

112TH CONGRESS  
1ST SESSION

# H. R. 1860

To promote neutrality, simplicity, and fairness in the taxation of digital goods and digital services.

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## IN THE HOUSE OF REPRESENTATIVES

MAY 12, 2011

Mr. SMITH of Texas (for himself, Mr. COHEN, Mr. COBLE, and Mr. HASTINGS of Florida) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To promote neutrality, simplicity, and fairness in the taxation of digital goods and digital services.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Digital Goods and  
5 Services Tax Fairness Act of 2011”.

6 **SEC. 2. FINDING.**

7 The Congress finds that it is appropriate to exercise  
8 congressional enforcement authority under section 5 of the  
9 14th amendment to the Constitution of the United States  
10 and Congress’ plenary power under article I, section 8,

1 clause 3 of the Constitution of the United States (com-  
2 monly known as the “commerce clause”) in order to en-  
3 sure that States and political subdivisions thereof do not  
4 discriminate against providers and consumers of digital  
5 goods and digital services by imposing multiple, excessive  
6 and discriminatory taxes and other burdens on such pro-  
7 viders and consumers.

8 **SEC. 3. MULTIPLE AND DISCRIMINATORY TAXES PROHIB-**  
9 **ITED.**

10 No State or local jurisdiction shall impose multiple  
11 or discriminatory taxes on or with respect to the sale or  
12 use of digital goods or digital services.

13 **SEC. 4. RETAIL, SOURCING, AND OTHER LIMITATIONS AND**  
14 **RULES.**

15 (a) **RETAIL LIMITATION.**—Taxes on or with respect  
16 to the sale of digital goods or digital services may only  
17 be imposed on or with respect to a sale to a customer.

18 (b) **TAXPAYER LIMITATION.**—Taxes on or with re-  
19 spect to the sale of digital goods or digital services may  
20 only be imposed on and collected only from a customer  
21 or a seller.

22 (c) **SOURCING LIMITATION.**—

23 (1) **IN GENERAL.**—Taxes on or with respect to  
24 the sale of digital goods or digital services may be  
25 imposed only by the State and local jurisdictions

1       whose territorial limits encompass the customer's tax  
2       address.

3               (2) MULTIPLE LOCATIONS.—If the sale of dig-  
4       ital goods or digital services is made to multiple lo-  
5       cations of a customer, whether simultaneously or  
6       over a period of time, the seller may determine the  
7       customer's tax address or addresses using the ad-  
8       dress or addresses of use as provided by the cus-  
9       tomer.

10              (3) SELLER HELD HARMLESS.—A seller that  
11       relies in good faith on information provided by a  
12       customer to determine the customer's tax address or  
13       addresses shall not be held liable for any additional  
14       tax based on a different determination of the cus-  
15       tomer's tax address or addresses.

16              (d) LIMITATION ON EXPANSIVE INTERPRETATION.—  
17       No tax on or with respect to the sale or use of tangible  
18       personal property, telecommunications service, Internet  
19       access service, or audio or video programming service may  
20       be construed by any regulation, administrative ruling, or  
21       otherwise, to be imposed on or with respect to the sale  
22       or use of a digital good or a digital service. For purposes  
23       of this Act, a transaction involving a digital good shall  
24       be characterized solely as a transaction involving the pro-  
25       vision of a digital service unless the transaction results

1 in the transfer or delivery of a complete copy, with the  
2 right to use permanently or for a specified period, of the  
3 digital good that is the subject of the transaction. No tax  
4 on or with respect to the sale or use of a digital good may  
5 be construed by any regulation, administrative ruling, or  
6 otherwise, to be imposed on or with respect to the sale  
7 or use of a digital service. The limitations provided by this  
8 subsection shall not apply to any construction of a statute  
9 that was approved by a judicial interpretation of that stat-  
10 ute on or before the date of the enactment of this Act.

11 (e) TREATMENT OF BUNDLED GOODS AND SERV-  
12 ICES.—

13 (1) IN GENERAL.—Subject to paragraph (2), if  
14 charges for digital goods or digital services are ag-  
15 gregated with, and not separately stated from,  
16 charges for other goods or services, then the charges  
17 for digital goods or digital services may be taxed for  
18 purposes of this Act at the same rate and on the  
19 same basis as charges for the other goods or services  
20 unless the seller can reasonably identify the charges  
21 for the digital goods or digital services from its  
22 books and records kept in the regular course of busi-  
23 ness.

24 (2) CHARGES FOR DELIVERY AND TRANS-  
25 PORT.—If the charge for a digital good or digital

1 service is aggregated with, and not separately stated  
2 from, a charge for electronically delivering or trans-  
3 porting the digital good, or providing the digital  
4 service, to the customer, then the seller may either  
5 apply paragraph (1) or treat the service of electronic  
6 delivery or transport as a non-severable and inci-  
7 dental component of the digital good or digital serv-  
8 ice.

9 (f) TREATMENT OF DIGITAL CODE.—The tax treat-  
10 ment of the sale of a digital code shall be the same as  
11 the tax treatment of the sale of the digital good or digital  
12 service to which the digital code relates. The sale of the  
13 digital code shall be considered the sale transaction for  
14 purposes of this Act.

15 **SEC. 5. DEFINITIONS.**

16 In this Act:

17 (1) CUSTOMER.—

18 (A) IN GENERAL.—Subject to subpara-  
19 graph (B), the term “customer” means a per-  
20 son that purchases a digital good or digital  
21 service, for a purpose other than resale.

22 (B) END USER.—For the purpose of deter-  
23 mining a place of primary use under paragraph  
24 (2)(A), the term “customer” means the “end  
25 user” (as such term is used in section 124 of

1 title 4, United States Code) of the purchased  
2 digital good or digital service.

3 (2) CUSTOMER'S TAX ADDRESS.—The term  
4 “customer's tax address” means—

5 (A) with respect to digital goods or digital  
6 services that are sold to a customer by a pro-  
7 vider of mobile telecommunications service that  
8 is subject to being sourced under section 117 of  
9 title 4, United States Code, or for which the  
10 charges are billed to the customer by such pro-  
11 vider, and delivered or transferred electronically  
12 by means of such provider's mobile tele-  
13 communications service, the customer's place of  
14 primary use, as defined in section 124 of such  
15 title;

16 (B) if subparagraph (A) does not apply,  
17 and if the digital good or digital service is re-  
18 ceived by the customer at a business location of  
19 the seller, such business location;

20 (C) if neither subparagraph (A) nor sub-  
21 paragraph (B) applies, and if the location where  
22 the digital good or digital service is received by  
23 the customer is known to the seller, such loca-  
24 tion;

1 (D) if none of subparagraphs (A) through  
2 (C) applies, the customer’s address that is ei-  
3 ther known to the seller or, if not known, ob-  
4 tained by the seller during the consummation of  
5 the transaction, including the address of the  
6 customer’s payment instrument if no other ad-  
7 dress is available;

8 (E) if an address is neither known nor ob-  
9 tained as provided in subparagraph (D), the ad-  
10 dress of the seller from which the digital good  
11 or digital service was sold; and

12 (F) notwithstanding subparagraphs (A)  
13 through (E), for digital goods that are delivered  
14 or transferred, or digital services that are pro-  
15 vided, to a person other than the customer, in-  
16 cluding advertising services, the location of de-  
17 livery, transfer, or provision if known or, other-  
18 wise, the customer’s address determined under  
19 subparagraph (D) or (E).

20 (3) DELIVERED OR TRANSFERRED ELECTRONI-  
21 CALLY; PROVIDED ELECTRONICALLY.—The term  
22 “delivered or transferred electronically” means deliv-  
23 ered or transferred by means other than tangible  
24 storage media, and the term “provided electroni-  
25 cally” means provided remotely via electronic means.

1           (4) DIGITAL CODE.—The term “digital code”  
2 means a code that conveys only the right to obtain  
3 a single type of digital good or digital service.

4           (5) DIGITAL GOOD.—The term “digital good”  
5 means any good or product that is delivered or  
6 transferred electronically, including software, infor-  
7 mation maintained in digital format, digital audio-  
8 visual works, digital audio works, and digital books.

9           (6) DIGITAL SERVICE.—

10           (A) IN GENERAL.—The term “digital serv-  
11 ice” means any service that is provided elec-  
12 tronically, including the provision of remote ac-  
13 cess to or use of a digital good.

14           (B) EXCEPTION.—

15           (i) IN GENERAL.—The term “digital  
16 service” does not include telecommuni-  
17 cations service, Internet access service, or  
18 audio or video programming service.

19           (ii) AUDIO OR VIDEO PROGRAM-  
20 MING.—The term “audio or video pro-  
21 gramming” means programming provided  
22 by, or generally considered comparable to  
23 programming provided by, a radio or tele-  
24 vision broadcast station.



1 (iii) VIDEO PROGRAMMING.—The term  
2 “video programming” shall not include  
3 interactive on-demand services (as defined  
4 section 602(12) of the Communications  
5 Act of 1934 (47 U.S.C. 522(12)), pay-per-  
6 view services, or services generally consid-  
7 ered comparable to such services regardless  
8 of the technology used to provide such  
9 services.

10 (7) DISCRIMINATORY TAX.—

11 (A) IN GENERAL.—The term “discrimina-  
12 tory tax” means any tax imposed by a State or  
13 local jurisdiction—

14 (i) on or with respect to the sale or  
15 use of any digital good or digital service at  
16 a higher rate than is generally imposed on  
17 or with respect to the sale or use of tan-  
18 gible personal property or of similar serv-  
19 ices that are not provided electronically;

20 (ii) on or with respect to any seller of  
21 digital goods or digital services at a higher  
22 rate or by incorporating a broader tax base  
23 than is generally imposed on or with re-  
24 spect to sellers in transactions involving  
25 tangible personal property or involving

1 similar services that are not provided elec-  
2 tronically, except that this clause shall  
3 apply only to the extent that the higher  
4 rate or broader tax base is attributable to  
5 the fact that such person sells digital goods  
6 or digital services;

7 (iii) that is required to be collected  
8 with respect to the sale or use of digital  
9 goods or digital services by different sellers  
10 or under other terms that are disadvanta-  
11 geous to those applied in taxing the sale or  
12 use of tangible personal property or of  
13 similar services that are not provided elec-  
14 tronically; or

15 (iv) on or with respect to any sepa-  
16 rately stated amount that is charged by  
17 the seller of a specific digital good or dig-  
18 ital service, and is directly related to elec-  
19 tronically delivering or transferring that  
20 good or service, at a higher rate than is  
21 generally imposed on or with respect to de-  
22 livery charges, or shipping and handling  
23 charges, on tangible personal property.

24 (B) APPLICATION.—For purposes of this  
25 paragraph, all taxes, tax rates, exemptions, de-

1           ductions, credits, incentives, exclusions, and  
2           other similar factors shall be taken into account  
3           in determining whether a tax is a discrimina-  
4           tory tax.

5           (8) **GENERALLY IMPOSED.**—A tax shall not be  
6           considered “generally imposed” if it is imposed only  
7           on specific services, specific industries or business  
8           segments, or specific types of property.

9           (9) **MULTIPLE TAX.**—The term “multiple tax”  
10          means any tax that is imposed on or with respect to  
11          the sale or use of a digital good or a digital service  
12          by a State or local jurisdiction, for which such State  
13          or local jurisdiction gives no credit with respect to  
14          a tax that was previously paid on or with respect to  
15          the sale or use of such digital good or digital service  
16          to another State or local jurisdiction, unless the ter-  
17          ritorial limits of the jurisdiction imposing the earlier  
18          tax and the jurisdiction imposing the later tax both  
19          encompass the same tax address of the customer.

20          (10) **PURCHASE FOR RESALE.**—A digital good  
21          or digital service is purchased for the purpose of re-  
22          sale if such good or service is purchased for the pur-  
23          pose of reselling it, or for using it as a component  
24          part of or integration into another digital good or  
25          digital service that is to be sold to another person,

1 and includes the purchase of a digital good or digital  
2 service for further commercial broadcast, rebroad-  
3 cast, streaming, restreaming, transmission, retrans-  
4 mission, licensing, relicensing, reproduction, copying,  
5 distribution, redistribution, or exhibition of the dig-  
6 ital good or digital service, in whole or in part, to  
7 another person.

8 (11) SALE AND PURCHASE.—The terms “sale”  
9 and “purchase”, and all variations thereof, shall in-  
10 clude lease, rent, and license, and corresponding  
11 variations thereof.

12 (12) SELLER.—The term “seller” means a per-  
13 son making sales of tangible personal property, dig-  
14 ital goods, digital services, or other services, and  
15 does not include a person that provides, on behalf of  
16 another person, order taking, order fulfillment, bill-  
17 ing, or electronic delivery or transfer service with re-  
18 spect to the sale of a digital good or a digital serv-  
19 ice.

20 (13) STATE OR LOCAL JURISDICTION.—The  
21 term “State or local jurisdiction” means any of the  
22 several States, the District of Columbia, any terri-  
23 tory or possession of the United States, a political  
24 subdivision of any State, territory, or possession, or  
25 any governmental entity or person acting on behalf

1 of such State, territory, possession, or subdivision  
2 and with the authority to assess, impose, levy, or  
3 collect taxes.

4 (14) TAX.—The term “tax” means any charge  
5 imposed by any State or local jurisdiction for the  
6 purpose of generating revenues for governmental  
7 purposes, including any tax, charge, or fee levied as  
8 a fixed charge or measured by gross amounts  
9 charged, regardless of whether such tax, charge, or  
10 fee is imposed on the seller or the customer and re-  
11 gardless of the terminology used to describe the tax,  
12 charge, or fee. Such term does not include a tax on  
13 or measured by net income or an ad valorem tax.

14 **SEC. 6. FEDERAL JURISDICTION.**

15 Notwithstanding section 1341 of title 28, United  
16 States Code, and without regard to the amount in con-  
17 troversy or citizenship of the parties, a district court of  
18 the United States has jurisdiction, concurrent with other  
19 jurisdiction of courts of the United States and the States,  
20 to prevent a violation of this Act.

21 **SEC. 7. EFFECTIVE DATE; APPLICATION.**

22 (a) GENERAL RULE.—This Act shall take effect on  
23 the date of the enactment of this Act.

24 (b) APPLICATION TO LIABILITIES AND PENDING  
25 CASES.—Nothing in this Act shall affect liability for taxes

1 accrued and enforced before the date of the enactment of  
2 this Act, or affect ongoing litigation relating to such taxes,  
3 except as provided in section 4(d) of this Act.

4 **SEC. 8. SENSE OF CONGRESS.**

5       It is the sense of Congress that each State shall take  
6 reasonable steps necessary to prevent multiple taxation of  
7 digital goods and digital services in situations where a for-  
8 eign country has imposed a tax on such goods or services.

9 **SEC. 9. SAVINGS PROVISION.**

10       If any provision or part of this Act is held to be in-  
11 valid or unenforceable by a court of competent jurisdiction  
12 for any reason, such holding shall not affect the validity  
13 or enforceability of any other provision or part of this Act.

○