

Submitted Testimony



**Testimony in support  
Part BB, S.2009 / A.3009**

Joint Legislative Public Hearing  
On 2017-2018 Executive Budget Proposal

Taxes

Testimony of  
Ted Potrikus  
President and CEO  
Retail Council of New York State

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The Retail Council of New York State supports Part BB of S.2009 / A.3009 as it relates to the collection of New York State and local sales and use taxes on tangible personal property shipped into the state by an out-of-state seller that uses a 'marketplace provider' as the platform facilitating the sale of such tangible personal property.

On behalf of New York's Main Street merchants small and large, we urge the state Legislature to accept the Executive Budget proposal as drafted. The proposal closes a loophole in the state's successful 'click-through nexus' sales and use tax collection mechanism and, in so doing, would strip from out-of-state merchants the competitive advantage they now hold over tens of thousands of merchants at work today across New York State.

This proposal earns the Retail Council's support for the same reasons we so strongly supported New York State's precedent-setting "click-through nexus" law approved by the state Legislature in 2008: it is not a "new tax," a "new fee," or a "tax on the Internet." It reaffirms current state law, which requires New Yorkers to pay the sales and use tax on tangible personal property bought from an out-of-state merchant.

Random application of state tax laws exacerbated by a lack of federal action cannot be the basis of fair competition. Part BB rectifies in a fair and equitable fashion the disadvantage New York's merchants face today.

**Background: New York's click-through nexus (2008)**

The state Legislature adopted click-through nexus (Tax Law §1101(b)(8)(vi)) and expanded the definition of 'vendor' to collect New York State and local sales and use taxes when:

- the vendor enters into an agreement(s) with a New York State resident(s) under which, for a commission or other consideration, the resident representative directly or indirectly refers potential customers to the seller whether by link on an Internet website or otherwise; and

- the cumulative gross receipts from sales by the seller to customers in New York State as a result of referrals to the seller by all of the seller's resident representatives under the type of contract or agreement totals more than \$10,000 during the preceding four quarters.

New York's law - the first in the nation and the template for click-through nexus laws now in force in nearly two-dozen states - survived court challenges up to and including the New York State Court of Appeals and was upheld after the Supreme Court of the United States denied cert. in Overstock.com v. New York State Department of Taxation and Finance (U.S. 13-259, cert. denied December 2, 2013) and Amazon.com LLC v. New York State Department of Taxation and Finance (U.S. 13-259, cert. denied December 2, 2013).

Opponents argued that the 2008 law violated a 1992 Supreme Court ruling (*Quill v. North Dakota*) that physical presence in a state - "nexus" - is a prerequisite to collecting a state's sales and use tax from that state's residents. The nearly 8,000 different sales tax jurisdictions meant, potentially, 8,000 different sets of complicated regulations - too much for merchants without nexus to absorb and, therefore, a hindrance to interstate commerce.

That might not have been an unreasonable argument in 1992, but it was ancient technological history in 2008 and, for the giants dominating on-line shopping in 2017, even more so.

While *Quill* challenged state governments to simplify those sales tax structures, simplification was not a priority until several years later when states noticed a growing gulf in sales tax collections because of something new called "Internet shopping." Sparring jurisdictional bureaucracies and an absence of federal guidance for nearly two decades have stifled national simplification, and demand that New York and other states find ways to remain current with available out-of-state shopping options.

New York's 2008 law survived legal challenges in part because it follows a Supreme Court decision from 1960 (*Scripto v. Carson*), ruling that independent brokers or agents acting on behalf of an out-of-state seller creates sufficient nexus to

require collection of a state's sales and use tax on the sale of personal tangible property.

**The online "marketplace": A digital consignment shop**

Fully one-third of all retail sales on the Internet today are made by sellers transacting their business through a host's website - usually through the host's branded "marketplace." It's a platform that generally did not exist when New York enacted its "click-through nexus" law in 2008, and therefore is not addressed by the definition of nexus found in that law.

The proposal we support in 2017 (**Part BB, S.2009 / A.3009**) would establish that a business that displays for sale tangible personal property owned by third parties and accepts payment from purchasers on behalf of third parties (a "marketplace provider") would be required to collect tax on those sales. Marketplace providers with less than \$100 million in annual sales made by remote means would be excluded.

Amazon.com operates a huge Internet marketplace. It offers for sale millions of products of its own. The 'marketplace' offers for sale the merchandise of more than two million other sellers. These "hosted" sellers display their goods and complete sales transactions on Amazon's marketplace using Amazon's shopping cart and checkout to process payments.

When a purchaser buys an item on the Amazon marketplace from a hosted seller, Amazon receives and processes the payment, retains a portion of the sales price, and deposits the remaining funds in a bank account designated by the seller. When a New York purchaser buys an Amazon product, Amazon is required to - and does - collect sales tax from the purchaser. In contrast, when a purchaser buys from a hosted seller, Amazon is not required to collect sales tax from the purchaser at checkout, even though the purchaser owes the tax and Amazon is, indeed, in control of the digital cash register. The hosted seller has the legal obligation to collect and remit the tax owed by the purchaser, despite the fact that these sellers do not participate directly in the actual sales transaction.

It's a platform where more shoppers are heading. An Amazon.com press release from November 2016 boasted "50 percent of the total units sold on Amazon are from sellers" ("Sellers on

Amazon Ready for Busy Holiday Season," Amazon Press Room, November 17, 2016).

This application of current law to the marketplace model results in a disconnect between a seller's obligation to collect tax and its opportunity to collect tax. This disconnect, in turn, results in the widespread failure of New York State to receive taxes legally due and owing on sales by hosted sellers.

Part BB offers a simple remedy: require marketplaces (in this example, Amazon) to collect tax on all sales to New York buyers transacted on its site. This collection obligation would be the same as that currently imposed by New York on consignment shop owners and auction houses which, like Amazon, facilitate sales and "control the cash register." They are best suited to collect tax on sales by the sellers they assist.

The proposed legislation would require online marketplaces with more than \$100 million in annual sales to collect and remit tax just as consignment shops and auction houses currently do.

**Bottom line: It's fair, and pro-business**

We'll say it again - New York's Main Street merchants small and large will compete on price, selection, and quality of service. State law requires these merchants to register as sales tax vendors and collect the sales and use taxes that shoppers are required by state law to pay.

Marketplace providers must follow the same rules as Main Street merchants and the out-of-state merchants captured under New York's court-tested 'click-through nexus' law.

The largest marketplace providers that would be captured under this balanced proposal are sophisticated enough to make instant recommendations and tailor on-line advertisements to every individual shopper based on his or her purchase history. If they can do that; if they can create international platforms and systems of distribution for themselves and their third-party sellers, then it can be no issue whatsoever for them to collect and remit New York's sales and use taxes.

Part BB of S.2009 / A.3009 supports and defends the state's Main Street businesses small and large that give jobs to hundreds of thousands of New Yorkers, support community activities, and give our communities their local color, flavor, and vibrancy.

The Retail Council of New York State therefore thanks Governor Cuomo for including the measure in his Executive Budget proposal and urges the state Legislature to accept and enact it as written.