

115TH CONGRESS
2D SESSION

S. 3581

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

IN THE SENATE OF THE UNITED STATES

OCTOBER 11, 2018

Mr. THUNE (for himself and Mr. WYDEN) 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 2018”.

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

8 (a) MULTIPLE TAXES.—No State or local jurisdiction
9 shall impose multiple taxes on the sale or use of a covered
10 electronic good or service.

1 (b) DISCRIMINATORY TAXES.—No State or local ju-
 2 risdiction shall impose discriminatory taxes on the sale or
 3 use of a digital good or a digital service.

4 **SEC. 3. SOURCING LIMITATION.**

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

9 **SEC. 4. CUSTOMER TAX ADDRESS.**

10 (a) SELLER OBLIGATION.—

11 (1) IN GENERAL.—Subject to subsection (e)(2),
 12 a seller shall be responsible for obtaining and main-
 13 taining in the ordinary course of business the cus-
 14 tomer tax address with respect to the sale of a cov-
 15 ered electronic good or service, and shall be respon-
 16 sible for collecting and remitting the correct amount
 17 of tax for the State and local jurisdictions whose ter-
 18 ritorial limits encompass the customer tax address if
 19 the State or local jurisdiction has the authority to
 20 require such collection and remittance by the seller.

21 (2) CERTAIN TRANSACTIONS.—When a cus-
 22 tomer tax address is not a business location of the
 23 seller under clause (i) of section 7(4)(A)—

24 (A) if the sale is a separate and discrete
 25 transaction, then a seller shall use reasonable

efforts to obtain a customer tax address, as such efforts are described in clauses (iii), (iv), and (v) of section 7(4)(A), before resorting to using a customer tax address as determined by clause (vi) of such section 7(4)(A); and

(B) if the sale is not a separate and discrete transaction, then a seller shall use reasonable efforts to obtain a customer tax address, as such efforts are described in clauses (ii), (iii), (iv), and (v) of section 7(4)(A), before resorting to using a customer tax address as determined by clause (vi) of such section 7(4)(A).

(b) RELIANCE ON CUSTOMER-PROVIDED INFORMATION.—A seller that relies in good faith on information provided by a customer to determine a customer tax address shall not be held liable for any additional tax based on a different determination of that customer tax address by a State or local jurisdiction or court of competent jurisdiction, unless and until binding notice is given as provided in subsection (c).

(c) ADDRESS CORRECTION.—If a State or local jurisdiction is authorized under State law to administer a tax, and the jurisdiction determines that the customer tax address determined by a seller is not the customer tax address that would have been determined under section

1 7(4)(A) if the seller had the additional information pro-
 2 vided by the State or local jurisdiction, then the jurisdic-
 3 tion may give binding notice to the seller to correct the
 4 customer tax address on a prospective basis, effective not
 5 less than 45 days after the date of such notice, if—

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

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

16 (d) COORDINATION WITH SOURCING OF MOBILE
 17 TELECOMMUNICATIONS SERVICE.—

18 (1) IN GENERAL.—If—

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

1 the customer by such a home service provider;
 2 and

3 (B) the covered electronic good or service
 4 is delivered, transferred, or provided electroni-
 5 cally by means of mobile telecommunications
 6 service that is deemed to be provided by such
 7 home service provider under section 117 of such
 8 title,

9 then the home service provider and, if different, the
 10 seller of the covered electronic good or service, may
 11 presume that the customer's place of primary use
 12 for such mobile telecommunications service is the
 13 customer tax address described in section 7(4)(A)(ii)
 14 with respect to the sale of such covered electronic
 15 good or service.

16 (2) DEFINITIONS.—For purposes of this sub-
 17 section, the terms “home service provider”, “mobile
 18 telecommunications service”, and “place of primary
 19 use” have the same meanings as in section 124 of
 20 title 4, United States Code.

21 (e) MULTIPLE LOCATIONS.—

22 (1) IN GENERAL.—If a digital service, audio or
 23 video programming service, or VoIP service is sold
 24 to a customer and available for use by the customer
 25 in multiple locations simultaneously, the seller may

1 determine the customer tax addresses using a rea-
2 sonable and consistent method based on the address-
3 es of use as provided by the customer and deter-
4 mined in agreement with the customer at the time
5 of sale or at a later time.

6 (2) DIRECT CUSTOMER PAYMENT.—

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

18 (B) EFFECT OF CUSTOMER COMPLIANCE
19 WITH DIRECT PAYMENT PROCEDURES.—When
20 a qualified customer elects to pay tax directly
21 under the procedures established under sub-
22 paragraph (A), the seller shall—

23 (i) have no obligation to obtain the
24 multiple customer tax addresses under sub-
25 section (a); and

1 (ii) not be liable for such tax, provided
 2 the seller follows the State and local proce-
 3 dures and maintains appropriate docu-
 4 mentation in its books and records.

5 **SEC. 5. TREATMENT OF BUNDLED TRANSACTIONS, DIGITAL**
 6 **CODES, AND OTHER RULES.**

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

18 (b) DIGITAL CODE.—The tax treatment of the sale
 19 of a digital code shall be the same as the tax treatment
 20 of the sale of the covered electronic good or service to
 21 which the digital code relates.

22 (c) APPLICATION OF FIXED CHARGES TO VOIP
 23 SERVICE.—With respect to VoIP service, if any tax is
 24 based on a fixed charge, such fixed charge shall be based
 25 on the number of simultaneous outbound calls the cus-

1 tomer has purchased the right to place, regardless of ac-
2 tual usage or the number of the customer's phone num-
3 bers.

4 (d) RULE OF CONSTRUCTION.—The sale of a digital
5 code shall be considered the sale transaction for purposes
6 of this Act.

7 **SEC. 6. NO INFERENCE.**

8 (a) CUSTOMER LIABILITY.—Subject to the prohibi-
9 tion provided in section 2, nothing in this Act modifies,
10 impairs, supersedes, or authorizes the modification, im-
11 pairment, or supersession of any law allowing a State or
12 local jurisdiction to impose tax on and collect tax directly
13 from a customer based upon use of a covered electronic
14 good or service in such State.

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

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

23 (d) INTERNET TAX FREEDOM ACT.—Nothing in this
24 Act modifies, impairs, supersedes, or authorizes the modi-

1 fication, impairment, or supersession of the Internet Tax
 2 Freedom Act (47 U.S.C. 151 note).

3 **SEC. 7. DEFINITIONS.**

4 In this Act, the following definitions shall apply:

5 (1) AUDIO OR VIDEO PROGRAMMING SERV-
 6 ICE.—The term “audio or video programming serv-
 7 ice” means programming provided by, or generally
 8 considered comparable to programming provided by,
 9 a radio or television broadcast station, regardless of
 10 the facilities used to deliver or provide such service.

11 (2) COVERED ELECTRONIC GOOD OR SERV-
 12 ICE.—The term “covered electronic good or service”
 13 means a digital good, digital service, audio or video
 14 programming service, or VoIP service.

15 (3) CUSTOMER.—The term “customer” means
 16 a person that purchases a covered electronic good or
 17 service or digital code.

18 (4) CUSTOMER TAX ADDRESS.—

19 (A) IN GENERAL.—The term “customer
 20 tax address” means—

21 (i) with respect to the sale of a cov-
 22 ered electronic good or service that is re-
 23 ceived by the customer at a business loca-
 24 tion of the seller, such business location;

1 (ii) if clause (i) does not apply and
2 the primary use location of the covered
3 electronic good or service is known by the
4 seller, such location;

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

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

20 (v) if none of clauses (i) through (iv)
21 applies, the location indicated by an ad-
22 dress for the customer obtained during the
23 consummation of the sale, including the
24 address of a customer's payment instru-

1 ment, when use of this address does not
2 constitute bad faith; or

3 (vi) if none of clauses (i) through (v)
4 applies, including the circumstance in
5 which the seller is without sufficient infor-
6 mation to apply such paragraphs, one of
7 the following locations, as selected by the
8 seller, provided that such location is con-
9 sistently used by the seller for all such
10 sales to which this clause applies:

11 (I) The location in the United
12 States of the headquarters of the sell-
13 er's business.

14 (II) The location in the United
15 States where the seller has the great-
16 est number of employees.

17 (III) The location in the United
18 States—

19 (aa) from which the seller
20 makes digital goods available for
21 electronic delivery; or

22 (bb) from which digital serv-
23 ices, VoIP services, or audio or
24 video programming services are
25 provided electronically.

1 (B) EXCLUSION.—For purposes of this
2 paragraph, the term “location” does not include
3 the location of a server, machine, or device, in-
4 cluding an intermediary server, that is used
5 simply for routing or storage.

6 (5) DELIVERED OR TRANSFERRED ELECTRONI-
7 CALLY; PROVIDED ELECTRONICALLY.—The term
8 “delivered or transferred electronically” means the
9 delivery or transfer of a digital good by means other
10 than tangible storage media, and the term “provided
11 electronically” means the provision of a digital serv-
12 ice, audio or video programming service, or VoIP
13 service remotely via electronic means.

14 (6) DIGITAL CODE.—The term “digital code”
15 means a code that conveys only the right to obtain
16 a covered electronic good or service without making
17 further payment.

18 (7) DIGITAL GOOD.—The term “digital good”
19 means any software or other good that is delivered
20 or transferred electronically, including sounds, im-
21 ages, data, facts, or combinations thereof, main-
22 tained in digital format, where such software or
23 other good is the true object of the transaction,
24 rather than the activity or service performed to cre-
25 ate such software or other good, that results in the

1 delivery to the customer of a complete copy of such
 2 software or other good, with the right to use perma-
 3 nently or for a specified period, and includes, as an
 4 incidental component, charges for the delivery or
 5 transfer of such software or other good.

6 (8) DIGITAL SERVICE.—

7 (A) IN GENERAL.—The term “digital serv-
 8 ice” means any service that is provided elec-
 9 tronically, including the provision of remote ac-
 10 cess to or use of a digital good, and includes,
 11 as an incidental component, charges for the
 12 electronic provision of the digital service to the
 13 customer.

14 (B) EXCEPTIONS.—The term “digital serv-
 15 ice” does not include a service that is predomi-
 16 nantly attributable to the direct, contempora-
 17 neous expenditure of live human effort, skill, or
 18 expertise, a telecommunications service, an an-
 19 cillary service, Internet access, audio or video
 20 programming service, or a hotel intermediary
 21 service.

22 (C) CLARIFYING DEFINITIONS.—For pur-
 23 poses of subparagraph (B)—

24 (i) the term “ancillary service” means
 25 a service that is associated with or inci-

1 dental to the provision of telecommuni-
2 cations services, including, but not limited
3 to, detailed telecommunications billing, di-
4 rectory assistance, vertical service, and
5 voice mail services;

6 (ii) the term “hotel intermediary serv-
7 ice”—

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

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

19 (iii) the term “Internet access” means
20 any service included within the definition
21 of the term “internet access” under section
22 1105(5) of the Internet Tax Freedom Act
23 (47 U.S.C. 151 note); and

24 (iv) the term “telecommunications
25 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 VoIP service; and

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

23 (9) DISCRIMINATORY TAX.—

24 (A) IN GENERAL.—The term “discrimina-
25 tory tax” means any tax imposed by a State or

1 local jurisdiction on digital goods or digital
2 services that—

3 (i) is not generally imposed and le-
4 gally collectible by such State or local ju-
5 risdiction on transactions involving similar
6 property, goods, or services accomplished
7 through other means;

8 (ii) is not generally imposed and le-
9 gally collectible at the same or higher rate
10 by such State or local jurisdiction on
11 transactions involving similar property,
12 goods, or services accomplished through
13 other means;

14 (iii) imposes an obligation to collect or
15 pay the tax on a person, other than the
16 seller, that the State or local jurisdiction
17 would not impose in the case of trans-
18 actions involving similar property, goods,
19 or services accomplished through other
20 means;

21 (iv) establishes a classification of dig-
22 ital services or digital goods providers for
23 purposes of establishing a higher tax rate
24 to be imposed on such providers than the
25 tax rate generally imposed on providers of

1 similar property, goods, or services accom-
 2 plished through other means; or

3 (v) does not provide a resale and com-
 4 ponent part exemption for the purchase of
 5 digital goods or digital services in a man-
 6 ner consistent with the State's resale and
 7 component part exemption applicable to
 8 the purchase of similar property, goods, or
 9 services accomplished through other
 10 means.

11 (B) CLARIFICATION.—For purposes of this
 12 paragraph, any tax that is limited in its appli-
 13 cation to only certain services, providers, or in-
 14 dustries shall not be considered to be generally
 15 imposed, with the exception of any State tax
 16 which is imposed—

17 (i) in lieu of a generally imposed tax;

18 and

19 (ii) at a rate which is not greater than
 20 the rate of such tax.

21 (10) LOCAL JURISDICTION.—

22 (A) IN GENERAL.—The term “local juris-
 23 diction” means—

1 (i) any municipality, city, county,
 2 township, parish, transportation district, or
 3 assessment jurisdiction;

4 (ii) any other local jurisdiction in the
 5 territorial jurisdiction of the United States
 6 with the authority to impose a tax; and

7 (iii) any governmental entity or per-
 8 son acting on behalf of an entity described
 9 in clause (i) or (ii) and with the authority
 10 to assess, impose, levy, or collect taxes.

11 (B) EXCEPTION.—The term “local juris-
 12 diction” shall not include a State.

13 (11) MULTIPLE TAX.—

14 (A) IN GENERAL.—The term “multiple
 15 tax” means any tax that is imposed by one
 16 State, one or more of that State’s local jurisdic-
 17 tions, or both on the same or essentially the
 18 same covered electronic good or service that is
 19 also subject to tax imposed by another State,
 20 one or more local jurisdictions in such other
 21 State (whether or not at the same rate or on
 22 the same basis), or both, without a credit for
 23 taxes paid in other jurisdictions.

24 (B) EXCEPTION.—The term “multiple
 25 tax” shall not include a tax imposed by a State

1 and one or more political subdivisions thereof
2 on the same covered electronic good or service
3 or a tax on persons engaged in selling covered
4 electronic goods or services which also may have
5 been subject to a sales or use tax thereon.

6 (12) PRIMARY USE LOCATION.—

7 (A) IN GENERAL.—The term “primary use
8 location” means a street address representative
9 of where the customer’s use of a covered elec-
10 tronic good or service will primarily occur,
11 which shall be the residential street address or
12 a business street address of the actual end user
13 of the covered electronic good or service, includ-
14 ing, if applicable, the address of a donee of the
15 customer that is designated by the customer.

16 (B) CUSTOMERS THAT ARE NOT INDIVID-
17 UALS.—For the purpose of subparagraph (A), if
18 the customer is not an individual, the primary
19 use location is determined by the location of the
20 customer’s employees or equipment (machine or
21 device) that make use of the covered electronic
22 good or service, but does not include the loca-
23 tion of a person who uses the covered electronic
24 good or service as the purchaser of a separate
25 good or service from the customer.

1 (13) SALE AND PURCHASE.—The terms “sale”
 2 and “purchase”, and all variations thereof, shall in-
 3 clude the provision, lease, rent, license, and cor-
 4 responding variations thereof.

5 (14) SELLER.—

6 (A) IN GENERAL.—The term “seller”
 7 means a person making sales of covered elec-
 8 tronic goods or services.

9 (B) EXCEPTIONS.—A person that provides
 10 billing service or electronic delivery or transport
 11 service on behalf of another unrelated or unaf-
 12 filiated person, with respect to the other per-
 13 son’s sale of a covered electronic good or serv-
 14 ice, shall not be treated as a seller of that cov-
 15 ered electronic good or service.

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

22 (15) SEPARATE AND DISCRETE TRANS-
 23 ACTION.—The term “separate and discrete trans-
 24 action” means a sale of a covered electronic good or
 25 service or digital code sold in a single transaction

1 that does not involve any additional charges or con-
2 tinued payment in order to maintain possession of
3 the digital good or access to or usage of the digital
4 service, audio or video programming service, or VoIP
5 service.

6 (16) STATE.—The term “State” means—

7 (A) any of the several States, the District
8 of Columbia, or any territory or possession of
9 the United States; and

10 (B) any governmental entity or person act-
11 ing on behalf of an entity described in subpara-
12 graph (A) and with the authority to assess, im-
13 pose, levy, or collect taxes.

14 (17) TAX.—

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

1 (B) EXCLUSIONS.—The term “tax” does
 2 not include an ad valorem tax, a tax on or
 3 measured by capital, a tax on or measured by
 4 net income, apportioned gross income, appor-
 5 tioned revenue, apportioned taxable margin, or
 6 apportioned gross receipts, or a State or local
 7 jurisdiction business and occupation tax im-
 8 posed on a broad range of business activity in
 9 a State that enacted a State tax on gross re-
 10 cepts after January 1, 1932, and before Janu-
 11 ary 1, 1936.

12 (18) VOIP SERVICE.—The term “VoIP service”
 13 means any interconnected VoIP service, as defined
 14 in section 9.3 of title 47, Code of Federal Regula-
 15 tions, or any successor technology.

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

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

19 (b) EXCEPTIONS.—A State or local jurisdiction shall
 20 have 2 years from the date of enactment of this Act to
 21 modify any State or local tax statute enacted prior to the
 22 date of enactment of this Act to conform to the provisions
 23 set forth in sections 4 and 5 of this Act.

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

1 accrued and enforced before the effective date of this Act
2 or affect ongoing litigation relating to such taxes.

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

4 If any provision or part of this Act is held to be in-
5 valid or unenforceable by a court of competent jurisdiction
6 for any reason, such holding shall not affect the validity
7 or enforceability of any other provision or part of this Act
8 unless such holding substantially limits or impairs the es-
9 sential elements of this Act, in which case this Act shall
10 be deemed invalid and of no legal effect as of the date
11 that the judgment on such holding is final and no longer
12 subject to appeal.

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