

112TH CONGRESS
1ST SESSION

S. 971

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

IN THE SENATE OF THE UNITED STATES

MAY 12, 2011

Mr. WYDEN (for himself and Mr. THUNE) introduced the following bill; which was read twice and referred to the Committee on Finance

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 TRANSFER.—

25 If the charge for a digital good or digital service is

1 aggregated with, and not separately stated from, a
2 charge for electronically delivering or transferring
3 the digital good, or providing the digital service, to
4 the customer, then the seller may either apply para-
5 graph (1) or treat the service of electronic delivery
6 or transfer as a non-severable and incidental compo-
7 nent of the digital good or digital service.

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

14 **SEC. 5. DEFINITIONS.**

15 In this Act:

16 (1) CUSTOMER.—

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

21 (B) END USER.—For the purpose of deter-
22 mining a place of primary use under paragraph
23 (2)(A), the term “customer” means the “end
24 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 electronically”
25 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 providing that service, at a higher
21 rate than is generally imposed on or with
22 respect to delivery charges, or shipping and
23 handling charges, on tangible personal
24 property.

1 (B) APPLICATION.—For purposes of this
2 paragraph, all taxes, tax rates, exemptions, de-
3 ductions, credits, incentives, exclusions, and
4 other similar factors shall be taken into account
5 in determining whether a tax is a discrimina-
6 tory tax.

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

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

22 (10) PURCHASE FOR RESALE.—A digital good
23 or digital service is purchased for the purpose of re-
24 sale if such good or service is purchased for the pur-
25 pose of reselling it, or for using it as a component

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

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

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

22 (13) STATE OR LOCAL JURISDICTION.—The
23 term “State or local jurisdiction” means any of the
24 several States, the District of Columbia, any terri-
25 tory or possession of the United States, a political

1 subdivision of any State, territory, or possession, or
2 any governmental entity or person acting on behalf
3 of such State, territory, possession, or subdivision
4 and with the authority to assess, impose, levy, or
5 collect taxes.

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

16 **SEC. 6. FEDERAL JURISDICTION.**

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

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

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

1 (b) APPLICATION TO LIABILITIES AND PENDING
2 CASES.—Nothing in this Act shall affect liability for taxes
3 accrued and enforced before the date of the enactment of
4 this Act, or affect ongoing litigation relating to such taxes,
5 except as provided in section 4(d) of this Act.

6 **SEC. 8. SENSE OF CONGRESS.**

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

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

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

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