order, or the internet. We fail to see how that would be equal, consistent, or fair.

Discourages investment in New Mexico

This tax mandate would create a barrier to attracting new jobs and investment to New Mexico since HB 4 paints New Mexico as anti-business and anti-tech. The provisions to create new tax obligations on online businesses discourages the growing array of companies from creating any presence in the state.

Grants the Department of Revenue broad powers to learn about New Mexico residents' private purchases

Under Section 5(c) the Department of Revenue broad (DoR) can force sellers and marketplaces to remit private purchases to the state.

This would almost certainly violate the privacy expectations of New Mexico citizens, once they discover that the state could know that they are buying products related to medical conditions, financial problems, sexual preferences, and political beliefs. Moreover, the state would learn the address of any New Mexico receiving gift deliveries that were purchased by other New Mexico residents.

⁶ Lauren Thomas, *Amazon grabbed 4 percent of all US retail sales in 2017, new study says*, CNBC (Jan. 3, 2018).

⁷ Bruce, Fox, and Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, University of Tennessee (2009).

⁸ U.S. Government Accountability Office, *States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs* (Nov. 2017)

Recent polling showing that 78% of Coloradans do not believe the state should force businesses to turn-over information about their catalog and online purchases. You can see those poll results at <http://NetChoice.org/CoPoll> We would expect similar results in New Mexico.

We ask that you reject HB 4 and protect New Mexico businesses from out-of-state tax auditors, protect New Mexico citizens from a new tax, avoid costly litigation the state is likely to lose, and move away from encouraging the state to invade the privacy of New Mexico residents.

Thank you for considering our views and please let us know if we can provide further information.

Sincerely,

A handwritten signature in cursive script, appearing to read "Carl Szabo".

Carl Szabo
Vice President and General Counsel
NetChoice

