

Insights

NEW YORK MAY LEAD THE PACK THROUGH IMPOSITION OF DATA EXCISE TAXES

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New York may lead the charge on implementation of data excise taxes (*i.e.*, “data mining taxes”) which will impose taxes on businesses that collect personal data. These data excise taxes primarily target large tech companies like Google and Amazon and other large corporations given the thresholds set forth in the proposed bill. Presently under review by the New York Senate is [NY Senate Bill S2012](#) (the “Bill”) which, if enacted, would “raise revenue to fund state services by imposing a tax on the collection of New Yorkers’ consumer data by businesses for commercial purposes.” The Bill was first introduced in 2021 without much movement until recently when the Bill was sent to the state’s Budget and Revenue Committee. Interestingly, this implicitly assigns a value to data which is not only a new approach not previously implemented by any other state but also may have consequences for Article III standing purposes.

Under the Bill, the data excise tax would only be imposed on businesses who meet the following thresholds:

1. the businesses must be for-profit businesses that collect data (excluding basic consumer contact information); and
2. the data collected must be for greater than one million New York consumers in any given month.

Notably, “consumer contact information,” as used in the Bill, includes traditional contact information—*i.e.*, email address, telephone number, address, etc.—but also includes credit card information necessary for a sales transaction. The foregoing thresholds would quickly encompass large corporations such as Google and Facebook but would also capture other corporations of smaller scale.

The data excise tax would be implemented in a graduated rate schedule starting at five cents per New York consumer per month if greater than one million New York consumers are affected in a month. The rate gradually increases to a maximum of fifty cents per New York resident per month if greater than ten million New York consumers are affected in a month; however, once greater than two million New York consumers are affected in a month, the business is not only taxed per individual but is also required to pay monthly a set amount which increases based on the number

of affected consumers. For example, when between 2,000,001 and 3,000,000 consumers are affected in a given month, the company would be required to pay ten cents per consumer per month, *plus* \$50,000 per month. Those taxes increase at defined intervals up to greater than ten million consumers where the company would be required to pay fifty cents per consumer and a set fee of \$2,250,000 per month.

The sponsor's memo states that “[t]he tax paid per consumer is extremely modest” citing the following examples: thirty cents a year per consumer for businesses collecting data on two million New York residents, or \$2.70 per consumer per year for businesses collecting data on ten million New York residents. The sponsor's memo, however, does not reference the per month set fee to be paid in addition to the per consumer per month rate.^[1] Indeed, the proposed data excise tax has the potential to quickly add up thereby costing businesses millions of dollars a year to operate in New York when “consumer contact information” is collected by such businesses.

In addition, business entities with common ownership will be treated as a single taxpayer for purposes of this Bill. Note, however, by combining businesses with common ownership, the thresholds for application of the tax may be reached where they would not be had the entities been assessed individually. If passed, the data excise tax would start to be imposed on the first day of the month that begins six months after the Bill becomes effective.

One of the major factors that should be considered with this proposed data excise tax is how the state would administer and enforce the tax. For example, should this impact businesses who collect data but do not use it for business activities? Or, how would the state distinguish between data controllers and data processors when the data processors are collecting data for the data controller? Once the Bill is through the Budget and Revenue Committee, more light may be shed on this topic.

[1] It is unclear how the sponsor arrived at the stated per consumer per year rates presented in the sponsor's memo. Using the sponsor's exemplary number of consumers of 10,000,000, the calculations, based on the values set forth in the Bill, for the per consumer per year tax yield results that differ from those provided by the sponsor:

Ten million New York residents:

$10,000,000 \times \$0.45 \text{ per consumer} = \$4,500,000$

$\$4,500,000 + \$1,800,000 \text{ set fee} = \$6,300,000 \text{ per month total}$

$\$6,300,000 \times 12 \text{ months} = \$75,600,000 \text{ per year}$

$\$75,600,000 \div 10,000,000 \text{ consumers} = \$7.56 \text{ per consumer per year}$

Note, if the number of consumers is increased by one consumer to 10,000,001, the per consumer per year tax increases to \$8.70.

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- Data Privacy & Security

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