

Internet Tax Moratorium Update

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Expiration of the Internet Tax Moratoriums

Federal Internet Tax Moratorium: The Internet Tax Freedom Act moratorium expired on November 1, 2003. Several bills have been introduced to extend it, expand it or tighten it.

Moratorium Review: The Internet Tax Freedom Act¹ (ITFA, P.L. 105-277, 10/21/98) imposed a 3-year moratorium (from 10/1/98 through 10/21/2001) on state and local taxes on Internet access, unless such tax was generally imposed and actually enforced before October 1, 1998, and multiple or discriminatory taxes on e-commerce. This moratorium was extended to November 1, 2003 (P.L. 107-75; 11/28/01). The ITFA preserved state and local taxing authority to the extent a particular tax was not covered under the moratorium. Thus, sales and use taxes still applied to sales of taxable items made via e-commerce.

- ITFA defined "Internet" as "collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio."
- ITFA defined "Internet access service" as "a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services."
- ITFA defined "telecommunications service" as having the meaning given such term in section 3(46) of the Communications Act of 1934 (47 U.S.C. 153(46)) and includes communications services (as defined in section 4251 of the Internal Revenue Code of 1986)."

§ S. 150 extends the moratorium and grandfather provision retroactively until 11/1/07. Other provisions include (also see Appendix A):

- § Adding a provision that the term "Internet access service" "does not include telecommunications services, except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access."

This change is due to confusion over whether DSL services are covered by the original moratorium language. Some states tax DSL on the basis that it consists of both Internet access services and telecom services. DSL providers argue that such treatment puts them at competitive disadvantage with cable modem and direct satellite providers.

¹ Full text of ITFA available at <http://www.ecommercecommission.org/ITFA.htm>.

§ VoIP – the bill adds: “Nothing in this Act shall be construed to affect the imposition of tax on a charge for voice or similar service utilizing Internet Protocol or any successor protocol. This section shall not apply to any services that are incidental to Internet access, such as voice-capable e-mail or instant messaging.”

§ Calls for the GAO to conduct a study due 11/1/05 of the impact of the moratorium on state and local governments and broadband deployment.

S. 150 passed in the Senate (97-3) on 4/29/04, with 4 senators not voting, including Senator Kerry (he appears to support a moratorium and voted yes on the original legislation S. 442 in 1998). See Appendix A for how S. 150 would change the language of the ITFA, as amended by P.L. 107-75.

The CBO did a cost estimate² under the Unfunded Mandates Reform Act on S. 150 in September 2003. At that time, S. 150 preserved the grandfather provision under 10/1/06 and modified the definition of Internet access. The modification was to expand the statement on telecommunication services to read: “Such term does not include telecommunications services *except to the extent such services are used to provide Internet access.*” CBO estimated that beginning in 10/06, state and local governments would begin to lose revenue beyond the UMRA threshold by 2007 (\$64 million in 2007). Loss of the grandfather clause would result in revenue loss in 10 states³ of between \$80 and \$120 million per year beginning in 2007. CBO stated that it could not estimate the impact of the change in the definition of Internet access.

H.R. 49, calling for a permanent moratorium and repeal of the grandfather provision passed in the House on 9/17/03. The CBO cost estimate on this bill is similar to that for S. 150 only the effect would start earlier because H.R. 49 would eliminate the grandfather clause immediately. See Appendix B for how H.R. 49 would change the language of the ITFA, as amended by P.L. 107-75.

S. 2084 calls for (1) a 2-year extension; (2) adding: “The term ‘Internet access service’ does not include telecommunications services, except to the extent such services are purchased, used, or sold by an Internet access provider to connect a purchaser of Internet access to the Internet access provider;” (3) modifying the grandfather clause; (4) adding an accounting rule – “If charges for Internet access are aggregated with and not separately stated from charges for telecommunications services or other charges that are subject to taxation, then the charges for Internet access may be subject to taxation unless the Internet access provider can reasonably identify the charges for Internet access from its books and records kept in the regular course of business;” and (5) providing that nothing in the Act is to prevent the collection of universal access and 911 fees. Senator Feinstein is a co-sponsor.

S. 2348 would extend the current moratorium until June 1, 2005. Senator Feinstein is a co-sponsor.

Arguments in Favor of Extending and Modifying the Moratorium

- “Abolishing the federal prohibition would force the Internet superhighway to navigate the same labyrinthine maze of overlapping and disparate state and local tax regulations and burdens that currently strangles the Nation’s telecommunications services.” “It should be the National Policy of the United States to promote freedom and ubiquitous Internet access and connectivity in America.” Additional arguments

² CBO cost estimates are available at <http://www.cbo.gov/CESearch.htm>.

³ “CBO believes that as many as 10 states (Hawaii, New Hampshire, New Mexico, North Dakota, Ohio, South Dakota, Tennessee, Texas, Washington, Wisconsin) and several local jurisdictions in Colorado, Ohio, South Dakota, Texas, Washington, and Wisconsin are currently collecting such taxes and that these taxes total between \$80 million and \$120 million annually.” CBO did not increase this amount for inflation to derive the revenue loss for 2006 because it assumed that change in technology and cost reductions would offset the inflation amount.

include closing the digital divide, states are not dependent on Internet access taxes, and it prevents double taxation because the telecom aspect of the access is already subject to tax. Former Governor James Gilmore (Virginia), 4/1/03 testimony before the House Judiciary Committee.

[<http://www.house.gov/judiciary/gilmore040103.htm>]

- The moratorium “promotes across the board fairness, not special advantages for one group over another.” Harris Miller of ITAA, 4/1/03 testimony before the House Judiciary Committee. [<http://www.house.gov/judiciary/miller040103.htm>]
- “We estimate that taxes on the full amount of the basic monthly dial-up subscription service for typical members would increase its cost by approximately \$2 to \$3 per month on basic dial-up service. For higher cost broadband service, the cost could be an additional \$5 to \$10 per month.” Joseph Ripp of AOL, 7/16/03 testimony before the Senate Committee on Commerce, Science and Transportation. [<http://commerce.senate.gov/hearings/witnesslist.cfm?id=861>]
- Congressman Cox in a 3/10/04 speech to the League of CA Cities: “unfortunately Senator Feinstein has not yet supported us because she's under the impression that our bill could cost cities and counties revenue by preventing taxes on VOIP services. But VOIP services are taxed now and will continue to be, under the moratorium. It is only Internet access that is not taxed now, and it still won't be. DSL is not taxed now, and it won't be. No change. If every town in America begins taxing the Internet, and taxing authorities around the world begin setting up new tollbooths on the Internet, make no mistake, California will be the biggest loser of all.” [<http://cox.house.gov/html/speeches.cfm?id=721>]
- The National Taxpayers Union refers to S. 2084 as a stealth tax hike that will hinder the continued advancement of the Internet and provide uncertainty that will lead to reduced investment in Internet technologies.⁴
- The Bush administration supports S. 150 per a 11/5/03 press release from the Treasury and Commerce secretaries: ““We believe that government should support the widespread availability and use of the Internet, including the use of broadband technology, and not discourage the Internet’s growth through new access taxes. Keeping the Internet free of multiple or discriminatory taxes will help create an environment for innovation and will help ensure that electronic commerce remains a vital, and growing, part of our economy. A permanent moratorium means a permanent victory for American consumers and businesses. We urge the Senate to pass S. 150 as soon as possible so President Bush can sign a permanent Internet tax moratorium.” [JS-971 at <http://www.treas.gov/press/>]

Arguments Against Extending and Modifying the Moratorium

- S. 2084 was supported by the National Governor’s Association and the National League of Cities. The NGA noted that S. 150 would lead to a revenue loss for California and its local governments of \$836 million, while H.R. 49 would lead to a loss of \$1,495 million. The H.R. 49 estimate is based on an assumption that governments lose all state and local telecom transaction taxes and business taxes “as companies migrate their telecommunications services to the Internet.” The S. 150 estimate is based on the fact that the proposal “includes all telecommunications taxes except for 911 fees and business taxes such as property taxes, capital stock taxes on net worth, or sales and use taxes on business inputs.” [Cong. Rec. 4/29/04, S4639 et seq]

⁴ NTU press release of 2/11/04; <http://www.ntu.org>.

- The NGA recommended that Congress adhere to three principles: [Cong. Rec. 4/29/04, S4640]
 - 1) “Do no harm” – be sure that any legislation preserves existing state and local revenues.
 - 2) “Be clear – definitions matter” – the original legislation specifically excluded telecom services from the definition of Internet access. This “allowed some jurisdictions to tax the telecommunications component of certain broadband technologies like DSL while others remained tax-free. This perceived inequity led to a push to alter the definition of Internet access in H.R. 49 and S. 150 to make tax free telecommunications services ‘used to provide Internet access,’ as a means to making the ITFA technology neutral. This change, however, is too broad. Not only would it prohibit taxes states and localities are collecting on DSL, it would also exempt all telecommunications services used anywhere along the Internet – from the end-user all the way to the ‘backbone.’ Compared to the original moratorium, which specifically expressly telecommunications services from its scope, H.R. 49 and S. 150 could ultimately put at risk most, if not all, state and local telecommunication tax revenue.” The NGA is also concerned that the growth of VoIP usage that is bundled with Internet access will further hurt revenues.
 - 3) “Stay flexible – a temporary solution is better than permanent confusion” – the rapid pace of innovation surrounding the Internet makes it difficult to define terms and ongoing work of the FCC and others calls for the exercise of caution in governing in this area.
- The NLC noted that it has no goal to tax email or create new taxes for the Internet, but only wants to preserve current telecom tax and franchise fee authority at the state and local level. [Cong. Rec. 4/29/04, S4641]
- The Center on Budget and Policy Priorities raised several concerns with S. 150 and H.R. 49 in a 10/03 report. These concerns include:⁵
 - § Loss of revenues to states that had fallen under the grandfather provision.
 - § Loss of revenue to many states if DSL services are also protected by the moratorium.⁶ In October 2003, the 9th Circuit overturned an FCC ruling that cable modem was solely an information service. The court found it to be both a telecom service and an information service.⁷ Thus, the CBPP questions why Congress should apply the moratorium to DSL services rather than require cable modem operators to break down their bills between telecom and information services.
 - § Loss of revenue on the use of telecommunications services by ISPs. S. 150 modifies the definition of Internet access services by adding that it excludes telecom services except to the extent those services are purchased, used, or sold by an Internet service provider in providing Internet access. The CBPP notes that this is an area where the CBO was unable to project the revenue loss because telecom service providers do not report how much of their services

⁵ Center on Budget and Policy Priorities report – “Making the Internet Tax Freedom Act Permanent in the Form Currently Proposed Would Lead to a Substantial Revenue Loss for States and Localities, 10/03; at <http://www.cbpp.org/10-20-03sfp.pdf>.

⁶ The CBPP notes that at least 27 states and the District of Columbia current receive sales and excise taxes from DSL services. California is not one of those states. CBPP estimates the revenue loss at \$70 million per year.

⁷ *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 10/6/03); available at <http://caselaw.lp.findlaw.com/data2/circs/9th/0270518p.pdf>.

were provided to ISPs. The CBPP also notes the irony of this change because an argument made by ISPs for the original moratorium was that it would avoid double taxation on the telecom services that are built-in to the access charges to customers.

- § Loss of revenue from the expected growth of usage of VoIP since such services will likely qualify as Internet access.
- § Loss of revenue as more Internet access providers bundle proprietary content (such as music, movies, games and software) with the access services.
- § Possible loss of revenue beyond sales and excise with the removal of the grandfather provision. "Internet access providers (including telecommunications companies providing VoIP and other Internet-related telecommunications services such as DSL) could seek to establish in the courts that state and local taxes on their property and profits are prohibited *indirect* taxes on access service. Opening the door to such claims clearly is unintended, but to date the relevant Senate committees have been unwilling to add language to S. 150 ... to eliminate any possibility of such litigation." [page 16 of the CBPP report at <http://www.cbpp.org/10-20-03sfp.pdf>]
- § Why should state and local governments be forced to subsidize the growth of Internet access? Why shouldn't the federal government also bear some of the financial burden?

CA Internet Tax Moratorium: The moratorium expired January 1, 2004. AB 1791 would extend it to January 1, 2010.

CA Moratorium Review: The CA-ITFA imposed a moratorium to prevent any city, or county, or city and county from assessing taxes on Internet access, on-line computer services, or the use of Internet access or any on-line computer service; a bit tax or bandwidth tax;⁸ or any discriminatory tax on Internet access or on-line computer services. The prohibition did not apply to any new or existing tax of general application imposed or assessed in a uniform and nondiscriminatory manner without regard to whether the activities or transactions taxed are conducted through the use of the Internet, Internet access, or Online Computer Services. Thus, sales and use taxes, business license taxes, utility user taxes generally continued to apply. If the FCC were to find that Online Computer Services or Internet access delivered over a cable television system are not cable services, a cable television franchise fee may not be imposed on such services.

"It is the intent of this Legislature that no existing or future state taxes or state fees be imposed by the state in a discriminatory manner upon Internet access or Online Computer Services. This statement of legislative intent is meant to place the greatest possible barrier to the creation of discriminatory taxes or fees upon this Legislature and all future Legislatures." [from AB 1614, Chapter 351, 8/24/98]

⁸ A bandwidth tax is defined as "any transactional tax imposed on or measured by the physical capacity of an available signal to transmit information electronically or by fiber optics."

Appendix A

Internet Tax Moratorium Statutory Provisions – As Proposed to be Amended by S. 150

Only Sections 1101 and 1004 of the statute are provided below because these are the relevant parts in any extension of the moratorium.

SEC. 1101. MORATORIUM.

- (a) Moratorium.--No State or political subdivision thereof ~~shall~~ may impose any of the following taxes during the period beginning on ~~October~~ November 1, 1998~~2003~~, and ending on ~~November 1, 2003~~ 2007:
- (1) Taxes on Internet. ~~access, unless such tax was generally imposed and actually enforced prior to October 1, 1998; and~~
 - (2) Multiple or discriminatory taxes on electronic commerce.
- (b) Preservation of State and Local Taxing Authority.-- Except as provided in this section, nothing in this title shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or superseding of, any State or local law pertaining to taxation that is otherwise permissible by or under the Constitution of the United States or other Federal law and in effect on the date of enactment of this Act.
- (c) Liabilities and Pending Cases.--Nothing in this title affects liability for taxes accrued and enforced before the date of enactment of this Act, nor does this title affect ongoing litigation relating to such taxes.
- ~~(d) Definition of Generally Imposed and Actually Enforced.-- For purposes of this section, a tax has been generally imposed and actually enforced prior to October 1, 1998, if, before that date, the tax was authorized by statute and either--~~
- ~~(1) a provider of Internet access services had a reasonable opportunity to know by virtue of a rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; or~~
 - ~~(2) a State or political subdivision thereof generally collected such tax on charges for Internet access.~~
- ~~(ed)~~ Exception to Moratorium.--
- (1) In general.--Subsection (a) shall also not apply in the case of any person or entity who knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors unless such person or entity has restricted access by minors to material that is harmful to minors--
 - (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
 - (B) by accepting a digital certificate that verifies age; or
 - (C) by any other reasonable measures that are feasible under available technology.
 - (2) Scope of exception.--For purposes of paragraph (1), a person shall not be considered to making a communication for commercial purposes of material to the extent that the person is--
 - (A) a telecommunications carrier engaged in the provision of a telecommunications service;
 - (B) a person engaged in the business of providing an Internet access service;
 - (C) a person engaged in the business of providing an Internet information location tool; or
 - (D) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the communication.
 - (3) Definitions.--In this subsection:
 - (A) By means of the world wide web.--The term ``by means of the World Wide Web" means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol, file transfer protocol, or other similar protocols.
 - (B) Commercial purposes; engaged in the business.--

(i) Commercial purposes.--A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(ii) Engaged in the business.--The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

(C) Internet.--The term "Internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.

(D) Internet access service.--The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. ~~Such term does not include telecommunications services.~~ The term 'Internet access service' does not include telecommunications services, except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access.

(E) Internet information location tool.--The term "Internet information location tool" means a service that refers or links users to an online location on the World Wide Web. Such term includes directories, indices, references, pointers, and hypertext links.

(F) Material that is harmful to minors.--The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--

(i) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(ii) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(G) Minor.--The term "minor" means any person under 17 years of age.

(H) Telecommunications carrier; telecommunications service.--The terms "telecommunications carrier" and "telecommunications service" have the meanings given such terms in section 3 of the Communications Act of 1934 (47 U.S.C. 153).

(f) Additional Exception to Moratorium.--

(1) In general.--Subsection (a) shall also not apply with respect to an Internet access provider, unless, at the time of entering into an agreement with a customer for the provision of Internet access services, such provider offers such customer (either for a fee or at no charge) screening software that is designed to permit the customer to limit access to material on the Internet that is harmful to minors.

(2) Definitions.--In this subsection:

(A) Internet access provider.--The term "Internet access provider" means a person engaged in the business of providing a computer and communications facility through which a customer may obtain access to the Internet, but does not include a common carrier to the extent that it provides only telecommunications services.

- (B) Internet access services.--The term "Internet access services" means the provision of computer and communications services through which a customer using a computer and a modem or other communications device may obtain access to the Internet, but does not include telecommunications services provided by a common carrier.
- (C) Screening software.--The term "screening software" means software that is designed to permit a person to limit access to material on the Internet that is harmful to minors.
- (3) Applicability.--Paragraph (1) shall apply to agreements for the provision of Internet access services entered into on or after the date that is 6 months after the date of enactment of this Act.

SEC. 1104. GRANDFATHERING OF STATES THAT TAX INTERNET ACCESS.

(a) Pre-October 1998 Taxes-

“(1) IN GENERAL- Section 1101(a) does not apply to a tax on Internet access that was generally imposed and actually enforced prior to October 1, 1998, if, before that date, the tax was authorized by statute and either--

“(A) a provider of Internet access services had a reasonable opportunity to know, by virtue of a rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; or

“(B) a State or political subdivision thereof generally collected such tax on charges for Internet access.

“(2) TERMINATION- This subsection shall not apply after November 1, 2007.

(b) Pre-November 2003 Taxes-

“(1) IN GENERAL- Section 1101(a) does not apply to a tax on Internet access that was generally imposed and actually enforced as of November 1, 2003, if, as of that date, the tax was authorized by statute and--

“(A) a provider of Internet access services had a reasonable opportunity to know by virtue of a public rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; and

“(B) a State or political subdivision thereof generally collected such tax on charges for Internet access.

“(2) TERMINATION- This subsection shall not apply after November 1, 2005.

SEC. ~~1104~~1105. DEFINITIONS.

For the purposes of this title:

(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) 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, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period;

(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;

- (iv) establishes a classification of Internet access service providers or online service providers 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) ~~except with respect to a tax (on Internet access) that was generally imposed and actually enforced prior to October 1, 1998,~~ the sole ability to access a site on a remote seller's out-of-State computer server is considered a factor in determining a remote seller's tax collection obligation; or
 - (ii) a provider of Internet access service or online services is deemed to be the agent of a remote seller for determining tax collection obligations solely as a result of--
 - (I) the display of a remote seller's information or content on the out-of-State computer server of a provider of Internet access service or online services; or
 - (II) the processing of orders through the out-of-State computer server of a provider of Internet access service or online services.
- (3) Electronic commerce.--The term ``electronic commerce" means any transaction conducted over the Internet or through Internet access, 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.
- (4) Internet.--The term ``Internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.
- (5) Internet access.--The term ``Internet access" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to users. ~~Such term does not include telecommunications services.~~ The term 'Internet access service' does not include telecommunications services, except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access.
- (6) Multiple tax.--
 - (A) In general.--The term ``multiple tax" means any tax that is imposed by one State or political subdivision thereof on the same or essentially the same electronic commerce that is also subject to another tax imposed by another State or political subdivision thereof (whether or not at the same rate or on the same basis), without a credit (for example, a resale exemption certificate) for taxes paid in other jurisdictions.
 - (B) Exception.--Such term shall not include a sales or use tax imposed by a State and 1 or more political subdivisions thereof on the same electronic commerce or a tax on persons engaged in electronic commerce which also may have been subject to a sales or use tax thereon.
 - (C) Sales or use tax.--For purposes of subparagraph (B), the term ``sales or use tax" means a tax that is imposed on or incident to the sale, purchase, storage, consumption, distribution, or other use of tangible personal property or services as may be defined by laws imposing such tax and which is measured by the amount of the sales price or other charge for such property or service.
- (7) State.--The term ``State" means any of the several States, the District of Columbia, or any commonwealth, territory, or possession of the United States.
- (8) Tax.--
 - (A) In general.--The term ``tax" means--
 - (i) any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred; or
 - (ii) the imposition on a seller of an obligation to collect and to remit to a governmental entity any sales or use tax imposed on a buyer by a governmental entity.
 - (B) Exception.--Such term does not include any franchise fee or similar fee 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), or any other fee related to obligations or telecommunications carriers under the Communications Act of 1934 (47 U.S.C. 151 et seq.).

(9) Telecommunications service.--The term "telecommunications service" has the meaning given such term in section 3(46) of the Communications Act of 1934 (47 U.S.C. 153(46)) and includes communications services (as defined in section 4251 of the Internal Revenue Code of 1986).

(10) Tax on Internet access.--~~The term "tax on Internet access" means a tax on Internet access, including the enforcement or application of any new or preexisting tax on the sale or use of Internet services unless such tax was generally imposed and actually enforced prior to October 1, 1998.~~

(A) In General – The term 'tax on Internet access' means a tax on Internet access, regardless of whether such tax is imposed on a provider of Internet access or a buyer of Internet access and regardless of the terminology used to describe the tax.

(B) General Exception – The term 'tax on Internet access' does not include a tax levied upon or measured by net income, capital stock, net worth, or property value.'

SEC. 1106. ACCOUNTING RULE.

(a) IN GENERAL- If charges for Internet access are aggregated with and not separately stated from charges for telecommunications services or other charges that are subject to taxation, then the charges for Internet access may be subject to taxation unless the Internet access provider can reasonably identify the charges for Internet access from its books and records kept in the regular course of business.

(b) DEFINITIONS- In this section:

'(1) CHARGES FOR INTERNET ACCESS- The term 'charges for Internet access' means all charges for Internet access as defined in section 1105(5).

'(2) CHARGES FOR TELECOMMUNICATIONS SERVICES- The term 'charges for telecommunications services' means all charges for telecommunications services, except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access.

SEC. 1107. EFFECT ON OTHER LAWS.

(a) UNIVERSAL SERVICE- Nothing in this Act shall prevent the imposition or collection of any fees or charges used to preserve and advance Federal universal service or similar State programs--

(1) authorized by section 254 of the Communications Act of 1934 (47 U.S.C. 254); or

(2) in effect on February 8, 1996.

(b) 911 and E-911 Services- Nothing in this Act shall prevent the imposition or collection, on a service used for access to 911 or E-911 services, of any fee or charge specifically designated or presented as dedicated by a State or political subdivision thereof for the support of 911 or E-911 services if no portion of the revenue derived from such fee or charge is obligated or expended for any purpose other than support of 911 or E-911 services.

(c) NON-TAX REGULATORY PROCEEDINGS- Nothing in this Act shall be construed to affect any Federal or State regulatory proceeding that is not related to taxation.

SEC. 1108. EXCEPTION FOR VOICE SERVICES OVER THE INTERNET.

Nothing in this Act shall be construed to affect the imposition of tax on a charge for voice or similar service utilizing Internet Protocol or any successor protocol. This section shall not apply to any services that are incidental to Internet access, such as voice-capable e-mail or instant messaging.

Non-Code Provisions:

SEC. 7. GAO STUDY OF EFFECTS OF INTERNET TAX MORATORIUM ON STATE AND LOCAL GOVERNMENTS AND ON BROADBAND DEPLOYMENT.

The Comptroller General shall conduct a study of the impact of the Internet tax moratorium, including its effects on the revenues of State and local governments and on the deployment and adoption of broadband technologies for Internet access throughout the United States, including the impact of the Internet Tax Freedom

Act (47 U.S.C. 151 note) on build-out of broadband technology resources in rural under served areas of the country. The study shall compare deployment and adoption rates in States that tax broadband Internet access service with States that do not tax such service, and take into account other factors to determine whether the Internet Tax Freedom Act has had an impact on the deployment or adoption of broadband Internet access services. The Comptroller General shall report the findings, conclusions, and any recommendations from the study to the Senate Committee on Commerce, Science, and Transportation and the House of Representatives Committee on Energy and Commerce no later than November 1, 2005.

SEC. 8. EFFECTIVE DATE.

The amendments made by this Act take effect on November 1, 2003.

Appendix B

Internet Tax Moratorium Statutory Provisions – As Proposed to be Amended by H.R. 49

Only Sections 1101 and 1004 of the statute are provided below because these are the relevant parts in any extension of the moratorium.

SEC. 1101. MORATORIUM.

- (a) Moratorium.--No State or political subdivision thereof ~~shall~~ may impose any of the following taxes; ~~during the period beginning on October 1, 1998, and ending on November 1, 2003—~~
- (1) Taxes on Internet access., ~~unless such tax was generally imposed and actually enforced prior to October 1, 1998; and~~
 - (2) Multiple or discriminatory taxes on electronic commerce.
- (b) Preservation of State and Local Taxing Authority.-- Except as provided in this section, nothing in this title shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or superseding of, any State or local law pertaining to taxation that is otherwise permissible by or under the Constitution of the United States or other Federal law and in effect on the date of enactment of this Act.
- (c) Liabilities and Pending Cases.--Nothing in this title affects liability for taxes accrued and enforced before the date of enactment of this Act, nor does this title affect ongoing litigation relating to such taxes.
- ~~(d) Definition of Generally Imposed and Actually Enforced.-- For purposes of this section, a tax has been generally imposed and actually enforced prior to October 1, 1998, if, before that date, the tax was authorized by statute and either—~~
- ~~(1) a provider of Internet access services had a reasonable opportunity to know by virtue of a rule or other public proclamation made by the appropriate administrative agency of the State or political subdivision thereof, that such agency has interpreted and applied such tax to Internet access services; or~~
 - ~~(2) a State or political subdivision thereof generally collected such tax on charges for Internet access.~~
- (e) Exception to Moratorium.--
- (1) In general.--Subsection (a) shall also not apply in the case of any person or entity who knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors unless such person or entity has restricted access by minors to material that is harmful to minors--
 - (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
 - (B) by accepting a digital certificate that verifies age; or
 - (C) by any other reasonable measures that are feasible under available technology.
 - (2) Scope of exception.--For purposes of paragraph (1), a person shall not be considered to making a communication for commercial purposes of material to the extent that the person is--
 - (A) a telecommunications carrier engaged in the provision of a telecommunications service;
 - (B) a person engaged in the business of providing an Internet access service;
 - (C) a person engaged in the business of providing an Internet information location tool; or
 - (D) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the communication.
 - (3) Definitions.--In this subsection:
 - (A) By means of the world wide web.--The term ``by means of the World Wide Web" means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol, file transfer protocol, or other similar protocols.
 - (B) Commercial purposes; engaged in the business.--

- (i) Commercial purposes.--A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.
 - (ii) Engaged in the business.--The term ``engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.
 - (C) Internet.--The term ``Internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.
 - (D) Internet access service.--The term ``Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services except to the extent such services are used to provide Internet access.
 - (E) Internet information location tool.--The term ``Internet information location tool" means a service that refers or links users to an online location on the World Wide Web. Such term includes directories, indices, references, pointers, and hypertext links.
 - (F) Material that is harmful to minors.--The term ``material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--
 - (i) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
 - (ii) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
 - (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.
 - (G) Minor.--The term ``minor" means any person under 17 years of age.
 - (H) Telecommunications carrier; telecommunications service.--The terms ``telecommunications carrier" and ``telecommunications service" have the meanings given such terms in section 3 of the Communications Act of 1934 (47 U.S.C. 153).
- (f) Additional Exception to Moratorium.--
- (1) In general.--Subsection (a) shall also not apply with respect to an Internet access provider, unless, at the time of entering into an agreement with a customer for the provision of Internet access services, such provider offers such customer (either for a fee or at no charge) screening software that is designed to permit the customer to limit access to material on the Internet that is harmful to minors.
 - (2) Definitions.--In this subsection:
 - (A) Internet access provider.--The term ``Internet access provider" means a person engaged in the business of providing a computer and communications facility through which a customer may obtain access to the Internet, but does not include a common carrier to the extent that it provides only telecommunications services.

- (B) Internet access services.--The term "Internet access services" means the provision of computer and communications services through which a customer using a computer and a modem or other communications device may obtain access to the Internet, but does not include telecommunications services provided by a common carrier.
- (C) Screening software.--The term "screening software" means software that is designed to permit a person to limit access to material on the Internet that is harmful to minors.
- (3) Applicability.--Paragraph (1) shall apply to agreements for the provision of Internet access services entered into on or after the date that is 6 months after the date of enactment of this Act.

SEC. 1104. DEFINITIONS.

For the purposes of this title:

- (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) 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, unless the rate is lower as part of a phase-out of the tax over not more than a 5-year period;
 - (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;
 - (iv) establishes a classification of Internet access service providers or online service providers 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) ~~except with respect to a tax (on Internet access) that was generally imposed and actually enforced prior to October 1, 1998,~~ the sole ability to access a site on a remote seller's out-of-State computer server is considered a factor in determining a remote seller's tax collection obligation; or
 - (ii) a provider of Internet access service or online services is deemed to be the agent of a remote seller for determining tax collection obligations solely as a result of--
 - (I) the display of a remote seller's information or content on the out-of-State computer server of a provider of Internet access service or online services; or
 - (II) the processing of orders through the out-of-State computer server of a provider of Internet access service or online services.
- (3) Electronic commerce.--The term "electronic commerce" means any transaction conducted over the Internet or through Internet access, 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.
- (4) Internet.--The term "Internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.
- (5) Internet access.--The term "Internet access" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content,

information, and other services as part of a package of services offered to users. Such term does not include telecommunications services except to the extent such services are used to provide Internet access.

(6) Multiple tax.--

(A) In general.--The term ``multiple tax" means any tax that is imposed by one State or political subdivision thereof on the same or essentially the same electronic commerce that is also subject to another tax imposed by another State or political subdivision thereof (whether or not at the same rate or on the same basis), without a credit (for example, a resale exemption certificate) for taxes paid in other jurisdictions.

(B) Exception.--Such term shall not include a sales or use tax imposed by a State and 1 or more political subdivisions thereof on the same electronic commerce or a tax on persons engaged in electronic commerce which also may have been subject to a sales or use tax thereon.

(C) Sales or use tax.--For purposes of subparagraph (B), the term ``sales or use tax" means a tax that is imposed on or incident to the sale, purchase, storage, consumption, distribution, or other use of tangible personal property or services as may be defined by laws imposing such tax and which is measured by the amount of the sales price or other charge for such property or service.

(7) State.--The term ``State" means any of the several States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(8) Tax.--

(A) In general.--The term ``tax" means--

(i) any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred; or

(ii) the imposition on a seller of an obligation to collect and to remit to a governmental entity any sales or use tax imposed on a buyer by a governmental entity.

(B) Exception.--Such term does not include any franchise fee or similar fee 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), or any other fee related to obligations or telecommunications carriers under the Communications Act of 1934 (47 U.S.C. 151 et seq.).

(9) Telecommunications service.--The term ``telecommunications service" has the meaning given such term in section 3(46) of the Communications Act of 1934 (47 U.S.C. 153(46)) and includes communications services (as defined in section 4251 of the Internal Revenue Code of 1986).

(10) Tax on Internet access.--The term ``tax on Internet access" means a tax on Internet access, including the enforcement or application of any new or preexisting tax on the sale or use of Internet services. ~~unless such tax was generally imposed and actually enforced prior to October 1, 1998.~~