

110TH CONGRESS  
2D SESSION

# H. R. 5267

To regulate certain State taxation of interstate commerce, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 7, 2008

Mr. BOUCHER (for himself, Mr. GOODLATTE, Mr. DAVIS of Alabama, Mr. CHABOT, Ms. HERSETH SANDLIN, Mr. FEENEY, Ms. JACKSON-LEE of Texas, Mr. GALLEGLY, Mr. JOHNSON of Georgia, Mr. PENCE, Ms. ZOE LOFGREN of California, Mr. SCOTT of Virginia, and Mr. WEXLER) introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

To regulate certain State taxation of interstate commerce,  
and for other purposes.

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 “Business Activity Tax  
5 Simplification Act of 2008”.

6 **SEC. 2. MODERNIZATION OF PUBLIC LAW 86-272.**

7 (a) SOLICITATIONS WITH RESPECT TO SALES AND  
8 TRANSACTIONS OF OTHER THAN TANGIBLE PERSONAL

1 PROPERTY.—Section 101 of the Act entitled “An Act re-  
2 lating to the power of the States to impose net income  
3 taxes on income derived from interstate commerce, and  
4 authorizing studies by congressional committees of mat-  
5 ters pertaining thereto”, approved September 14, 1959  
6 (15 U.S.C. 381 et seq.) is amended—

7 (1) in section (a), by striking “either, or both,”  
8 and inserting “any one or more”;

9 (2) in subsection (a)(1), by striking “by such  
10 person” and all that follows and inserting “(which  
11 are sent outside the State for approval or rejection)  
12 or customers by such person, or his representative,  
13 in such State for sales or transactions, which are—

14 “(A) in the case of tangible personal prop-  
15 erty, filled by shipment or delivery from a point  
16 outside the State; and

17 “(B) in the case of all other forms of prop-  
18 erty, services, and other transactions, fulfilled  
19 or distributed from a point outside the State;”;

20 (3) in subsection (a)(2), by striking the period  
21 at the end and inserting a semicolon;

22 (4) in subsection (a), by adding at the end the  
23 following new paragraphs:

24 “(3) the furnishing of information to customers  
25 or affiliates in such State, or the coverage of events

1 or other gathering of information in such State by  
2 such person, or his representative, which information  
3 is used or disseminated from a point outside the  
4 State; and

5 “(4) those business activities directly related to  
6 such person’s potential or actual purchase of goods  
7 or services within the State if the final decision to  
8 purchase is made outside the State.”;

9 (5) by striking subsection (c) and inserting the  
10 following new subsection:

11 “(c) For purposes of subsection (a) of this section,  
12 a person shall not be considered to have engaged in busi-  
13 ness activities within a State during any taxable year  
14 merely—

15 “(1) by reason of sales or transactions in such  
16 State, the solicitation of orders for sales or trans-  
17 actions in such State, the furnishing of information  
18 to customers or affiliates in such State, or the cov-  
19 erage of events or other gathering of information in  
20 such State, on behalf of such person by one or more  
21 independent contractors;

22 “(2) by reason of the maintenance of an office  
23 in such State by one or more independent contrac-  
24 tors whose activities on behalf of such person in  
25 such State consist solely of making sales or fulfilling

1 transactions, soliciting order for sales or trans-  
2 actions, the furnishing of information to customers  
3 or affiliates, or the coverage of events or other gath-  
4 ering of information; or

5 “(3) by reason of the furnishing of information  
6 to an independent contractor by such person ancil-  
7 lary to the solicitation of orders or transactions by  
8 the independent contractor on behalf of such per-  
9 son.”; and

10 (6) in subsection (d)(1)—

11 (A) by inserting “or fulfilling trans-  
12 actions,” after “selling”; and

13 (B) by striking “the sale of, tangible per-  
14 sonal property” and inserting “a sale or trans-  
15 action, furnishing information, or covering  
16 events, or otherwise gathering information”.

17 (b) APPLICATION OF PROHIBITIONS TO OTHER BUSI-  
18 NESS ACTIVITY TAXES.—Title I of the Act entitled “An  
19 Act relating to the power of the States to impose net in-  
20 come taxes on income derived from interstate commerce,  
21 and authorizing studies by congressional committees of  
22 matters pertaining thereto”, approved September 14,  
23 1959, (15 U.S.C. 381 et seq.) is amended by adding at  
24 the end the following:

1       “SEC. 105. For taxable periods beginning on or after  
 2 January 1, 2009, the prohibitions of section 101 that  
 3 apply with respect to net income taxes shall also apply  
 4 with respect to each other business activity tax, as defined  
 5 in section 3(g) of the Business Activity Tax Simplification  
 6 Act of 2008. A State or political subdivision thereof may  
 7 not assess or collect any tax which by reason of this sec-  
 8 tion the State or political subdivision may not impose.”.

9       (c) EFFECTIVE DATE.—The amendments made by  
 10 this section shall apply with respect to the imposition, as-  
 11 sessment, and collection of taxes for taxable periods begin-  
 12 ning on or after January 1, 2009.

13 **SEC. 3. MINIMUM JURISDICTIONAL STANDARD FOR STATE**  
 14 **AND LOCAL NET INCOME TAXES AND OTHER**  
 15 **BUSINESS ACTIVITY TAXES.**

16       (a) IN GENERAL.—No taxing authority of a State  
 17 shall have power to impose, assess, or collect a net income  
 18 tax or other business activity tax on any person relating  
 19 to such person’s activities in interstate commerce unless  
 20 such person has a physical presence in the State during  
 21 the taxable period with respect to which the tax is im-  
 22 posed.

23       (b) REQUIREMENTS FOR PHYSICAL PRESENCE.—

24               (1) IN GENERAL.—For purposes of subsection

25       (a), a person has a physical presence in a State only

1 if such person's business activities in the State in-  
 2 clude any of the following during such person's tax-  
 3 able year:

4 (A) Being an individual physically in the  
 5 State, or assigning one or more employees to be  
 6 in the State.

7 (B) Using the services of an agent (exclud-  
 8 ing an employee) to establish or maintain the  
 9 market in the State, if such agent does not per-  
 10 form business services in the State for any  
 11 other person during such taxable year.

12 (C) The leasing or owning of tangible per-  
 13 sonal property or of real property in the State.

14 (2) DE MINIMIS PHYSICAL PRESENCE.—For  
 15 purposes of this section, the term “physical pres-  
 16 ence” shall not include—

17 (A) presence in a State for less than 15  
 18 days in a taxable year (or a greater number of  
 19 days if provided by State law); or

20 (B) presence in a State to conduct limited  
 21 or transient business activity.

22 (c) TAXABLE PERIODS NOT CONSISTING OF A  
 23 YEAR.—If the taxable period for which the tax is imposed  
 24 is not a year, then any requirements expressed in days

1 for establishing physical presence under this Act shall be  
2 adjusted pro rata accordingly.

3 (d) MINIMUM JURISDICTIONAL STANDARD.—This  
4 section provides for minimum jurisdictional standards and  
5 shall not be construed to modify, affect, or supersede the  
6 authority of a State or any other provision of Federal law  
7 allowing persons to conduct greater activities without the  
8 imposition of tax jurisdiction.

9 (e) EXCEPTIONS.—

10 (1) DOMESTIC BUSINESS ENTITIES AND INDIVIDUALS  
11 DOMICILED IN, OR RESIDENTS OF, THE  
12 STATE.—Subsection (a) does not apply with respect  
13 to—

14 (A) a person (other than an individual)  
15 that is incorporated or formed under the laws  
16 of the State (or domiciled in the State) in which  
17 the tax is imposed; or

18 (B) an individual who is domiciled in, or a  
19 resident of, the State in which the tax is im-  
20 posed.

21 (2) TAXATION OF PARTNERS AND SIMILAR PER-  
22 SONS.—This section shall not be construed to modify  
23 or affect any State business activity tax liability of  
24 an owner or beneficiary of an entity that is a part-  
25 nership, an S corporation (as defined in section

1        1361 of the Internal Revenue Code of 1986), a lim-  
 2        ited liability company (classified as a partnership for  
 3        Federal income tax purposes), a trust, an estate, or  
 4        any other similar entity, if the entity has a physical  
 5        presence in the State in which the tax is imposed.

6            (3) PRESERVATION OF AUTHORITY.—This sec-  
 7        tion shall not be construed to modify, affect, or su-  
 8        persede the authority of a State to bring an enforce-  
 9        ment action against a person or entity that may be  
 10      engaged in an illegal activity, a sham transaction, or  
 11      any perceived or actual abuse in its business activi-  
 12      ties if such enforcement action does not modify, af-  
 13      fect, or supersede the operation of any provision of  
 14      this section or of any other Federal law.

15      (f) RULE OF CONSTRUCTION.—This section shall not  
 16      be construed to modify, affect, or supersede the operation  
 17      of title I of the Act entitled “An Act relating to the power  
 18      of the States to impose net income taxes on income derived  
 19      from interstate commerce, and authorizing studies by con-  
 20      gressional committees of matters pertaining thereto”, ap-  
 21      proved September 14, 1959 (15 U.S.C. 381 et seq.).

22      (g) DEFINITIONS, ETC.—For purposes of this section:

23            (1) NET INCOME TAX.—The term “net income  
 24      tax” has the meaning given that term for the pur-  
 25      poses of the Act entitled “An Act relating to the



1 power of the States to impose net income taxes on  
2 income derived from interstate commerce, and au-  
3 thorizing studies by congressional committees of  
4 matters pertaining thereto”, approved September  
5 14, 1959 (15 U.S.C. 381 et seq.).

6 (2) OTHER BUSINESS ACTIVITY TAX.—

7 (A) IN GENERAL.—The term “other busi-  
8 ness activity tax” means any tax in the nature  
9 of a net income tax or tax measured by the  
10 amount of, or economic results of, business or  
11 related activity conducted in the State.

12 (B) EXCLUSION.—The term “other busi-  
13 ness activity tax” does not include a sales tax,  
14 a use tax, or a similar transaction tax, imposed  
15 on the sale or acquisition of goods or services,  
16 whether or not denominated a tax imposed on  
17 the privilege of doing business.

18 (3) PERSON.—The term “person” has the  
19 meaning given such term by section 1 of title 1 of  
20 the United States Code.

21 (4) STATE.—The term “State” means any of  
22 the several States, the District of Columbia, or any  
23 territory or possession of the United States, or any  
24 political subdivision of any of the foregoing.

1           (5) TANGIBLE PERSONAL PROPERTY.—For pur-  
2       poses of subsection (b)(1)(C), the leasing or owning  
3       of tangible personal property does not include the  
4       leasing or licensing of computer software.

5       (h) EFFECTIVE DATE.—This section shall apply with  
6       respect to taxable periods beginning on or after January  
7       1, 2009.

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