

113TH CONGRESS
1ST SESSION

S. 1364

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

IN THE SENATE OF THE UNITED STATES

JULY 25, 2013

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 2013”.

6 **SEC. 2. MULTIPLE AND DISCRIMINATORY TAXES PROHIB-**
7 **ITED.**

8 No State or local jurisdiction shall impose multiple
9 or discriminatory taxes on the sale or use of a digital good
10 or a digital service.

1 **SEC. 3. SOURCING LIMITATION.**

2 Subject to section 6(a), taxes on the sale of a digital
3 good or a digital service may only be imposed by a State
4 or local jurisdiction whose territorial limits encompass the
5 customer tax address.

6 **SEC. 4. CUSTOMER TAX ADDRESS.**

7 (a) SELLER OBLIGATION.—

8 (1) IN GENERAL.—Subject to subsection (e)(2),
9 a seller shall be responsible for obtaining and main-
10 taining in the ordinary course of business the cus-
11 tomer tax address with respect to the sale of a dig-
12 ital good or a digital service, and shall be responsible
13 for collecting and remitting the correct amount of
14 tax for the State and local jurisdictions whose terri-
15 torial limits encompass the customer tax address if
16 the State has the authority to require such collection
17 and remittance by the seller.

18 (2) CERTAIN TRANSACTIONS.—When a cus-
19 tomer tax address is not a business location of the
20 seller under clause (i) of section 7(2)(A)—

21 (A) if the sale is a separate and discrete
22 transaction, then a seller shall use reasonable
23 efforts to obtain a customer tax address, as
24 such efforts are described in clauses (iii), (iv),
25 and (v) of section 7(2)(A), before resorting to

1 using a customer tax address as determined by
2 clause (vi) of such section 7(2)(A); and

3 (B) if the sale is not a separate and dis-
4 crete transaction, then a seller shall use reason-
5 able efforts to obtain a customer tax address,
6 as such efforts are described in clauses (ii),
7 (iii), (iv), and (v) of section 7(2)(A), before re-
8 sorting to using a customer tax address as de-
9 termined by clause (vi) of such section 7(2)(A).

10 (b) RELIANCE ON CUSTOMER-PROVIDED INFORMA-
11 TION.—A seller that relies in good faith on information
12 provided by a customer to determine a customer tax ad-
13 dress shall not be held liable for any additional tax based
14 on a different determination of that customer tax address
15 by a State or local jurisdiction or court of competent juris-
16 diction, except if and until binding notice is given as pro-
17 vided in subsection (c).

18 (c) ADDRESS CORRECTION.—If a State or local juris-
19 diction is authorized under State law to administer a tax,
20 and the jurisdiction determines that the customer tax ad-
21 dress determined by a seller is not the customer tax ad-
22 dress that would have been determined under section
23 7(2)(A) if the seller had the additional information pro-
24 vided by the State or local jurisdiction, then the jurisdic-
25 tion may give binding notice to the seller to correct the

1 customer tax address on a prospective basis, effective not
2 less than 45 days after the date of such notice, if—

3 (1) when the determination is made by a local
4 jurisdiction, such local jurisdiction obtains the con-
5 sent of all affected local jurisdictions within the
6 State before giving such notice of determination; and

7 (2) before the State or local jurisdiction gives
8 such notice of determination, the customer is given
9 an opportunity to demonstrate in accordance with
10 applicable State or local tax administrative proce-
11 dures that the address used is the customer tax ad-
12 dress.

13 (d) COORDINATION WITH SOURCING OF MOBILE
14 TELECOMMUNICATIONS SERVICE.—

15 (1) IN GENERAL.—If—

16 (A) a digital good or a digital service is
17 sold to a customer by a home service provider
18 of mobile telecommunications service that is
19 subject to being sourced under section 117 of
20 title 4, United States Code, or the charges for
21 a digital good or a digital service are billed to
22 the customer by such a home service provider;
23 and

24 (B) the digital good or digital service is de-
25 livered, transferred, or provided electronically

1 by means of mobile telecommunications service
2 that is deemed to be provided by such home
3 service provider under section 117 of such title,
4 then the home service provider and, if different, the
5 seller of the digital good or digital service, may pre-
6 sume that the customer’s place of primary use for
7 such mobile telecommunications service is the cus-
8 tomer tax address described in section 7(2)(B) with
9 respect to the sale of such digital good or digital
10 service.

11 (2) DEFINITIONS.—For purposes of this sub-
12 section, the terms “home service provider”, “mobile
13 telecommunications service”, and “place of primary
14 use” have the same meanings as in section 124 of
15 title 4, United States Code.

16 (e) MULTIPLE LOCATIONS.—

17 (1) IN GENERAL.—If a digital good or a digital
18 service is sold to a customer and available for use
19 by the customer in multiple locations simultaneously,
20 the seller may determine the customer tax addresses
21 using a reasonable and consistent method based on
22 the addresses of use as provided by the customer
23 and determined in agreement with the customer at
24 the time of sale.

25 (2) DIRECT CUSTOMER PAYMENT.—

1 (A) ESTABLISHMENT OF DIRECT PAYMENT
2 PROCEDURES.—Each State and local jurisdic-
3 tion shall provide reasonable procedures that
4 permit the direct payment by a qualified cus-
5 tomer, as determined under procedures estab-
6 lished by the State or local jurisdiction, of taxes
7 that are on the sale of digital goods and digital
8 services to multiple locations of the customer
9 and that would, absent such procedures, be re-
10 quired or permitted by law to be collected from
11 the customer by the seller.

12 (B) EFFECT OF CUSTOMER COMPLIANCE
13 WITH DIRECT PAYMENT PROCEDURES.—When
14 a qualified customer elects to pay tax directly
15 under the procedures established under sub-
16 paragraph (A), the seller shall—

17 (i) have no obligation to obtain the
18 multiple customer tax addresses under sub-
19 section (a); and

20 (ii) not be liable for such tax, provided
21 the seller follows the State and local proce-
22 dures and maintains appropriate docu-
23 mentation in its books and records.

1 **SEC. 5. TREATMENT OF BUNDLED TRANSACTIONS AND DIG-**
2 **ITAL CODES.**

3 (a) BUNDLED TRANSACTION.—If a charge for a dis-
4 tinct and identifiable digital good or a digital service is
5 aggregated with and not separately stated from one or
6 more charges for other distinct and identifiable goods or
7 services, which may include other digital goods or digital
8 services, and any part of the aggregation is subject to tax-
9 ation, then the entire aggregation may be subject to tax-
10 ation, except to the extent that the seller can identify, by
11 reasonable and verifiable standards, one or more charges
12 for the nontaxable goods or services from its books and
13 records kept in the ordinary course of business.

14 (b) DIGITAL CODE.—The tax treatment of the sale
15 of a digital code shall be the same as the tax treatment
16 of the sale of the digital good or digital service to which
17 the digital code relates.

18 (c) RULE OF CONSTRUCTION.—The sale of a digital
19 code shall be considered the sale transaction for purposes
20 of this Act.

21 **SEC. 6. NO INFERENCE.**

22 (a) CUSTOMER LIABILITY.—Subject to the prohibi-
23 tion provided in section 2, nothing in this Act modifies,
24 impairs, supersedes, or authorizes the modification, im-
25 pairment, or supersession of any law allowing a State or
26 local jurisdiction to impose tax on and collect tax directly

1 from a customer based upon use of a digital good or digital
2 service in such State.

3 (b) NON-TAX MATTERS.—This Act shall not be con-
4 strued to apply in, or to affect, any non-tax regulatory
5 matter or other context.

6 (c) STATE TAX MATTERS.—The definitions con-
7 tained in this Act are intended to be used with respect
8 to interpreting this Act. Nothing in this Act shall prohibit
9 a State or local jurisdiction from adopting different no-
10 menclature to enforce the provisions set forth in this Act.

11 **SEC. 7. DEFINITIONS.**

12 In this Act, the following definitions shall apply:

13 (1) CUSTOMER.—The term “customer” means
14 a person that purchases a digital good, digital serv-
15 ice, or digital code.

16 (2) CUSTOMER TAX ADDRESS.—

17 (A) IN GENERAL.—The term “customer
18 tax address” means—

19 (i) with respect to the sale of a digital
20 good or digital service that is received by
21 the customer at a business location of the
22 seller, such business location;

23 (ii) if clause (i) does not apply and
24 the primary use location of the digital good

1 or digital service is known by the seller,
2 such location;

3 (iii) if neither clause (i) nor clause (ii)
4 applies, and if the location where the dig-
5 ital good or digital service is received by
6 the customer, or by a donee of the cus-
7 tomer that is identified by such customer,
8 is known to the seller and maintained in
9 the ordinary course of the seller's business,
10 such location;

11 (iv) if none of clauses (i) through (iii)
12 applies, the location indicated by an ad-
13 dress for the customer that is available
14 from the business records of the seller that
15 are maintained in the ordinary course of
16 the seller's business, when use of the ad-
17 dress does not constitute bad faith;

18 (v) if none of clauses (i) through (iv)
19 applies, the location indicated by an ad-
20 dress for the customer obtained during the
21 consummation of the sale, including the
22 address of a customer's payment instru-
23 ment, when use of this address does not
24 constitute bad faith; or

1 (vi) if none of clauses (i) through (v)
2 applies, including the circumstance in
3 which the seller is without sufficient infor-
4 mation to apply such paragraphs, the loca-
5 tion from which the digital good was first
6 available for transmission by the seller
7 (disregarding for these purposes any loca-
8 tion that merely provides for the digital
9 transfer of the product sold), or from
10 which the digital service was provided by
11 the seller.

12 (B) EXCLUSION.—For purposes of this
13 paragraph, the term “location” does not include
14 the location of a server, machine, or device, in-
15 cluding an intermediary server, that is used
16 simply for routing or storage.

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

24 (4) DIGITAL CODE.—The term “digital code”
25 means a code that conveys only the right to obtain

1 a digital good or digital service without making fur-
2 ther payment.

3 (5) DIGITAL GOOD.—The term “digital good”
4 means any software or other good that is delivered
5 or transferred electronically, including sounds, im-
6 ages, data, facts, or combinations thereof, main-
7 tained in digital format, where such good is the true
8 object of the transaction, rather than the activity or
9 service performed to create such good, and includes,
10 as an incidental component, charges for the delivery
11 or transfer of the digital good.

12 (6) DIGITAL SERVICE.—

13 (A) IN GENERAL.—The term “digital serv-
14 ice” means any service that is provided elec-
15 tronically, including the provision of remote ac-
16 cess to or use of a digital good, and includes,
17 as an incidental component, charges for the
18 electronic provision of the digital service to the
19 customer.

20 (B) EXCEPTIONS.—The term “digital serv-
21 ice” does not include a service that is predomi-
22 nantly attributable to the direct, contempora-
23 neous expenditure of live human effort, skill, or
24 expertise, a telecommunications service, an an-
25 cillary service, Internet access service, audio or

1 video programming service, or a hotel inter-
2 mediary service.

3 (C) CLARIFYING DEFINITIONS.—For pur-
4 poses of subparagraph (B)—

5 (i) the term “ancillary service” means
6 a service that is associated with or inci-
7 dental to the provision of telecommuni-
8 cations services, including, but not limited
9 to, detailed telecommunications billing, di-
10 rectory assistance, vertical service, and
11 voice mail services;

12 (ii) the term “audio or video program-
13 ming service”—

14 (I) means programming provided
15 by, or generally considered com-
16 parable to programming provided by,
17 a radio or television broadcast station;
18 and

19 (II) does not include interactive
20 on-demand services, as defined in
21 paragraph (12) of section 602 of the
22 Communications Act of 1934 (47
23 U.S.C. 522(12)), pay-per-view serv-
24 ices, or services generally considered
25 comparable to such services regardless

1 of the technology used to provide such
2 services;

3 (iii) the term “hotel intermediary
4 service”—

5 (I) means a service provided by a
6 person that facilitates the sale, use, or
7 possession of a hotel room or other
8 transient accommodation to the gen-
9 eral public; and

10 (II) does not include the pur-
11 chase of a digital service by a person
12 who provides a hotel intermediary
13 service or by a person who owns, oper-
14 ates, or manages hotel rooms or other
15 transient accommodations;

16 (iv) the term “Internet access service”
17 means a service that enables users to con-
18 nect to the Internet, as defined in the
19 Internet Tax Freedom Act (47 U.S.C. 151
20 note), to access content, information, or
21 other services offered over the Internet;
22 and

23 (v) the term “telecommunications
24 service”—

1 (I) means the electronic trans-
2 mission, conveyance, or routing of
3 voice, data, audio, video, or any other
4 information or signals to a point, or
5 between or among points;

6 (II) includes such transmission,
7 conveyance, or routing in which com-
8 puter processing applications are used
9 to act on the form, code, or protocol
10 of the content for purposes of trans-
11 mission, conveyance, or routing, with-
12 out regard to whether such service is
13 referred to as voice over Internet pro-
14 tocol service; and

15 (III) does not include data proc-
16 essing and information services that
17 allow data to be generated, acquired,
18 stored, processed, or retrieved and de-
19 livered by an electronic transmission
20 to a purchaser where such purchaser's
21 primary purpose for the underlying
22 transaction is the processed data or
23 information.

24 (7) DISCRIMINATORY TAX.—The term “dis-
25 criminatory tax” means any tax imposed by a State

1 or local jurisdiction on digital goods or digital serv-
2 ices that—

3 (A) is not generally imposed and legally
4 collectible by such State or local jurisdiction on
5 transactions involving similar property, goods,
6 or services accomplished through other means;

7 (B) is not generally imposed and legally
8 collectible at the same or higher rate by such
9 State or local jurisdiction on transactions in-
10 volving similar property, goods, or services ac-
11 complished through other means;

12 (C) imposes an obligation to collect or pay
13 the tax on a person, other than the seller, than
14 the State or local jurisdiction would impose in
15 the case of transactions involving similar prop-
16 erty, goods, or services accomplished through
17 other means;

18 (D) establishes a classification of digital
19 services or digital goods providers for purposes
20 of establishing a higher tax rate to be imposed
21 on such providers than the tax rate generally
22 applied to providers of similar property, goods,
23 or services accomplished through other means;
24 or

1 (E) does not provide a resale and compo-
2 nent part exemption for the purchase of digital
3 goods or digital services in a manner consistent
4 with the State's resale and component part ex-
5 emption applicable to the purchase of similar
6 property, goods, or services accomplished
7 through other means.

8 (8) MULTIPLE TAX.—

9 (A) IN GENERAL.—The term “multiple
10 tax” means any tax that is imposed by one
11 State, one or more of that State's local jurisdic-
12 tions, or both on the same or essentially the
13 same digital goods and digital services that is
14 also subject to tax imposed by another State,
15 one or more local jurisdictions in such other
16 State (whether or not at the same rate or on
17 the same basis), or both, without a credit for
18 taxes paid in other jurisdictions.

19 (B) EXCEPTION.—The term “multiple
20 tax” shall not include a tax imposed by a State
21 and one or more political subdivisions thereof
22 on the same digital goods and digital services or
23 a tax on persons engaged in selling digital
24 goods and digital services which also may have
25 been subject to a sales or use tax thereon.

1 (9) PRIMARY USE LOCATION.—

2 (A) IN GENERAL.—The term “primary use
3 location” means a street address representative
4 of where the customer’s use of a digital good or
5 digital service will primarily occur, which shall
6 be the residential street address or a business
7 street address of the actual end user of the dig-
8 ital good or digital service, including, if applica-
9 ble, the address of a donee of the customer that
10 is designated by the customer.

11 (B) CUSTOMERS THAT ARE NOT INDIVID-
12 UALS.—For the purpose of subparagraph (A), if
13 the customer is not an individual, the primary
14 use location is determined by the location of the
15 customer’s employees or equipment (machine or
16 device) that make use of the digital good or dig-
17 ital service, but does not include the location of
18 a person who uses the digital good or digital
19 service as the purchaser of a separate good or
20 service from the customer.

21 (10) SALE AND PURCHASE.—The terms “sale”
22 and “purchase”, and all variations thereof, shall in-
23 clude the provision, lease, rent, license, and cor-
24 responding variations thereof.

25 (11) SELLER.—

1 (A) IN GENERAL.—The term “seller”
2 means a person making sales of digital goods or
3 digital services.

4 (B) EXCEPTIONS.—A person that provides
5 billing service or electronic delivery or transport
6 service on behalf of another unrelated or unaf-
7 filiated person, with respect to the other per-
8 son’s sale of a digital good or digital service,
9 shall not be treated as a seller of that digital
10 good or digital service.

11 (C) RULE OF CONSTRUCTION.—Nothing in
12 this paragraph shall preclude the person pro-
13 viding the billing service or electronic delivery
14 or transport service from entering into a con-
15 tract with the seller to assume the tax collection
16 and remittance responsibilities of the seller.

17 (12) SEPARATE AND DISCRETE TRANS-
18 ACTION.—The term “separate and discrete trans-
19 action” means a sale of a digital good, digital code,
20 or a digital service sold in a single transaction which
21 does not involve any additional charges or continued
22 payment in order to maintain possession of the digi-
23 tal good or access to the digital service.

24 (13) STATE OR LOCAL JURISDICTION.—The
25 term “State or local jurisdiction” means any of the

1 several States, the District of Columbia, any terri-
2 tory or possession of the United States, a political
3 subdivision of any State, territory, or possession, or
4 any governmental entity or person acting on behalf
5 of such State, territory, possession, or subdivision
6 and with the authority to assess, impose, levy, or
7 collect taxes.

8 (14) TAX.—

9 (A) IN GENERAL.—The term “tax” means
10 any charge imposed by any State or local juris-
11 diction for the purpose of generating revenues
12 for governmental purposes, including any tax,
13 charge, or fee levied as a fixed charge or meas-
14 ured by gross amounts charged, regardless of
15 whether such tax, charge, or fee is imposed on
16 the seller or the customer and regardless of the
17 terminology used to describe the tax, charge, or
18 fee.

19 (B) EXCLUSIONS.—The term “tax” does
20 not include an ad valorem tax, a tax on or
21 measured by capital, a tax on or measured by
22 net income, apportioned gross income, appor-
23 tioned revenue, apportioned taxable margin, or
24 apportioned gross receipts, or, a State or local
25 jurisdiction business and occupation tax im-

1 posed on a broad range of business activity in
2 a State that enacted a State tax on gross re-
3 ceipts after January 1, 1932, and before Janu-
4 ary 1, 1936.

5 **SEC. 8. EFFECTIVE DATE; APPLICATION.**

6 (a) GENERAL RULE.—This Act shall take effect 60
7 days after the date of enactment of this Act.

8 (b) EXCEPTIONS.—A State or Local jurisdiction shall
9 have 2 years from the date of enactment of this Act to
10 modify any State or local tax statute enacted prior to date
11 of enactment of this Act to conform to the provisions set
12 forth in sections 4 and 5 of this Act.

13 (c) APPLICATION TO LIABILITIES AND PENDING
14 CASES.—Nothing in this Act shall affect liability for taxes
15 accrued and enforced before the effective date of this Act,
16 or affect ongoing litigation relating to such taxes.

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

18 If any provision or part of this Act is held to be in-
19 valid or unenforceable by a court of competent jurisdiction
20 for any reason, such holding shall not affect the validity
21 or enforceability of any other provision or part of this Act
22 unless such holding substantially limits or impairs the es-
23 sential elements of this Act, in which case this Act shall
24 be deemed invalid and of no legal effect as of the date

- 1 that the judgment on such holding is final and no longer
- 2 subject to appeal.

