

NetChoice Promoting Convenience, Choice, and Commerce on The Net

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Governor John Kasich
Riffe Center, 30th Floor
77 South High Street
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June 29, 2017

RE: Request Line-Item Veto of Remote Seller Tax Collection language in HB 49

Dear Governor Kasich:

We ask that you line-item veto the remote seller tax collection language in HB 49 (hereinafter HB 49) and avoid making the same mistakes as South Dakota and Tennessee.

HB 49 will be seen by Ohio consumers as a new tax and could erode your ability to protect Ohio businesses from out-of-state tax collectors.

First, consider problems created by HB 49's anticipated legal challenges:

- Will not go into effect for several years, if ever
 - We have already seen the injunction of similar provisions in South Dakota and Tennessee
- Will cost Ohio taxpayers in attorney's fees and court costs
- May be rendered irrelevant by other state lawsuits or Congressional action

Second, if the HB 49 survives court challenges, it would:

- Reduce the ability of Ohio to protect its businesses from burdens imposed by other states
- Rely on new revenue extracted from Ohio 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

Likely seen as a new tax by your constituents

Ohio residents will likely see this as a new tax since any tax collected will come from the pockets of Ohio 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 Ohio citizens. (see Tennessee poll at NetChoice.org/TNTaxPoll)

HB 49 is likely to bring burdens on Ohio businesses from other states

Just by proposing HB 49's remote seller tax collection requirements, Ohio created a dangerous precedent for other state revenue departments to follow. While HB 49 would apply only to remote sellers, it encourages other states to create similar laws that would impact Ohio sellers.

No revenue would be generated from HB 49 for several years, if ever. And HB 49 fritters away tax dollars on an unnecessary lawsuit

HB 49's remote seller tax collection requirements 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 49 is likely, since even the state of South Dakota¹ stipulated that its similar "Kill Quill" law was unconstitutional – this led to a swift injunction of both South Dakota and Tennessee's "Kill Quill" actions.

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 Ohio, the state could not enforce this part of HB 49. 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 this remote seller tax collection requirement 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 HB 49 makes its way through the courts. As noted above, courts are now reviewing the legality of a similar law in South Dakota,² Tennessee,³ and regulation in Alabama.⁴ HB 49 acts as a pile-on with no material benefit to Ohio -- while incurring litigation costs for the state.

Passage of HB 49 would erode state sovereignty

Advocates for HB 49 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 Ohio businesses that have no physical presence in those states.

But passage of HB 49 would remove the protections of *Quill* and reduce the ability of Ohio to protect its businesses from tax collectors across the country, forcing Ohio businesses to travel across the country to defend themselves in foreign state courts.

State tax collectors would be the true "winners" if HB 49's remote seller tax collection succeeds in overturning the *Quill* standard. Ohio citizens and Ohio 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 *ACMA & NetChoice v. Gerregano*, No. 17-307-IV (Tenn. Chancery Ct. Apr. 10, 2017) (issuing an injunction of the Tennessee action, available at <https://netchoice.org/wp-content/uploads/Tennessee-Injunction-Order-Apr-11-2017.pdf>)

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 Ohio

Even if HB 49 survived a Supreme Court challenge, *no new money would flow into Ohio*. Any sales taxes collected as the result of HB 49 would come from the pockets of Ohio residents -- not from out-of-state businesses.

Minimal tax revenue would be generated from HB Ohio

Today, most of the top e-retailers already collect for Ohio. That includes Amazon, who accounted for 41% of online sales in Q1 2016.⁶

Some pro-tax 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.

The question, assuming HB 49 survives in court, is whether the minimal tax revenue extracted from Ohio citizens is enough to justify the legal costs, executive branch overreach, and erosion of state sovereignty?

HB 49 creates a new tax that is not equal, consistent, or fair

Tax advocates justify HB 49 by saying it “creates a level playing field for all sellers.” However, HB 49 foists disproportionate collection burdens on catalog and online retailers. When a customer enters a gift shop in Cleveland, 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 49 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 line-item veto the remote seller tax collection language from HB 49 and protect Ohio businesses from out-of-state tax auditors, protect Ohio 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,



Carl Szabo
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⁶ Ken Kam, *The Market Is Underestimating Amazon*, Forbes (May 27, 2016).

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

