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INTERNET TAX FREEDOM ACT

JUNE 5, 1998.—Ordered to be printed

Mr. BLILEY, from the Committee on Commerce, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 3849]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, to whom was referred the bill (H.R. 3849) to amend the Communications Act of 1934 to establish a national policy against Federal and State regulation of Internet access and online services, and to exercise congressional jurisdiction over interstate and foreign commerce by establishing a moratorium on the imposition of exactions that would interfere with the free flow of commerce conducted over the Internet, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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AMENDMENT

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Internet Tax Freedom Act".

SEC. 2. PROVISION OF INTERNET ACCESS AND ONLINE SERVICES.

Title II of the Communications Act of 1934 is amended by inserting after section 230 (47 U.S.C. 230) the following new section:

"SEC. 231. PROHIBITION ON REGULATION OF INTERNET ACCESS AND ONLINE SERVICES.

"(a) PROHIBITION.—The Commission shall have no authority or jurisdiction under this title or section 4(i), nor shall any State commission have any authority or jurisdiction, to regulate the prices or charges paid by subscribers for Internet access or online services.

"(b) PRESERVATION OF AUTHORITY.—Nothing in this subsection shall limit or otherwise affect—

"(1) the Commission's or State commissions' implementation of the Telecommunications Act of 1996 (Public Law 104–104) or the amendments made by such Act; and

"(2) the Commission's or State commissions' authority to regulate telecommunications carriers that offer Internet access or online services in conjunction with the provision of any telephone toll, telephone exchange, or exchange access services as such terms are defined in title I.

"(c) DEFINITIONS.—As used in this section:

"(1) INTERNET.—The term 'Internet' means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected world-wide network of computer networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocol, to transmit information.

"(2) INTERNET ACCESS.—The term 'Internet access' means a service that enables users to access content, information, and other services offered over the Internet, but does not mean a telecommunications service.

"(3) ONLINE SERVICE.—The term 'online service' means the offering or provision of information services combined with Internet access to a user.".

SEC. 3. FEDERAL REGULATORY FEES.

(a) NO REGULATORY FEES.—Section 9(h) of the Communications Act of 1934 (47 U.S.C. 159(h)) is amended by inserting "; or (3) providers of Internet access or online service" after "(47 C.F.R. Part 97)" .

(b) CONFORMING AMENDMENT.—Section 9(h) of the Communications Act of 1934 (47 U.S.C. 159(h)) is amended by striking "or" that appears before "(2)".

(c) DETERMINATION.—Not later than 1 year after the date of the enactment of this Act, the National Telecommunications and Information Administration shall determine whether any direct or indirect Federal regulatory fees, other than the fees identified in subsection (a), are imposed on providers of Internet access or online services, and if so, make recommendations to the Congress regarding whether such fees should be modified or eliminated.

SEC. 4. REPORT ON FOREIGN COMMERCE.

(a) CONTENTS OF REPORT.—In order to promote electronic commerce, the Secretary of Commerce, in consultation with appropriate committees of the Congress, shall undertake an examination of—

(1) barriers imposed in foreign markets on United States providers of property, goods, services, or information engaged in electronic commerce and on United States providers of telecommunications services;

(2) how the imposition of such barriers will affect United States consumers, the competitiveness of United States citizens providing property, goods, service, or information in foreign markets, and the growth and maturing of the Internet; and

(3) what measures the Government should pursue to foster, promote, and develop electronic commerce in the United States and in foreign markets.

(b) PUBLIC COMMENT.—For purposes of this section, the Secretary of Commerce shall give all interested persons an opportunity to comment on the matters identified in subsection (a) through written or oral presentations of data, views, or arguments.

(c) TRANSMITTAL TO THE PRESIDENT.—Not later than 18 months after the date of the enactment of this Act, the Secretary of Commerce shall transmit to the President a report containing the results of the examination undertaken in accordance with subsection (a).

(d) RECOMMENDATIONS OF THE PRESIDENT.—Not later than 2 years and 45 days after the date of the enactment of this Act, the President shall review the report described in subsection (c) and submit to the appropriate committees of Congress such policy recommendations as the President deems necessary or expedient.

SEC. 5. MORATORIUM ON CERTAIN TAXES.

(a) MORATORIUM.—For a period of 3 years following the date of the enactment of this Act, neither any State, nor any political subdivision thereof, shall impose, assess, collect, or attempt to collect—

(1) taxes on Internet access or online services;

(2) bit taxes; or

(3) multiple or discriminatory taxes on electronic commerce.

(b) EXCEPTION TO MORATORIUM.—

(1) IN GENERAL.—The moratorium in subsection (a)(1) shall not apply to taxes on Internet access or online services generally imposed and actually enforced under State law before March 1, 1998.

(2) ENFORCEABILITY.—Paragraph (1) shall be enforceable only if a State enacts a law to expressly impose such tax within one year from the date of enactment. Failure of a State to act does not affect liabilities for taxes accrued and enforced prior to March 1, 1998, nor does it affect ongoing litigation relating to any assessments.

(c) APPLICATION OF MORATORIUM.—Subsection (a) shall not apply with respect to the provision of Internet access or online services that are offered for sale as part of a package of services that includes services other than Internet access or online services, unless the service provider separately states that portion of the billing that applies to such services on the user's bill.

SEC. 6. ADVISORY COMMISSION ON ELECTRONIC COMMERCE.

(a) ESTABLISHMENT OF COMMISSION.—There is established a temporary commission to be known as the Advisory Commission on Electronic Commerce (in this Act referred to as the "Commission"). The Commission shall—

(1) be composed of 29 members, which includes 2 chairpersons selected in accordance with subsection (b); and

(2) conduct its business in accordance with the provisions of this Act.

(b) MEMBERSHIP.—

(1) IN GENERAL.—The Commissioners shall serve for the life of the Commission. The membership of the Commission shall be as follows:

(A) Two representatives from the Federal Government comprised of the Secretary of Commerce and the Secretary of the Treasury, or their respective representatives.

(B) Fourteen representatives from State, local, and county governments comprised of 2 representatives each from the National Governors' Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, and the United States Conferences of Mayors; and 1 representative each from the International City/County Managers Association and the American Legislative Exchange Council.

(C) Thirteen representatives of taxpayers and business, of which 3 shall be appointed by the President and 2 each shall be appointed by the Senate majority leader, the Senate minority leader, the Speaker of the House, the House majority leader, and the house minority leader.

(2) CHAIRPERSON.—The Commission shall have 2 chairpersons to serve as cochairpersons. One of the Chairpersons shall be a representative selected by the National Governors' Association from 1 of the groups identified in subsection (b)(1)(B). The other Chairperson shall be a representative selected jointly by the Speaker of the House of Representatives and the majority leader of the Senate from 1 of the groups identified in subsection (b)(1)(C).

(3) APPOINTMENTS.—Appointments to the Commission shall be made not later than 45 days after the date of enactment of this Act. The Chairpersons shall be appointed not later than 60 days after the date of the enactment of this Act.

(c) ACCEPTANCE OF GIFTS AND GRANTS.—The Commission may accept, use, and dispose of gifts or grants of services or property, both real and personal, for purposes of aiding or facilitating the work of the Commission. Gifts or grants not used at the expiration of the Commission shall be returned to the donor or grantor.

(d) OTHER RESOURCES.—The Commission shall have reasonable access to materials, resources, data, and other information from the Department of Commerce and the Department of the Treasury. The Commission shall also have reasonable access to use the facilities of the Department of the Commerce and Department of the Treasury for purposes of conducting meetings.

(e) SUNSET.—The existence of the Commission shall terminate—

(1) when the last of the committees of jurisdiction referred to in section 8 concludes consideration of the legislation proposed under section 7; or

(2) 3 years after the date of the enactment of this Act;

whichever occurs first.

(f) RULES OF THE COMMISSION.—

(1) Fifteen members of the Commission shall constitute a quorum for conducting the business of the Commission.

(2) Any meetings held by the Commission shall be duly noticed at least 14 days in advance and shall be open to the public.

(3) The Commission may adopt other rules as needed.

(g) DUTIES OF THE COMMISSION.—The Commission, in consultation with the National Tax Association Communications and Electronic Commerce Tax Project, and other interested parties, shall—

(1) identify the taxes, fees, and charges imposed on electronic commerce within the United States that could impede the development of such commerce;

(2) propose a uniform system of definitions of electronic commerce that may be subject to sales and use tax within each State;

(3) propose a simplified system for sales and use tax for electronic commerce that would provide for a single statewide sales or use tax rate (which rate may be zero), and would establish a method of distributing to political subdivisions within each State their proportionate share of such taxes;

(4) examine ways to simplify the interstate administration of sales and use tax on electronic commerce, including a review of the need for a single or uniform tax registration, single or uniform tax returns, simplified remittance requirements, and simplified administrative procedures;

(5) examine the need for an independent third party collection system that would utilize the Internet to further simplify sales and use tax administration and collection;

(6) examine the level of contacts sufficient to permit a State to impose a sales or use tax on electronic commerce that would subject a remote seller to collection obligations imposed by the State, including the definition of a level of contacts below which a State may not impose collection obligations on a remote seller;

(7) examine the level of contacts sufficient to permit a State to impose sales or use tax on transactions not involving electronic commerce, and whether collection obligations imposed by a State are applied in a nondiscriminatory manner with respect to electronic commerce and such transactions;

(8) examine ways to simplify State and local taxes imposed on the provision of telecommunications services; and

(9) examine other issues that the Commission determines to be relevant.

(h) FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply with respect to the Commission.

SEC. 7. LEGISLATIVE RECOMMENDATIONS.

(a) TRANSMISSION OF PROPOSED LEGISLATION.—Not later than 2 years after the date of the enactment of this Act, the Commission described in section 6 shall transmit to the President and the Congress proposed legislation reflecting any findings concerning the matters described in such section.

(b) CONTENTS OF PROPOSED LEGISLATION.—The proposed legislation submitted under subsection (a) by the Commission shall have been agreed to by at least 18 members of the Commission and shall—

(1) define with particularity the level of contacts between a State and remote seller that the Commission considers should be sufficient to permit a State to impose collection obligations on the remote seller;

(2) provide that if, and only if, a State has adopted a single sales and use tax rate for electronic commerce, and adopted simplified procedures for the administration of its sales and use taxes, including uniform registration, tax returns, remittance requirements, and filing procedures, then such State should be authorized to impose on remote sellers a duty to collect sales or use tax on electronic commerce;

(3) provide that, effective upon the expiration of a 4-year period beginning on the date of the enactment of such legislation, a State that does not have in effect a single sales and use tax rate and simplified administrative procedures shall be deemed to have in effect a sales and use tax rate on electronic commerce equal to zero, until such time as such State does adopt a single sales and use tax rate and simplified administrative procedures;

(4) include uniform definitions of categories of property, goods, services, or information subject to, or exempt from, sales and use taxes;

(5) make permanent the temporary moratorium described in section 5 with respect to Internet access and online services, as well as such other taxes (including those described in section 5) that the Commission deems appropriate;

(6) provide a mechanism for the resolution of disputes between States regarding matters involving multiple taxation; and

(7) include other provisions that the Commission deems necessary.

(c) RECOMMENDATIONS OF THE PRESIDENT.—Not later than 45 days after the receipt of the Commission's legislative proposals, the President shall review such proposals and submit to the appropriate committees of the Congress such policy recommendations as the President deems necessary or expedient.

SEC. 8. EXPEDITED CONSIDERATION OF LEGISLATIVE RECOMMENDATIONS.

(a) Not later than 90 legislative days after the transmission to the Congress of the proposed legislation described in section 7, such legislation shall be considered by the respective committees of jurisdiction within the House of Representatives and the Senate, and, if reported, shall be referred to the proper calendar on the floor of each House for final action.

(b) For purposes of this section, the 90-day period shall be computed by excluding—

(1) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain or an adjournment of the Congress sine die; and

(2) any Saturday and Sunday, not excluded under paragraph (1), when either House is not in session.

SEC. 9. DECLARATION THAT THE INTERNET SHOULD BE FREE OF FOREIGN TARIFFS, TRADE BARRIERS, AND OTHER RESTRICTIONS.

It is the sense of the Congress that the President should seek bilateral and multilateral agreements to remove barriers to global electronic commerce, through the World Trade Organization, the Organization for Economic Cooperation and Development, the International Telecommunications Union, the Asia Pacific Economic Cooperation Council, the Free Trade Area of the Americas, and other appropriate international fora. Such agreements should require, inter alia, that the provision of Internet access or online services be free from undue and discriminatory regulation by foreign governments and that electronic commercial transactions between United States and foreign providers of property, goods, services, and information be free from undue and discriminatory regulation, international tariffs, and discriminatory taxation.

SEC. 10. DEFINITIONS.

For the purposes of this Act:

(1) BIT TAX.—The term "bit tax" means any tax on electronic commerce expressly imposed on or measured by the volume of digital information transmitted electronically, or the volume of digital information per unit of time transmitted electronically, but does not include taxes imposed on the provision of telecommunications services.

(2) COMPUTER SERVER.—The term "computer server" means a computer that functions as a centralized provider of information and services to multiple recipients.

(3) DISCRIMINATORY TAX.—The term "discriminatory tax" means—

(A) any tax imposed by a State or political subdivision thereof on electronic commerce that—

(i) is not generally imposed and legally collectible by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;

(ii) is not generally imposed and legally collectible at the same rate by such State or such political subdivision on transactions involving similar property, goods, services, or information accomplished through other means;

(iii) imposes an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means; or

(iv) establishes a classification of Internet access provider or online service provider for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means; or

(B) any tax imposed by a State or political subdivision thereof, if—

(i) the use of a computer server by a remote seller to create or maintain a site on the Internet is considered a factor in determining a remote seller's tax collection obligation; or

(ii) a provider of Internet access or online services is deemed to be the agent of a remote seller for determining tax collection obligations as a result of—

(I) the provider displaying a remote seller's information or content on such provider's computer server; or

(II) the provider maintaining or taking orders through such provider's computer server.

(4) ELECTRONIC COMMERCE.—The term "electronic commerce" means any transaction conducted over the Internet or an online service, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access and online services.

(5) INFORMATION SERVICES.—The term "information services" has the meaning given such term in section 3(20) of the Communications Act of 1934 (47 U.S.C. 3(20)).

(6) INTERNET.—The term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocol, to transmit information.

(7) INTERNET ACCESS.—The term "Internet access" means a service that enable users to access content, information, and other services offered over the Internet, but does not mean a telecommunications service.

(8) MULTIPLE TAX.—The term "multiple tax" means—

(A) any tax that is imposed by one State or political subdivision thereof on the same or essentially the same electronic commerce that is also taxed by any other State or political subdivision thereof (or the same State, except in the case of sales taxes) whether or not at the same rate or on the same basis without an offsetting credit for taxes paid in other jurisdictions or other similar mechanisms for avoiding double taxation of the same transaction; or

(B) any tax on Internet access or online services if the State or political subdivision thereof classifies such services as telecommunications or communications services under State law and such State or political subdivision thereof has already imposed a tax on the underlying telecommunications services that are used to provide such services without allowing a credit for other taxes paid, a sale for resale exemption, or other mechanism for eliminating duplicate taxation.

(9) ONLINE SERVICE.—The term "online service" means the offering or provision of information services combined with Internet access to a user.

(10) REMOTE SELLER.—The term "remote seller" means a person who sells, leases, licenses, offers, or delivers property, goods, services, or information from one State to a purchaser in another State using the Internet.

(11) STATE.—The term "State" means any of the several States, the District of Columbia, or any territory or possession of the United States.

(12) TAX.—The term "tax" means—

(A) any levy, fee, or charge imposed under governmental authority by any governmental entity; or

(B) the imposition of or obligation to collect and to remit to a governmental entity any such levy, fee, or charge imposed by a governmental entity.

Such term does not include any franchise fees or similar fees imposed by a State or local franchising authority, pursuant to section 622 or 653 of the Communications Act of 1934 (47 U.S.C. 542, 573).

(13) TELECOMMUNICATIONS SERVICES.—The term "telecommunications services" has the meaning given such term in section 3(46) of the Communications Act of 1934 (47 U.S.C. 3(46)).

SEC. 11. NO EXPANSION OF TAX AUTHORITY.

Nothing in this Act shall be construed to expand the power of any State or political subdivision thereof to collect taxes on Internet access, online services, bits, or electronic commerce beyond the power that existed on March 1, 1998.

SEC. 12. PRESERVATION OF AUTHORITY.

Nothing in this Act shall limit or otherwise affect the implementation of the Telecommunications Act of 1996 (Public Law 104–104) or the amendments made by such Act.

PURPOSE AND SUMMARY

For over two hundred years, the Congress of the United States has sought to protect and facilitate the development of interstate and foreign commerce. From regulating matters regarding ports of entry into the United States (18th century) to the creation of a national railroad system (19th century) to establishing communications policy (20th century), Congress' duty remains constant: to uphold the responsibilities delegated to the Congress by the people with respect to the regulation of commerce among the several States. As we approach the next millennium, electronic commerce is the newest form of interstate and foreign commerce and it is essential that the Congress not only adopts measures to enhance its development, but eliminates efforts that will impede its growth.

Electronic commerce can be conducted over various electromagnetic transmission media. It is the growth and development of the Internet, however, that has led to the dramatic explosion in electronic transactions. The Internet allows for the dissemination of ideas and information instantaneously throughout the world by removing paper, printing, and postage as major obstacles for companies to compete in a global market. With entry costs minimal, new companies are created daily. Costs also are decreasing for existing companies as they explore ways to sell their products over the Internet. Consequently, we have seen incredible growth in the number of Internet access providers providing the link between consumers and businesses in cyberspace. We have also seen incredible growth and increase in the number of online service providers as they compete to provide content and data services to consumers. Unnecessary regulation of these competitive services can only hamper the development of the Internet.

In addition to unnecessary regulation, the growth of the Internet, and thus the growth of electronic commerce, should not be hampered by State and local taxation. At least twelve States have taken measures to tax Internet-related activities and they do so in an inconsistent and potentially burdensome manner. For example, some States tax Internet access as "computer and data processing services." Other States tax Internet access as either a "telecommunications service" or "information service." These classification difficulties are only part of the problem. Given the way data is transmitted over the Internet, some States have challenged fundamental constitutional doctrines in order to assert substantial

nexus over out-of-State vendors. As a result of the actions of these States, many business executives argue that ambiguity surrounding the taxation of Internet-related activities is the single most significant impediment to the development of electronic commerce in the United States.

H.R. 3849 was introduced for a number of reasons: (1) to ensure that the Internet service providers and online service providers are free from Federal and State regulation regarding the prices they charge to consumers; (2) to bar special Internet taxes, and multiple and discriminatory taxes on electronic commerce; and (3) to commission a study on State and local taxation of the Internet and to ensure that any taxation of the Internet or electronic commerce does not burden interstate or foreign commerce. These policies are inextricably linked to the success and development of electronic commerce.

Background and Need for Legislation

The power of Congress to regulate interstate and foreign commerce stems from the Commerce Clause of the United States Constitution and any Federal laws made pursuant to this authority shall be the supreme law of the land. The Supreme Court has routinely upheld Congressional action to regulate interstate commerce even if such action preempts State laws and regulations. Over 100 years ago, the Supreme Court described the powers granted to Congress under the Commerce Clause and how such power has evolved as interstate commerce has changed over the centuries. In holding that an 1866 Federal statute aiding in construction and operation of telegraph lines preempted State law, the Court stated:

> The powers thus granted [by the Commerce Clause] * * * keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth * * *. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation. (*Pensacola Tel. Co.* v. *Western Union Tel. Co.,* 96 U.S. 1, 9 (1878)).

As we approach the next millennium, Congress must stand ready to "keep pace with the progress of the country, and adapt [itself] to the new developments of time and circumstances." *Pensacola Tel. Co.,* 96 U.S. at 9. One such development is the explosive growth of electronic commerce. In general, electronic commerce is the term used to describe the buying, selling, or transfer of goods and services over electromagnetic transmission media. The media could include wireline and wireless networks, both of which have been previously held to be interstate in nature. While the term "electronic commerce" is relatively new, many industries have been

conducting electronic commerce in some manner for years. Bank-wire transactions, the use of automatic-teller machines, credit card verifications, and the purchase of goods or services over the telephone all constitute electronic commerce.

Although the Internet is currently thought of as the medium of choice for electronic commerce, a large amount of electronic commerce is conducted over other networks including, for example, the public switched telephone network and private computer networks (often referred to as intranets or extranets). It is the growth and use of the Internet, however, that has led to the dramatic expansion of electronic commerce.

The Internet was largely the domain of academic researchers from its creation in the late 1960s until the start of the 1990s. In 1991, the National Science Foundation lifted its restriction on commercial activity on the Internet. Also in 1991, the World Wide Web was created. In 1993, the first commercially available Web browser was introduced, thus allowing millions of consumers and businesses an easy method of navigating on the Internet. These events, combined with the widespread availability of inexpensive yet powerful personal computers (that allowed computer users to access graphics, audio, and video on the World Wide Web in addition to text), led to the dramatic growth of the Internet and other online services.

For the business community, the move to electronic commerce is seen as an opportunity to lower the traditional costs associated with doing business. For many companies, electronic commerce is an ideal means to expand business opportunities to new markets and reach new customers. For consumers, electronic commerce provides a means to engage in transactions when it is convenient for them. Consumers are no longer constrained by store hours or physical distances. Use of the Internet has also helped provide consumers with better information and choice about products they wish to buy.

The growth of electronic commerce is having a profound impact on the nation's economy. Over the past decade, the information technology sector of our economy has grown rapidly and is seen by many as playing a leading role in the current economic expansion. According to The Emerging Digital Economy, a recent Department of Commerce report on electronic commerce, the information technology sector now constitutes 8.2 percent of the nation's GDP, up from 4.5 percent in 1985. At the end of 1997, approximately 7.4 million Americans were employed in this field. Many are predicting even stronger growth in the future. Estimates of the total value of economic activity conducted electronically in 2002 range from $200 billion to more than $500 billion, compared to just $2.6 billion in 1996.

In recent years, we have seen a significant growth in the number of service providers offering consumers access to the Internet. Such services are known as Internet access services. The service providers could be pure access providers (such as Erol's), access providers that also offer content services (such as America Online), or other service providers that have begun to offer Internet access in conjunction with other regulated or unregulated activities (such as a telephone or cable company that offers Internet access in conjunc-

tion with the provision of telephone or cable service). Internet access providers and online service providers operate in a competitive marketplace and consumers have significant choice regarding how they access the Internet and how they obtain information. Recent data indicates that there are approximately 6,300 Internet access and online service providers in the United States.

As the Internet access and online service industry grows, States have reacted differently to whether, and if so, how, Internet access and online services should be taxed. Unfortunately, the States have not been consistent with their approaches. For example, under existing State interpretations, Internet access could be taxed as a "telecommunications service," "communications service," "information service," or "computer processing and data service." These interpretations also appear to directly conflict with national telecommunications policy. For more than 30 years, the FCC has been analyzing the nature and convergence of communications and computer services. On each occasion, the FCC has concluded that services offered over a telecommunications network are either "basic" (telecommunications services) or "enhanced" (computer services) bearing significant regulatory precedent, depending on how the service is classified. See 7 FCC 2d 11 (1966); 72 FCC 2d 358 (1979); and Report to Congress, CC Docket 96–45 (April 10, 1998). For States now to start classifying computer-based services as "telecommunications services" only creates confusion for the industry.

In addition, the Constitution has long protected businesses in the United States from subjecting themselves to the jurisdiction of a State in which it has no "minimum contacts" or "substantial nexus." More specifically, the Commerce Clause and Due Process Clause pose distinct limits on the taxing power of States. These principles were recently clarified in *Quill* v. *North Dakota,* 504 U.S. 298 (1992). In Quill, an out-of-State mail order vendor sold products within the State of North Dakota, but otherwise did not have any outlet stores or sales representatives in North Dakota. When North Dakota attempted to collect a tax from the vendor on goods purchased in North Dakota, the vendor challenged the tax on the grounds that it was unconstitutional. The Supreme Court agreed with the vendor, stating that the vendor did not have a "substantial nexus" with North Dakota because the vendor lacked a "bright-line" physical presence in the State, and thus, the State's enforcement of the tax places unconstitutional burden on interstate commerce.

Similarly, in *National Bellas Hess, Inc.* v. *Department of Revenue of the State of Illinois,* 386 U.S. 753 (1967), the Supreme Court noted that if a vendor's only contact with a State is over the telephone wires or through the mail, or other common carrier service, that vendor does not have the requisite "substantial nexus" required by the Commerce Clause to permit the State to impose tax collection duties on the out-of-State vendor.

Selling products over the Internet raises a new set of nexus issues. Not only is the Internet decentralized with no central controls or boundaries, but there are no key taxing points and information can be routed in multiple directions traveling through various domestic and international jurisdictions before it reaches its final destination. In addition, there is a very weak link between a

vendor's domain name and its physical address. Moreover, it is difficult to know the content of what is being transmitted because all communications are converted to digital format and the communications could be a voice conversation, a letter, or an electronic payment. The use of encryption technology makes it even more difficult to know the content of the communications and its source.

In light of the classification differences, potential for discriminatory or multiple taxes being imposed, and substantial nexus uncertainty, many business executives argue that ambiguity surrounding the taxation of Internet-related activities is the single most significant impediment to the development of electronic commerce in the United States. Similarly, critics of new State and local taxes on Internet-related activities argue that taxes dampen the use of the Internet itself and impede the ability of the Internet to develop into a ubiquitous medium. Critics also argue that it is administratively burdensome for Internet access providers and online service providers to potentially comply with the requirements of over 30,000 State and local taxing jurisdictions.

On the other hand, many State and local government officials oppose Federal intervention in State taxing policies. They argue that States have not rushed to tax the Internet as evidenced by the majority of States that have no Internet-related taxes. They also assert that uniformity issues are being addressed in other forums and Federal intervention in this matter is premature. In addition, the States maintain that sales and use taxes are the single largest source of State revenue. Finally, they argue that freeing the Internet community from paying certain taxes may not be competitively neutral if other similarly-situated non-Internet businesses are required to pay such taxes.

On March 17, 1997, H.R. 1054 was introduced in the House to address the regulatory and taxation issues discussed above. As introduced, H.R. 1054 would have prohibited the Federal Communications Commission (FCC) and States from regulating the prices that certain information service providers would charge to subscribers. H.R. 1054 also would have established a prohibition on State and local government authority to impose any tax or fee on Internet services, or the use of the Internet, although the bill did provide general exceptions to the prohibition. In addition, the bill would have required the formation of a consultative group that would make recommendations to the President and the Congress regarding domestic and international taxation of electronic commerce and Internet-related activities. The President, in turn, would make additional recommendations to the Congress. Finally, the bill stated that the President, in international forums, should declare that the Internet be free of foreign tariffs, trade barriers, and other restrictions.

On October 9, 1997, the Subcommittee on Telecommunications, Trade, and Consumer Protection considered H.R. 1054 and approved the bill for Full Committee consideration, as amended, by a voice vote. As amended in Subcommittee, H.R. 1054 would establish a moratorium (not a prohibition) on a State's ability to tax "access to, or use of the Internet or online services," including other Internet-related activities. The moratorium would expire after either 6 years or upon the occurrence of an event specified in the bill.

The moratorium did not apply, however, to certain State taxes and the Subcommittee bill sought to specifically retain State and local authority with respect to income taxes, property taxes, business license taxes, as well as other taxes or fees. H.R. 1054 would also limit a State's ability to tax an out-of-State vendor if the only contacts the out-of-State vendor made with the State were through the Internet or online services. Finally, the amended bill removed a section that would have prohibited the FCC or States from regulating the prices that subscribers pay for certain information services.

After the Subcommittee's approval of H.R. 1054, State and local officials strongly objected to the structure of the bill. They were concerned, inter alia, that the moratorium freezing taxes on "access to, or use of the Internet or online services" was too broadly written and the Subcommittee's attempt to protect the ability of State and local governments to tax other targets, such as property and income taxes, was not successful, nor was it an exhaustive list that could apply to all States and political subdivisions. This concern led to negotiations among the bill's sponsors, the National Governors' Association, and other State and local government organizations regarding a restructured bill that would clearly specify the taxes that would be prohibited during the moratorium. All other State taxes would be preserved. The negotiations also addressed other issues such as whether certain taxes would be grandfathered and how taxation of the Internet should be treated at the conclusion of the moratorium.

As a result of these negotiations, H.R. 3849 was introduced in the House on May 12, 1998. On May 14, 1998, the Full Committee considered H.R. 3849 and ordered the bill reported to the House, amended, by a roll call vote of 41 yeas to 0 nays. As ordered reported by the Full Committee, H.R. 3849 prohibits the FCC and State commissions from regulating the prices charged for Internet access and online services. H.R. 3849 also calls for a "time-out" on State and local taxation of the Internet so that such taxation does not become a burden on interstate and foreign commerce. In particular, H.R. 3849 calls for a three year moratorium on State and local governments' ability to impose or collect taxes on Internet access and online services, and on their ability to collect "bit" taxes. In addition, the bill calls for a moratorium on discriminatory and multiple taxation of electronic commerce. Some States are permitted to continue to collect taxes that have already been imposed on certain Internet-related activities. While the moratorium is in effect, H.R. 3849 requires a group of Federal, State, and local officials, as well as interested industry and consumer participants, to study long-term domestic issues surrounding taxation of the Internet and to report to Congress and the President with legislative proposals. H.R. 3849 also adopts other measures to ensure that the Internet and electronic commerce can mature and realize their full potential with minimal governmental intervention.

HEARINGS

The Subcommittee on Telecommunications, Trade, and Consumer Protection held a hearing on H.R. 1054, the Internet Tax Freedom Act, the predecessor to H.R. 3849, on July 11, 1997. The Subcommittee received testimony from the following witnesses: The

Honorable Ron Wyden, Senator, State of Oregon; Mr. Wade Anderson, Director of Tax Policy, Comptroller of Public Accounts, State of Texas; Mr. Karl A. Frieden, Senior Manager, Arthur Andersen LLP; Mr. Michael E. Liddick, Director of Taxes, America Online, Inc.; and Mr. Mark Q. Rhoads, Legislative Director, U.S. Internet Council.

Committee Consideration

On October 9, 1997, the Subcommittee on Telecommunications, Trade, and Consumer Protection met in open markup session and approved H.R. 1054, the Internet Tax Freedom Act, the predecessor to H.R. 3849, for Full Committee consideration, as amended, by a voice vote, a quorum being present.

On May 14, 1998, the Full Committee met in open markup session to consider H.R. 3849 and ordered the bill reported to the House, amended, by a roll call vote of 41 yeas to 0 nays.

Rollcall Votes

Clause 2(l)(2)(B) of rule XI of the Rules of the House requires the Committee to list the recorded votes on the motion to report legislation and amendments thereto. The following are the recorded vote on the motion to report H.R. 3849, including the names of those Members voting for and against, and the voice vote on the amendment offered to the measure.

COMMITTEE ON COMMERCE – 105TH CONGRESS
ROLL CALL VOTE #52

BILL: H.R. 3849, Internet Tax Freedom Act

MOTION: Motion by Mr. Bliley to order H.R. 3849 reported to the House, amended.

DISPOSITION: **AGREED TO**, by a roll call vote of 41 yeas to 0 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Bliley	X			Mr. Dingell	X		
Mr. Tauzin	X			Mr. Waxman			
Mr. Oxley				Mr. Markey	X		
Mr. Bilirakis	X			Mr. Hall			
Mr. Schaefer				Mr. Boucher			
Mr. Barton	X			Mr. Manton	X		
Mr. Hastert				Mr. Towns	X		
Mr. Upton	X			Mr. Pallone	X		
Mr. Stearns				Mr. Brown	X		
Mr. Paxon	X			Mr. Gordon	X		
Mr. Gillmor	X			Ms. Furse	X		
Mr. Klug	X			Mr. Deutsch	X		
Mr. Greenwood				Mr. Rush	X		
Mr. Crapo				Ms. Eshoo	X		
Mr. Cox	X			Mr. Klink	X		
Mr. Deal	X			Mr. Stupak	X		
Mr. Largent	X			Mr. Engel	X		
Mr. Burr	X			Mr. Sawyer	X		
Mr. Bilbray	X			Mr. Wynn	X		
Mr. Whitfield	X			Mr. Green	X		
Mr. Ganske	X			Ms. McCarthy	X		
Mr. Norwood				Mr. Strickland	X		
Mr. White	X			Ms. DeGette	X		
Mr. Coburn	X						
Mr. Lazio	X						
Mrs. Cubin	X						
Mr. Rogan	X						
Mr. Shimkus	X						

5/14/98

COMMITTEE ON COMMERCE—105TH CONGRESS VOICE VOTES

Bill: H.R. 3849, Internet Tax Freedom Act.

Amendment: Amendment by Mr. Cox re: making technical and clarifying changes.

Disposition: Agreed to by a voice vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee held a legislative hearing and made findings that are reflected in this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

Pursuant to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Reform and Oversight.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, the Committee finds that H.R. 3849, the Internet Tax Freedom Act, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 22, 1998.

Hon. TOM BLILEY,
Chairman, Committee on Commerce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate and intergovernmental mandates statement for H.R. 3849, the Internet Tax Freedom Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Kim Cawley (for federal costs), and Pepper Santalucia (for the state and local impact).

Sincerely,

ROBERT A. SUNSHINE
(For June E. O'Neill, Director).

Enclosures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

H.R. 3849—Internet Tax Freedom Act

CBO estimates that enacting H.R. 3849 would result in new discretionary spending of $1 million to $2 million over the 1999–2003 period, assuming appropriation of the necessary amounts. H.R. 3849 contains no private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995, but it does contain an intergovernmental mandate on state and local governments, as described in a separate mandates statement.

H.R. 3849 would impose a three-year moratorium on certain state and local taxation of online services and electronic commerce. Electronic commerce would be defined by the bill as the sale, lease, license, offer or delivery of goods or services over the Internet. Section 3 would amend the Communications Act of 1934 to prohibit the Federal Communications Commission (FCC) from collecting fees from providers of Internet access or online services to offset the cost of the FCC's regulatory program. Thus far, the FCC has not imposed regulatory fees on Internet service providers; therefore, we estimate this provision would have no budgetary impact.

Section 4 would require the Department of Commerce to prepare a report, within 18 months following enactment of the bill, regarding barriers to electronic commerce in foreign markets. Based on information from the Department of Commerce, CBO estimates this work would cost less than $300,000, assuming appropriation of the necessary funds. Section 6 would establish an Advisory Commission on Electronic Commerce to examine issues related to the taxation of electronic commerce. The commission would consist of representatives of federal, state and local governments, citizens and business. The bill would authorize the commission to have reasonable access to information, resources, and space to conduct meetings from the Departments of Commerce and the Treasury. CBO estimates the commission's expenses would be less than $300,000 annually because no staff or contractual support would be authorized by the bill.

H.R. 3849 would authorize the commission to accept and use gifts and donations to assist in its work. Donations of money are recorded in the budget as governmental receipts (revenues) and the use of any such amounts under the bill would be direct spending. Because the bill could affect receipts and direct spending, pay-as-you-go procedures would apply. CBO expects that any such effects would be negligible.

The CBO staff contact for this estimate is Kim Cawley. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONGRESSIONAL BUDGET OFFICE MANDATES STATEMENT

H.R. 3849—Internet Tax Freedom Act

Summary: H.R. 3849 contains no private-sector mandates, but by imposing a moratorium on certain types of state and local taxes, the bill would impose an intergovernmental mandate as defined in the Unfunded Mandates Reform Act of 1995 (UMRA). For reasons

described below, CBO cannot estimate whether the direct costs of this mandate would exceed the statutory threshold established in UMRA ($50 million in 1996, indexed annually for inflation).

Intergovernmental Mandates Contained in the Bill: H.R. 3849 would impose a three-year moratorium on certain state and local taxes, including taxes on Internet access and online services. This moratorium would constitute an intergovernmental mandate as defined in UMRA. The bill would allow states that have already imposed a tax on these services to reinstate their taxes but only if they enact, within a year's time, a new law expressly imposing the taxes.

Estimated direct costs of mandates to State, local, and tribal governments

Is the statutory threshold exceeded?

Because it is unclear what should be counted as the direct costs of the mandate, CBO cannot determine whether the threshold for intergovernmental mandates would be exceeded in any of the three years of the moratorium.

Total direct costs of mandates

UMRA defines the direct costs of an intergovernmental mandate as "the aggregate estimated amounts that all state, local, and tribal governments . . . would be prohibited from raising in revenues in order to comply with the federal intergovernmental mandate." There are several reasons why CBO is unsure how to measure the direct costs of the mandate in this bill, having to do either with ambiguities in UMRA or difficulty in interpreting the language of H.R. 3849. In particular:

It is unclear whether giving states the opportunity to opt out of the moratorium effectively eliminates most of the cost of the mandate;

It is unclear whether taxes assessed but not collected should be counted toward the direct costs of the mandate; and

It is unclear how the moratorium would apply during the period of up to a year in which states can override it.

H.R. 3849 would exempt from the moratorium any taxes that were "generally imposed and actually enforced under state law before March 1, 1998." CBO has identified 12 states (including the District of Columbia) that sought to impose their sales and use taxes on Internet access and online services by that date. However, in order to take advantage of this grandfather clause, these 12 states would have to enact a law within a year that expressly subjects those services to taxation. The direct costs of the mandate could be limited to the administrative costs to enact new laws in the 12 states plus any tax revenues lost during the interim between the enactment of H.R. 3849 and the enactment of those state laws. However, any of these 12 states that failed to enact the necessary law within a year would incur additional costs because they would be precluded from imposing their taxes on these services for two more years.

CBO is unsure whether those additional forgone revenues should also be considered direct costs of the mandate, because we are un-

certain how to measure the cost of a mandate that states can avoid by enacting a law. On the one hand, it could be argued that the 12 states would be able to choose whether or not to abide by the moratorium—and that the fiscal consequences of that choice would be the responsibility of the states, not of the federal government. On the other hand, in the absence of this bill, a state's failure to act would have no consequences. Under this bill, a state's failure to act would result in a restriction of its sovereign power to tax. It could be argued, therefore, that any loss of revenue should count as the costs of a mandate under UMRA.

Second, CBO cannot make a threshold determination because we are unsure whether the direct costs of the tax moratorium should be only actual collections forgone or whether tax liabilities that are being litigated should also be included. Information from states and industry sources indicates that while total collections and unpaid assessments in 1997 were close to $50 million, actual collections alone were significantly lower than that amount. The difference occurs because, in some of the states, companies are challenging the applicability of the tax to the service they provide or the state's finding that they are obliged to collect the tax on the state's behalf. In those cases, the companies are not collecting the tax, but they are accruing a potential tax liability to the states. CBO is unsure whether a tax that is being assessed but is not being paid should be counted toward the direct costs of a mandate when the applicability or constitutionality of the tax is being litigated.

The potential mandate cost would grow over the three years that the moratorium would be in effect, because of the projected growth of the market for Internet access and online services. Some industry analysts have predicted that the market will more than double in the next three years. Growth of this magnitude would push the state's collections plus potential tax liability over $50 million, but whether actual collections would reach that threshold would depend on the outcome of litigation. If the states prevail in court, the mandate cost would exceed the threshold.

It is possible that, in the absence of this legislation, some state and local governments would enact new taxes or decide to apply existing taxes to Internet access or online services during the next three years. It is also possible that some governments would repeal existing taxes or preclude their application to these services. Such changes would affect the ultimate cost of the mandate but are extremely difficult to predict. Therefore, for the purposes of estimating the direct costs of the mandate in this bill, CBO considered only the revenues from taxes that are currently in place.

Finally, it is not clear from the language in H.R. 3849 whether the each of the 12 states would be allowed to continue collecting its tax between the date of enactment of this bill and the date when it enacts a law reinstating its tax. Even if the 12 states were allowed to continue collecting their taxes during the first year of the moratorium, H.R. 3849 does not clearly indicate what would happen if any of those states did not manage to pass a law during the year. It is possible that any states failing to pass a law would be required to return any collections from the previous year. Because of these ambiguities, we cannot estimate whether these 12

states would forgo any revenues during the first year of the moratorium.

The moratorium in H.R. 3849 would also apply to "bit taxes," which are taxes based in some way on the volume of digital information being transmitted. According to both state officials and industry representatives, no state or locality has adopted this type of tax. The moratorium would also apply to "multiple or discriminatory taxes on electronic commerce." CBO could not identify any current state or local taxes that would clearly meet the definitions provided in the bill for these two types of taxes.

Appropriation or other Federal financial assistance provided in bill to cover mandate costs: None.

Other impacts on state, local, and tribal governments: H.R. 3849 would establish a process that could lead to a fundamental reform of state and local sales and use taxes as they apply to electronic commerce. The bill would establish an Advisory Commission on Electronic Commerce made up of federal officials, representatives of state and local governments, and representatives of taxpayers and businesses. The commission's duties would include writing proposed legislation to give states expanded authority to require the collection of sales and use taxes on electronic commerce if they simplify their tax codes. The proposed legislation would also have to provide that after four years, states that had not yet simplified their tax code would lose any authority to tax electronic commerce until they did so. This legislation would be submitted to the President, who would then have the choice of submitting some or all of it to the Congress. Any proposals submitted to the Congress would receive expedited consideration.

Previous CBO estimates: CBO has completed intergovernmental mandates statements for three other versions of the Internet Tax Freedom Act. Each version would impose a moratorium on some categories of state and local taxes. In each case, we determined that the moratorium would constitute an intergovernmental mandate as defined in UMRA. The direct costs that we estimated for the mandate in each bill differed depending on the scope and duration of the moratorium. For two bills, we determined that the costs of complying with the mandate would exceed the threshold established in UMRA. For the remaining bill, we were unable to determine whether the threshold was exceeded.

Date	Bill number	Version	Threshold determination
June 18, 1997	S. 442	As introduced	Threshold exceeded.
January 21, 1998	S. 442	As ordered reported by full committee	Cannot determine.
March 25, 1998	H.R. 1054	As approved by subcommittee	Threshold exceeded.

Estimate prepared by: Pepper Santalucia.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

Federal Mandates Statement

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

Advisory Committee Statement

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

Constitutional Authority Statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

Applicability to Legislative Branch

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

Section-by-Section Analysis of the Legislation

SECTION 1. SHORT TITLE

Section 1 identifies the title of the bill as the "Internet Tax Freedom Act."

SECTION 2. PROVISION OF INTERNET ACCESS AND ONLINE SERVICES

Section 2 amends Title II of the Communications Act of 1934 (Communications Act) by adding a new section that would prohibit the FCC and State commissions from regulating the prices or charges paid by subscribers for Internet access or online services. The Committee notes that there are over 6,300 Internet access and online service providers operating in the United States today and market forces will ensure that prices remain competitive and cost-based. Therefore, FCC and State commission oversight of prices is unnecessary.

The section defines "Internet access" as a service that enables users to access content, information, and other services offered over the Internet, but does not mean a telecommunications service. By including the phrase, "but does not mean a telecommunications service," the Committee intends to clarify that nothing in this section is meant to limit the FCC's or a State commission's ability to regulate basic telecommunications services. This section also reserves authority for the FCC and State commissions to regulate telecommunications carriers that offer telecommunications services bundled with Internet access or online services. Internet access and online services are both considered "information services" under the FCC's existing interpretations of the Communications Act.

This section adds two other definitions to help clarify the FCC's and State commissions' authority. "Internet" is defined as the combination of computer facilities and electromagnetic transmission media that employ the Transmission Control Protocol/Internet Protocol (TCP/IP) to transmit information. The Committee intends for the term to be technology-neutral and one that can evolve over time. "Online services" is defined as the offering or provision of in-

formation services combined with Internet access to a user. The Committee believes that for a service provider to be an online service provider, it must offer a subscriber access to the Internet, which is a specific type of information service, and some other information service, as part of a single service offering.

Section 2 also provides that the FCC and State commissions are free to implement the Telecommunications Act of 1996, including, but not limited to, the universal service provision of section 254, notwithstanding the limitations imposed in this section of the bill. Section 2 reflects the fact that the limitations imposed on FCC and State commission authority in H.R. 3849 regarding regulatory treatment of Internet access and online service do not impact those agencies' implementation of the Telecommunications Act, but rather, relate to policy not addressed in the Telecommunications Act.

SECTION 3. FEDERAL REGULATORY FEES

Subsection 3(a) amends section 9 of the Communications Act by stating that providers of Internet access or online services are exempt from paying Federal regulatory fees to the FCC. In general, section 9 fees are used by the FCC to recover the costs of performing certain regulatory activities such as enforcement activities and policy and rulemaking functions. Subsection 3(b) makes conforming amendments to section 9 of the Communications Act.

Subsection 3(c) requires the National Telecommunications and Information Administration (NTIA) to determine whether providers of Internet access or online services pay any direct or indirect Federal regulatory fees. For example, Federal agencies may have the authority to collect fees similar to the regulatory fees identified in subsection 3(a). By using the term "direct or indirect," the Committee intends for NTIA's examination to be as thorough and broad as possible. To the extent that NTIA determines that "indirect" fees may apply, NTIA should state its assumptions for the Committee. Once NTIA completes its examination, subsection 3(c) requires it to make recommendations to Congress regarding whether any such fees should be modified or eliminated.

SECTION 4. REPORT ON FOREIGN COMMERCE

Subsection 4(a) requires the Secretary of Commerce, in consultation with appropriate committees of the Congress, to undertake an examination of: (1) barriers imposed in foreign markets on U.S. providers of property, goods, services, or information engaged in electronic commerce and barriers imposed in foreign markets on U.S. providers of telecommunications services; (2) how the imposition of such barriers will affect U.S. consumers, the competitiveness of U.S. citizens providing property, goods, services, or information in foreign markets, and the growth and maturing of the Internet; and (3) what measures the Government should pursue to foster, promote, and develop electronic commerce in the U.S. and in foreign markets.

Subsection 4(b) requires the Secretary of Commerce to give all interested parties an opportunity to comment on matters set forth in subsection 4(a).

Subsection 4(c) requires the Secretary of Commerce to transmit a report containing the results of the examination to the President not later than 18 months after the date of enactment of the bill.

Subsection 4(d) requires the President to review the Secretary of Commerce's report and to submit to the appropriate committees of Congress the policy recommendations that the President deems necessary or expedient. To the extent that the President wishes to make policy recommendations, the President is required by subsection 4(d) to do so not later than 2 years and 45 days after the date of enactment of the bill. This deadline parallels the other obligation imposed on the President that is set forth in section 7.

The Committee believes that a report by the Secretary of Commerce and policy recommendations by the President on matters of foreign commerce will assist Congress in determining whether additional legislation is needed to protect and promote U.S. citizens that engage in global electronic commerce.

SECTION 5. MORATORIUM ON CERTAIN TAXES

Subsection 5(a) establishes a three year moratorium on certain Internet-related taxes. Specifically, the provision prohibits, for a period of three years, State and local governments from imposing, assessing, collecting, or attempting to collect: (1) taxes on Internet access or online services; (2) bit taxes; or (3) multiple or discriminatory taxes on electronic commerce. Section 10 of the bill defines the terms "bit tax", "discriminatory tax," "electronic commerce," "Internet," "Internet access," "multiple taxation," "online service," and, as a result, section 10 defines the scope of the moratorium.

Subsection 5(b) provides an exception to the moratorium. To the extent that a State has generally imposed and actually enforced a tax on Internet access or online services prior to March 1, 1998, then that State may continue to collect such taxes only if the State enacts a law to expressly impose such tax. The State must enact the law within one year from the date of enactment of the bill.

Subsection 5(b) provides further protection for States. Even if the State fails to act within one year, it may continue to collect outstanding debts owed to the State with respect to taxes that have accrued and were enforced prior to March 1, 1998. In addition, failure of a State to act should not affect ongoing litigation relating to any assessments that the State may have imposed on any Internet access or online service provider.

Subsection 5(c) provides a further exception to the moratorium. Subsection 5(c) states that the moratorium shall not apply with respect to the provision of Internet access or online services that are offered for sale as part of a package of services that includes services other than Internet access or online services, unless the service provider separately states that portion of the billing that applies to such services on the user's bill.

SECTION 6. ADVISORY COMMISSION ON ELECTRONIC COMMERCE

Section 6 creates an Advisory Commission on Electronic Commerce (the Commission) to study the complex tax issues implicated by the growth of electronic commerce. Subsection 6(a) establishes the temporary commission and requires it to be composed of 29 members. Subsection 6(b) designates that the membership of the

Commission shall be composed of the following: two representatives from the Federal government; fourteen representatives from the State, local, and county governments; and thirteen representatives of taxpayers and business groups. Subsection 6(b) also designates the co-chairs of the Commission and requires that appointments to the Commission be made within 45 days and that co-chairs be appointed within 60 days of the date of enactment.

Subsection 6(c) permits the Commission to receive, use, and dispose of gifts or grants for the purposes of aiding the work of the Commission. Subsection 6(d) permits the Commission to access materials, resources, data, and other information of the Department of Commerce and the Department of the Treasury. Subsection 6(d) also allows the Commission to use the facilities of these agencies for the purposes of conducting meetings.

Subsection 6(e) sunsets the Commission when the last Congressional committee has concluded consideration of the legislative recommendations pursuant to section 7 or three years after date of enactment, whichever is first. Subsection 6(f) establishes the operating rules of the Commission: fifteen members are needed for a quorum; 14 days advanced notice must be given for any meetings that may be held; all meetings are open to the public; and the Commission may establish any additional rules that the Commission determines necessary.

Subsection 6(g) establishes the duties of the Commission. In conducting these duties, the Commission is required to consult with the National Tax Association Communications and Electronic Commerce Tax Project and other interested parties. In general, the purpose of the Commission is to examine a broad set of issues involving electronic commerce. Many of the issues involve ways to clarify, reduce, or simplify current tax laws as they apply to electronic commerce, Internet-related activities, and telecommunications services. Subsections 6(g)(1)–(9) set forth the specific duties. Subsection 6(h) declares that the Federal Advisory Committee Act does not apply to the Commission.

SECTION 7. LEGISLATIVE RECOMMENDATIONS

Subsection 7(a) requires the Commission make legislative proposals, within 2 years after the date of enactment of the bill, to the President and Congress regarding the results of the examination it has undertaken pursuant to section 6.

Subsection 7(b) states that the proposed legislation submitted to the President and Congress must be agreed to by at least 18 of the 29 members. In addition, subsections 7(b)(1)–(7) specify the content of the proposed legislation, but provides sufficient flexibility for the Commission to propose other provisions that it deems necessary.

Subsection 7(c) requires the President to review the proposed legislation submitted by the Commission and submit, within 45 days after receipt of the proposed legislation, to the appropriate Congressional committees such policy recommendations that the President finds necessary or expedient.

SECTION 8. EXPEDITED CONSIDERATION OF LEGISLATIVE RECOMMENDATIONS

Section 8 requires that the respective committees in the House and the Senate consider, within 90 days, the proposed legislation offered by the Commission and any recommendations made by the President pursuant to section 7. If a Congressional committee takes action, the legislation is required to be referred to the proper calendar for floor consideration. Subsection 8(b) provides a mechanism for calculating the specific 90 day review period.

SECTION 9. DECLARATION THAT THE INTERNET SHOULD BE FREE OF FOREIGN TARIFFS, TRADE BARRIERS, AND OTHER RESTRICTIONS

This section states that it is the sense of the Congress that the President should seek bilateral and multilateral agreements to remove barriers to global electronic commerce in appropriate international forums, such as the World Trade Organization, the Organization for Economic Cooperation and Development, the International Telecommunications Union, the Asia Pacific Economic Cooperation Council, and the Free Trade Area of the Americas. The provision further provides that such agreements should require that the provision of Internet access or online services be free from undue and discriminatory regulation and that electronic commercial transactions between the United States and foreign providers be free from undue and discriminatory regulation, international tariffs, and discriminatory taxation. The Committee commends the efforts of the Administration to date to remove barriers to global electronic commerce and to keep discriminatory taxes off the Internet.

SECTION 10. DEFINITIONS

This section establishes the definitions of specific terms used throughout the bill and, unless otherwise stated, are meant to apply only within the context of this bill.

Subsection 10(1) provides that the term "bit tax" means any tax on electronic commerce expressly imposed on or measured by the volume of digital information transmitted electronically, or the volume of digital information per unit of time transmitted electronically, but does not include taxes imposed on the provision of telecommunications services. A "bit" is an abbreviation for "binary digit" which denotes either a zero or one.

Subsection 10(2) provides that the term "computer server" means a computer that functions as a centralized provider of information and services to multiple recipients. Generally, computer servers send information to other computers known as "clients," although other recipients could include other computer servers and end-users.

Subsection 10(3)(A)(i) defines "discriminatory tax" as any tax on electronic commerce that is not generally imposed and legally collectible by a State or local government on transactions involving similar property, goods, services, or information accomplished through other means. Similarly, subsection 10(3)(A)(ii) would prohibit a State or local government from taxing electronic commerce in a manner that resulted in a different tax rate being imposed on

electronic commerce when compared to a transaction that occurred through another means.

Subsection 10(3)(A)(iii) states that a tax on electronic commerce is discriminatory if it imposes an obligation to collect or pay a tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.

Subsection 10(3)(A)(iv) states that a tax on electronic commerce is discriminatory if it establishes a classification of Internet access provider or online service provider for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means.

Subsection 10(3)(B)(i) states that the use of a computer server by a remote seller to create or maintain a site on the Internet cannot be considered as a factor when determining the remote seller's collection obligation or else the tax will be considered discriminatory.

Similarly, section 10(3)(B)(ii) states that a tax is discriminatory if a State attempts to collect the tax from an Internet access or online service provider merely because such service provider is displaying a remote seller's information or content on the service provider's computer server, or if the service provider is merely maintaining or taking orders through its computer server.

Subsection 10(4) provides that the term "electronic commerce" means any transaction conducted over the Internet or an online service, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information, whether or not for consideration, and includes the provision of Internet access and online services.

Subsection 10(5) provides that the term "information services" has the meaning given to such term in section 3(20) of the Communications Act. Such term has been recently interpreted by the FCC in a Report to Congress, CC Docket No. 96–45 (April 10, 1998).

Subsection 10(6) provides that the term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected world-wide network of computer networks that employ the TCP/IP protocol, or any predecessor or successor protocol, to transmit information. The Committee intends for the term to be technology-neutral and one that can evolve over time.

Subsection 10(7) provides that the term "Internet access" means a service that enables users to access content, information, and other services offered over the Internet, but does not mean a telecommunications service. For example, providers of Internet access services provide their subscribers with the ability to run a variety of applications, including World Wide Web browsers, File Transfer Protocol clients, Usenet newsreaders, electronic mail clients, and Telnet applications. In general, these applications are considered "information services" as defined in section 3(20) of the Communications Act.

Subsection 10(8) defines a "multiple tax" in several ways. Subsection 10(8)(A) states that a tax is a "multiple tax" if it is imposed by one State or locality on the same or essentially the same electronic commerce that is also taxed by another State or locality (or

the same State, except in the case of sales taxes) whether or not at the same rate or on the same basis without an offsetting credit for taxes paid in other jurisdictions or other similar mechanisms for avoiding double taxation of the same transaction.

Subsection 10(8)(B) states that a tax is a "multiple tax" if a State or local government classifies Internet access or online services as telecommunications or communications services under State law and such State or local government has already imposed a tax on the underlying telecommunications services that are used to provide Internet access or online services without allowing a credit for other taxes paid, a sale for resale exemption, or other mechanism for avoiding double taxation.

Subsection 10(9) provides that the term "online service" means the offering or providing of information services combined with Internet access to a user. The Committee believes that for a service provider to be an online service provider, it must offer a subscriber Internet access, which is a specific type of information service, and some other information service, as part of a single service offering. Examples of online service providers include America Online, CompuServe, Prodigy, and Microsoft Network.

Subsection 10(10) provides that the term "remote seller" means a person who sells, leases, licenses, offers, or delivers property, goods, services, or information from one State to a purchaser in another State using the Internet.

Subsection 10(11) defines "State" to mean any of the several States, the District of Columbia, or any territory or possession of the United States.

Subsection 10(12) provides that the term "tax" means any levy, fee, or charge imposed under governmental authority by any governmental entity; or the imposition of or obligation to collect and to remit to a governmental entity any such levy, fee, or charge imposed by a governmental entity. This subsection also states that cable television franchise fees or similar fees should not be construed as taxes.

Subsection 10(13) provides that the term "telecommunications services" has the meaning given to such term in section 3(46) of the Communications Act. Such term has been recently interpreted by the FCC in a Report to Congress, CC Docket No. 96–45 (April 10, 1998).

SECTION 11. NO EXPANSION OF TAX AUTHORITY

This section states that nothing in the bill shall be construed to expand the power of any State or political subdivision to collect taxes on Internet access, online services, bits, or electronic commerce beyond the power that existed on March 1, 1998.

SECTION 12. PRESERVATION OF AUTHORITY

This section provides that nothing in the bill shall limit or otherwise affect the implementation of the Telecommunications Act of 1996. The Committee intends that the telecommunications policy established in the Telecommunications Act of 1996, especially those provisions that could impact a State or local government's ability to impose taxes or fees consistent with that Act, shall not be affected by the bill.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

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TITLE I—GENERAL PROVISIONS

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SEC. 9. REGULATORY FEES.

(a) * * *

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(h) EXCEPTIONS.—The charges established under this section shall not be applicable to (1) governmental entities or nonprofit entities; ⟦or⟧ (2) to amateur radio operator licenses under part 97 of the Commission's regulations (47 C.F.R. Part 97)*; or (3) providers of Internet access or online service*.

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TITLE II—COMMON CARRIERS

PART I—COMMON CARRIER REGULATION

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SEC. 231. PROHIBITION ON REGULATION OF INTERNET ACCESS AND ONLINE SERVICES.

(a) PROHIBITION.—The Commission shall have no authority or jurisdiction under this title or section 4(i), nor shall any State commission have any authority or jurisdiction, to regulate the prices or charges paid by subscribers for Internet access or online services.

(b) PRESERVATION OF AUTHORITY.—Nothing in this subsection shall limit or otherwise affect—

(1) the Commission's or State commissions' implementation of the Telecommunications Act of 1996 (Public Law 104–104) or the amendments made by such Act; and

(2) the Commission's or State commissions' authority to regulate telecommunications carriers that offer Internet access or online services in conjunction with the provision of any telephone toll, telephone exchange, or exchange access services as such terms are defined in title I.

(c) DEFINITIONS.—As used in this section:

(1) INTERNET.—The term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected world-wide network of computer networks that em-

ploy the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocol, to transmit information.

(2) INTERNET ACCESS.—The term "Internet access" means a service that enables users to access content, information, and other services offered over the Internet, but does not mean a telecommunications service.

(3) ONLINE SERVICE.—The term "online service" means the offering or provision of information services combined with Internet access to a user.

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ADDITIONAL VIEWS OF HON. CHRISTOPHER COX

Because certain key provisions of the Internet Tax Internet Tax Freedom Act, notably Section 5 ("Moratorium on Certain Taxes") and Section 11 ("No expansion of Tax Authority"), fall within the jurisdiction of the Judiciary Committee, and not the Commerce Committee, the Committee's report cannot fully explain the meaning and intent of these provisions. As the bill's author, I am filing these "Additional Views" to provide clarity on a number of important provisions.

The Internet Tax Freedom Act is based on a simple principle: Information should *not* be taxed. As we enter the digital age, the age of information, establishing this principle in law will have profound and long-lasting consequences. given the pace of the Internet's growth—the U.S. Commerce Department recently told us that the number of Internet users and the number of web pages are doubling every 100 days—protecting the Internet, and the information and commerce exchanged over the Net, for special and discriminatory taxation on a national basis will prove a further stimulus to the continued technological and commercial development of this dynamic new medium.

The Internet Tax Freedom Act is needed not just to give the Net room and time to grow. It is also needed because the Net is inherently susceptible to multiple and discriminatory taxation in a way that commerce conducted in more traditional ways is not. The very technologies that make the Net so useful and efficient—notably its decentralized, packet-switched architecture—also mean that several States and perhaps dozens of localities could attempt to impose a tax on a single Internet transaction. The Internet Tax Freedom Act will protect commerce conducted over the Internet from being singled out and taxed in new and creative ways, and will give Americans the reassurance they need that they will not be hit with unexpected taxes and tax collecting costs from remote governments.

The Internet Tax Freedom Act has undergone a number of changes since it was considered by the Telecommunications Subcommittee last October. Most of these changes are the result of months of intense negotiations with State and local government leaders. As a result, the legislation has been altered to reflect State and local concerns, and now reflects a balanced compromise between the national interest in protecting this burgeoning marketplace and the importance of guarding against erosion of the State and local treasuries. Several of these new provisions deserve further explanation.

NO TAXES ON INTERNET ACCESS OR ONLINE SERVICE

Section 5(a)(1) prohibits, for a period of 3 years, State and local governments from imposing, assessing, collecting, or attempting to

collect "taxes on Internet access or online services." It is intended that this temporary ban will be made permanent in the future, as the legislation submitted to Congress by the Advisory Commission pursuant to Section 7 is required to include provisions making the 3-year ban on such taxes permanent. I am also pleased to note that a number of Governors have already publicly declared their support for such a permanent ban.

The term "Internet access" is defined in Section 10(7) as a service that enables users to access content, information, and other services offered over the Internet, but does not mean a telecommunications service. For example, providers of Internet access services provide their subscribers with the ability to run a variety of applications, including World Wide Web browsers, File Transfer Protocol clients, Usenet newsreaders, electronic mail clients, and Talnet applications. In general, these applications are considered "information services" as such term is defined in Section 3(20) of the Communications Act.

The term "online service" is defined in Section 10(9) as the offering or providing of information services combined with Internet access to a user. For a service provider to be an online service provider, it must offer a subscriber access to the Internet, which is a specific type of information service, and some other information service, as part of a single service offering. Examples of online service providers include America Online, CompuServe, Prodigy, and Microsoft Network.

Section 5(b) provides a limited exception to the moratorium on taxes on Internet access and online service. The intent of this "grandfather" provision is to protect only those States that have come to rely on Internet access tax revenues to such an extent that they are willing to enact a law to preserve it.

Specifically, Section 5(b)(1) grandfathers taxes on Internet access and online services that were "generally imposed and actually enforced" under State law prior to March 1, 1998. The term "generally imposed and actually enforced" is intended to include taxes imposed pursuant to administrative interpretations of existing statues where a pubic notice of ruling has been issued clearly stating the taxing authorities' intent to tax Internet access and online services. By specifying a specific cut-off date (March 1, 1998), it is intended to prevent a situation in which a taxing jurisdiction might subsequently reinterpret an existing tax statute to apply for the first time to Internet access or online service. It is also worth mentioning that this grandfather provision only addresses the authority of a State to impose a tax on Internet access or online service consistent with this legislation. This provision does not, for example, alter the limitations on a State's ability to impose a tax on these services under the Constitution.

Section 5(b)(2) further qualified those taxes that are eligible for the grandfather provision by limiting it to only those States that enact—within one year of the moratorium's effective date—legislation expressly imposing such tax on Internet access or online services. If a State did not "generally impose and actually enforce" a tax on Internet access or online service prior to March 1, 1998, the State shall not be permitted to tax Internet access or online service

during the moratorium, regardless of whether it subsequently enacts a law to tax such services.

At present, no State has expressly imposed in statute a tax directly on Internet access or online service. But in a handful of States, taxes are nevertheless being imposed on Internet access or online service, as the result of decisions made by local tax administrators to interpret Internet access to fall within the definitions of existing telecommunications or other taxes. Requiring the express codification of such Internet access taxes is intended to ensure that such a significant policy decision—whether to continue to tax internet access—will be made by the State's duly elected representatives rather than by the singular action of a tax administrator. It should also be noted that it is certainly not without precedent for Congress to enact a Federal law and make its applicability contingent upon the actions of others, including State officials. See *Currin* v. *Wallace*, 306 U.S. 1 (1939); *North Dakota* v. *United States*, 460 U.S. 300 (1983); and *Confederated Tribes of Siletz Indians* v. *United States*, 110 F.3d 688 (9th Cir. 1997).

Section 5(b)(2) provides further protection for States. Even if the State fails to act within one year, it may continue to collect outstanding debts owed to the State with respect to taxes that have accrued and were enforced prior to March 1, 1998. In addition, failure of a State to act should not affect ongoing litigation relating to any assessments that the State may have imposed on any Internet access or online service provider. The use of the word "enforced" is meant to indicate that the State must have taken some formal public action prior to March 1 to notify taxpayers that there has been an underpayment of taxes for which enforcement action may be taken to compel payment of such taxes.

It is important to note that the exception provided in Section 5(b) only applies to "taxes on Internet access or online service." It does not apply to the other taxes included within the moratorium—bit taxes, or multiple or discriminatory taxes on electronic commerce. As a result of this clear language, even if a State tax on Internet access or online service meets the conditions of the exception set forth in Section 5(b), such tax may nevertheless be barred if it is determined to be imposed in a manner that would cause it to fall within the definition of a "multiple tax" or "discriminatory tax."

Section 5(c) provides a further exception to the moratorium to ensure that telecommunications carriers offering telecommunications services will not avoid tax liability for taxes on those telecommunications services. Specifically, this provision requires that, in order to be covered by the moratorium, a telephone company that bundles telephone service along with Internet access (with or without other "information" services) must separately state on the user's bill the portion of the billing that applies to such services.

NO BIT TAXES

Section 5(a)(2) prohibits, for a period of 3 years, State and local governments from imposing, assessing, collecting, or attempting to collect so-called "bit" taxes. A "bit" is an abbreviation for "binary digit" which denotes either a zero or one. The term "bit tax" is defined in Section 10(1) as any tax on electronic commerce expressly imposed on or measured by the volume of digital information trans-

mitted electronically, or the volume of digital information per unit of time transmitted electronically, but does not include taxes imposed on the provision of telecommunications services. Because bit taxes would be levied not on the value of the information being sent but on the number of bits that can flow across the Internet, they will prove extremely detrimental to the future of the Internet and extremely costly for consumers. For this reason, State and local governments should be barred from imposing any such tax.

NO MULTIPLE TAXES ON ELECTRONIC COMMERCE

Section 5(a)(3) prohibits, for a period of 3 years, State and local governments from imposing, assessing, collecting, or attempting to collect "multiple" taxes on electronic commerce. The term "multiple tax" is defined in Section 10(8). In general, this term describes two distinct instances where taxes become layered in an unfair manner: first, instances where two or more taxing jurisdictions each tax the same service; and second, instances where one taxing jurisdiction applies a telecommunications tax in a manner that results in the consumer paying the same tax twice, once on the underlying phone service used to connect to the Internet and again on the Internet service itself.

Section 10(8)(A) states that a tax is a "multiple tax" if it is imposed by one State or locality on the same or essentially the same electronic commerce that is also taxed by another State or locality (or the same State, except in the case of sales taxes) whether or not at the same rate or on the same basis without an offsetting credit for taxes paid in other jurisdictions or other similar mechanisms for avoiding double taxation of the same transaction. This is intended to strengthen the protections already afforded by the U.S. Supreme Court against multiple jurisdictional taxation. For instance, in *Goldberg* v. *Sweet*, 488 U.S. 252 (1989), the Court limited the ability of two States to double-tax the same service by requiring that an interstate telephone call must originate or terminate in the State and must be billed to an in-State address in order for that State to tax the telephone call. In the case of electronic commerce, it is critically important to provide clear protections against multiple taxation, especially since the Internet's ubiquity, decentralized packet-switched architecture, and increasingly portable nature make it vulnerable to such a threat.

Section 10(8)(B) states that a tax is a "multiple tax" if a State or local government classifies Internet access or online services as telecommunications or communications services under State law and such State or local government has already imposed a tax on the underlying telecommunications services that are used to provide Internet access or online services without allowing a credit for other taxes paid, a sale for resale exemption, or other mechanism for eliminating double taxation of the service and the means for delivering the service.

NO DISCRIMINATORY TAXES ON ELECTRONIC COMMERCE

Section 5(a)(3) prohibits, for a period of 3 years, State and local governments from imposing, assessing, collecting, or attempting to collect discriminatory taxes on electronic commerce. The term "discriminatory tax" is defined in Section 10(3).

In the world of multi-state tax law, the term "discriminatory" commonly carries with it its own distinct set of meanings, and is usually used to describe taxes that seek to favor local commerce over interstate commerce. For the purposes of this Act and only this Act, however, Section 10(3) defines the term "discriminatory" in a manner that is meant to capture instances where State or local tax policies seek to place electronic commerce at a disadvantage compared to similar commerce conducted through more traditional means, such as over the telephone or via mail-order. Adopting such a definition of "discriminatory tax" is not intended to disturb Commerce Clause protections against State or local tax laws that burden interstate commerce, but instead to complement these existing protections.

Section 10(3)(A)(i) defines "discriminatory tax" as any tax on electronic commerce that is not generally imposed and legally collectible by a State or local government on transactions involving similar property, goods, services, or information accomplished through other means. For example, if a State does not tax the sale of a particular product purchased over the telephone or through a mail-order catalog, then the State also would be prohibited from taxing the sale merely because the transaction occurs over the Internet. Section 10(3)(A)(ii) would prohibit a State or local government from taxing electronic commerce in a manner that resulted in a different tax rate being imposed on electronic commerce when compared to a transaction that occurred through another means.

No taxes on Internet-unique services

Taken together, Section 10(3)(A)(i) and (ii) mean that property, goods, services, or information that are sold exclusively over the Internet—with no comparable off-line equivalent—would be protected from taxation for the duration of the moratorium. Examples of such transactions include, but are not limited to, electronic mail over the Internet, Internet site selections, Internet bulletin boards, and Internet search services.

No new collection obligations

Section 10(3)(A)(iii) states that a tax on electronic commerce is discriminatory if it imposes an obligation to collect or pay a tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means, such as over the telephone or via mail-order. For instance, a tax does not discriminate against electronic commerce if the obligation to collect and remit the tax falls on the vendor if the same goods were ordered off-line as well as online.

This provision would also bar taxes that seek in the case of electronic commerce to impose tax collection obligations on persons other than the buyer or seller in a transaction. Specifically, it would bar taxes that impose collection or reporting duties on Internet access or online service providers, telephone companies, banks, credit card companies, financial intermediaries, or other entities that might have access to a consumer's billing address since these obligations do not also apply in the case of telephone or mail-order sales.

No classification of an ISP as a phone company

Section 10(3)(A)(iv) states that a tax on electronic commerce is discriminatory if it establishes a classification of Internet access provider or online service provider for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means. Since the term "information service" is defined in such a way as to exclude "telecommunications service," this provision would prohibit States and localities from classifying providers of Internet access or online service as a telephone or similar public utility service for the purpose of applying a business license tax, if such service providers are subject to higher tax rates.

No new "nexus"

The definition of "discriminatory tax" in Section 10(3)(B) is intended to prohibit States and localities from using Internet-based contacts as a factor in determining whether an out-of-State business has "substantial nexus" with a taxing jurisdiction.

This is intended to provide added assurance and certainty that the protections of *Quill* v. *North Dakota,* 504 U.S. 298 (1992), (including its requirement that substantial nexus be determined through a "bright-line" physical-presence test) will apply to businesses engaged in electronic commerce just as they now apply to mail-order firms, unless a future Congress should decide to alter the current nexus requirements. Until such time, electronic commerce should not be treated less favorably than mail-order or catalog sales, because to do so would place the former at a competitive disadvantage and do much to greatly discourage the continued commercial development of the Net.

These provisions were added in direct response to testimony from a State tax administrator, who offered his view to members of the Telecommunications Subcommittee at a July 1997 hearing that the protections provided by *Quill* to remote sellers without a substantial in-State physical presence do not apply to businesses engaged in electronic commerce. During the hearing, the tax administrator admitted that if a resident of his State uses the telephone to purchase a good from as out-of-State vendor, his State would not be permitted to reach beyond its borders to impose its tax collection obligations on that vendor unless it otherwise has a substantial in-State physical presence. Yet the tax administrator claimed that if the Internet were used to place the order (instead of the telephone or the U.S mail), his State would be able to require the out-of-State vendor to collect taxes, on the specious grounds that the flow of data over the Internet into his State, the "presence" of a web page on a computer server located in-State, or the supposed "agency" relationship between the remote seller and an in-State Internet access provider would be enough to give the remote seller a substantial physical presence in his State.

These arguments fly in the face of the U.S. Supreme Court's clear statement in *Quill* that a "bright-line" physical presence—not some malleable theory of electronic or economic presence—is required before a State has the requisite substantial nexus to impose its tax collection obligations on an out-of-State business. While the Courts, in light of *Quill,* are likely to view the arguments made by

State tax administrators on these matters with great skepticism, far greater certainty can be provided by specifically outlawing State efforts to pursue aggressive theories of nexus in an attempt to tax this emerging marketplace. This deterrence should also result in decreased litigation which will benefit States, localities, taxpayers and an often overworked Court system.

Section 10(3)(B)(i) defines “discriminatory tax” in such a way as to make it clear that Congress considers the use of a computer server by a remote seller to create or maintain a site on the Internet to be so insufficient a presence that it shall never be used in any way by a State or locality in determining whether a remote seller has substantial nexus.

Section 10(3)(B)(ii) defines “discriminatory tax” so as to prohibit a State or political subdivision from deeming a provider of Internet access or online service to be an “agent” of a remote seller in those common instances where such provider displays a remote seller’s information or content on such provider’s computer server (even if located in-State), or where such provider maintains or updates a web page on an in-State computer server for a remote seller. Even if the Internet access or online service provider provides other ancillary services, such as web page design or account processing, it should be treated no differently than a telephone company or mail carrier, neither of which are considered agents for purposes of taxation.

NO EXPANSION OF TAX AUTHORITY

Section 11 expressly states that nothing in the Act shall be construed to expand the power of any State or political subdivision to collect taxes on Internet access, online services, bits, or electronic commerce beyond the power that existed on March 1, 1998. This is intended to make it clear that any Court reviewing the validity of State and local taxes should continue to do so consistent with existing judicial precedent and interpretations of the Commerce Clause of the United States Constitution. This Act is not meant to subvert existing requirements that a tax be applied on an interstate activity with a “substantial nexus” (determined through a “bright-line” physical-presence test) with the taxing jurisdiction, be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the jurisdiction. It is fully intended that a State or local tax not subject to the provisions of this Act shall not be valid if such tax would otherwise constitute an undue burden on interstate and foreign commerce.

CONCLUSION

For many government officials, developing new taxes for new technologies often proves an irresistible temptation. More than a century and a half ago, Michael Faraday invented the dynamo—the first electric motor—by rotating a current-bearing wire around a suspended magnet. He became so well-known for this invention that, one day, he was granted an audience before King William IV. When he described what he had developed, the King looked at him and asked: “But, after all, what use is it?” Faraday came back with a quick response: “Only time will tell, but of this I am certain: Someday, sir, you will tax it.”

The Internet Tax Freedom Act shows that the government can indeed learn the lessons of the past. Through its enactment, we can protect the infant technology of the Internet from the very real and very destructive dangers of predatory taxation. And in so doing we will help ensure that all of us live to realize the vast potential of the World Wide Web.

CHRIS COX.

ADDITIONAL VIEWS OF HON JOHN DINGELL

H.R. 3849, the "Internet Tax Freedom Act," unanimously passed the Committee on May 14, 1998. The bill was introduced only two days earlier and came before the Full Committee with amazing speed and a sense of deja vu. A different version, H.R. 1054, bore the same title and was approved by the Telecommunications Subcommittee last October. However, that bill contained several infirmities.

While I strongly supported the notion that Internet-based businesses should be treated in a fair and non-discriminatory way from a tax standpoint, the actual language of the original bill did not accomplish this result. Instead, it conferred substantial regulatory and tax benefits on Internet-related businesses, benefits not available to businesses providing identical services through other channels.

H.R. 3849 is a vastly improved bill. I commend Chairman Bliley, Representative Cox, and their respective staffs for their work with the Minority to achieve consensus on these issues. The tax moratorium is now limited to Internet access and online services, and existing State taxes are grandfathered.

One problem does remain, however. The grandfather for existing State taxes does not extend to similar taxes legally imposed by local government authorities. I hope that this was simply an oversight by the Committee, and that the grandfather provision was intended to cover existing laws enacted by local jurisdictions. Local laws are entitled to the same protection as laws enacted by any other level of government. I urge my colleagues to support this important modification when the bill comes before the House for consideration.

Another important improvement to H.R. 3849 is that it retains existing Federal and State authority to regulate telecommunications services that are provided in combination with Internet access. This approach preserves the Committee's longstanding bipartisan telecommunications policy to regulate (or not regulate) like services in a like manner. Whether telephone services are provided over copper wires, digital loops, circuit switches or Internet protocol, companies will be treated consistently under this bill.

Just as important, it means that this Committee's longstanding bipartisan commitment to Universal Service, *i.e.,* ensuring affordable phone service is available for all Americans, also is solidly maintained into the future. If a company provides a telecommunications service, it will continue to be responsible under existing law to contribute to these support mechanisms no matter what conduit it uses to provide the service.

The changes made to H.R. 3849 are critical to maintaining the cohesive nature of our Nation's telecommunications policies. While we may feel protective of the Internet as we would a newborn

child, not wanting to stifle its growth in any way, we must also be responsible enough to see the long term consequences of a complete hands-off approach. I believe H.R. 3849 now strikes the correct balance.

JOHN D. DINGELL.