

NetChoice Promoting Convenience, Choice, and Commerce on The Net

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Sen. Andrew C. Brock, Co-chair
Sen. Jerry W. Tillman, Co-Chair
Sen. Tommy Tucker, Co-Chair
Senate Finance Committee
North Carolina General Assembly
Raleigh, North Carolina

March 8, 2017

RE: Opposition to SB 81 – Sales Tax Economic Nexus For Remote Sales

Dear Co-chairs Brock, Tillman and Tucker and members of the committee:

We ask that you not approve SB 81, since it will be seen by North Carolina voters as a new tax and could erode your ability to protect North Carolina businesses from out-of-state tax collectors.

Moreover, consider the problems created by SB 81's anticipated legal challenges:

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

And, even if SB 81 survives court challenges, it would:

- Reduce your ability to protect North Carolina businesses from burdens imposed by other states
- Rely on new revenue extracted from North Carolina 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
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Likely seen as a new tax by your constituents

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

We recently 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 North Carolina citizens. (Tennessee poll at NetChoice.org/TNTaxPoll)

SB 81 is likely to bring burdens on North Carolina businesses from other states

Just by proposing SB 81, North Carolina created a dangerous precedent for other state revenue departments to follow. While SB 81 would apply only to remote sellers, it encourages other states to create similar laws that would impact North Carolina sellers.

No revenue would come from SB 81 for several years, if ever. And SB 81 fritters away tax dollars on an unnecessary lawsuit.

SB 81 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, industry groups such as NetChoice and ACMA would seek an injunction and challenge the law. Immediate injunction of SB 81 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 North Carolina, the state could not enforce SB 81. If the US Supreme Court chooses not to hear the state’s appeals of this case, the existing *Quill* standard would remain in effect and SB 81 could not be enforced at any time.

It is likely that the US Supreme Court will have already decided on the *Quill* question even before the SB 81 makes its way through the courts. As noted above, courts are now reviewing the legality of a similar law in South Dakota² and regulations in Alabama³ and Tennessee. SB 81 acts as a pile-on with no material benefit to North Carolina -- while incurring litigation costs for the state.

Passage of SB 81 would erode state sovereignty

Advocates for SB 81 claim that the purpose of this bill is to overturn the current *Quill* standard⁴ of physical presence. Today, the *Quill* standard stops tax collectors in California, New York, or Illinois from harassing North Carolina businesses that have no physical presence in those states.

But passage of SB 81 would remove the protections of *Quill* and reduce the ability of North Carolina to protect its businesses from tax collectors across the country, forcing North Carolina businesses to travel across the country to defend themselves in foreign state courts.

State tax collectors would be the true “winners” if SB 81 succeeds in overturning the *Quill* standard. North Carolina citizens and North Carolina 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 See Chris Morran, *Newegg Challenges Alabama Over Collection Of Online Sales Tax*, Consumerist (June 14, 2016)

⁴ *Quill Corp. v. North Carolina*, 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 Carolina tax collectors and North Carolina tax rules – a state where Quill had no physical presence.

No new money would come into North Carolina

Even if SB 81 survived a Supreme Court challenge, *no new money would flow into North Carolina*. Any sales taxes collected as a result of SB 81 would come from the pockets of North Carolina residents -- not from out-of- state businesses.

Minimal tax revenue would be generated from SB 81

Today, most of the top e-retailers already collect for North Carolina. That includes Amazon, who accounted for 41% of online sales in Q1 2016.⁵

Some SB 81 advocates cite a 2009 University of Tennessee⁶ study to suggest a large windfall of uncollected sales taxes. However, that study is far out-of-date and fails to account for sales tax collection by Amazon and several other large e-retailers.

The question, assuming SB 81 survives in court, is whether the minimal tax revenue extracted from North Carolina citizens is enough to justify the legal costs, executive branch overreach, and erosion of state sovereignty?

SB 81 creates a new tax that is not equal, consistent, or fair

Tax advocates may say that SB 81 “creates a level playing field for all sellers.” However, SB 81 foists discriminatory burdens on catalog and online retailers.

When a customer enters a gift shop on the Outer Banks, the store clerk 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 SB 81 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.

We ask that you reject SB 81 and protect North Carolina businesses from out-of-state tax auditors, protect North Carolina citizens from a new tax, and avoid costly litigation the state is likely to lose.

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

Sincerely,



Steve DelBianco
Executive Director, NetChoice

NetChoice is a trade association of e-Commerce and online businesses. www.netchoice.org

⁵ Ken Kam, *The Market Is Underestimating Amazon*, Forbes (May 27, 2016).

⁶ Bruce, Fox, and Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce*, University of Tennessee (2009).