



Department of  
Taxation

## ST 2020-01: Internet Tax Freedom Act Summary – June 2020

The Internet Tax Freedom Act (ITFA)<sup>1</sup> was first enacted in 1998 (Pub.L. 105-277, Div. C, Title XI, §§ 1100 to 1109, Oct. 21, 1998) and established a temporary moratorium on the authority of states and their political subdivisions to impose taxes on access to the Internet or multiple or discriminatory taxes on electronic commerce. In addition to the moratorium, a grandfathering provision was included in ITFA that allowed states that had already imposed and collected a tax on electronic commerce before October 1, 1998 to continue implementing those taxes.<sup>2</sup> In February of 2016, the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA)<sup>3</sup> was signed into law, making the temporary moratorium permanent and extending the grandfathering clause temporarily through June 30, 2020. This release will outline the ITFA’s impact on Ohio’s automatic data processing and electronic information services.<sup>4</sup>

### Ohio’s History with the ITFA

Ohio levies sales tax on transactions by which automatic data processing and electronic information services are provided for use in business. The levy began with House Bill 291, effective July 1, 1983, that added to the definition of “sale and selling” transactions by which “automatic data processing and computer services are or are to be provided for use in business.” 1983 Ohio Laws 3215. House Bill 291 also added a definition of “automatic data processing and computer services” that included “providing direct access to computer equipment by remote or proximate access for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment.” 1983 Ohio Laws 3220.

House Bill 152, effective July 1, 1993, amended the statutory language “automatic data processing and computer services.” This bill also added the definition of “electronic information services”. The definition of “electronic information services” at R.C. 5739.01(Y)(1)(c) includes “access to computer equipment by means of telecommunications equipment for the purpose of either of the following: (i) [e]xamining or acquiring data stored in or accessible to the computer equipment; (ii) [p]lacing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment.” Internet access services are taxable as electronic information services if used in business.

Section 1101 of ITFA establishes a permanent moratorium on the authority of states and their political subdivisions to impose taxes on “Internet access” or “multiple or discriminatory taxes on electronic commerce”. 47 U.S.C. 151 Statutory Note.

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<sup>1</sup> *Internet Tax Freedom Act (ITFA)*, 47 U.S.C.A. § 151 Statutory Note. (West)

<sup>2</sup> Ohio’s commercial activity tax was specifically excluded from the requirements of this provision. See Section 1105(10) of the ITFA.

<sup>3</sup> See Pub.L. 114-125, Title IX, § 922, Feb. 24, 2016.

<sup>4</sup> This guidance represents the current position of the Ohio Department of Taxation (Department) on this topic. It does not establish any rights for any person and is not binding on the Department or the public.

The Section 1101 moratorium did not apply to states and their political subdivisions' taxes on Internet access pursuant to Section 1104 (the "grandfathering clause") that were 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."

Under the grandfathering clause, Ohio had the authority to levy sales taxes on Internet access services because it imposed tax on such services prior to October 1, 1998. The grandfathering clause has a termination provision separate from the provision that terminated the moratorium. The grandfathering clause is now set to expire on June 30, 2020.

### **Interpretation**

The Department believes that there will be limited impact on other services that will no longer be subject to Ohio's sales and use tax. The definition of Internet access is not broad enough to cover all services performed over the Internet. "Internet access" means a service that enables users to connect to the Internet to access: (1) content, (2) information, or (3) other services offered over the Internet; See Section 1105(5)(A) of the ITFA.

Absent the instances described below, transactions currently defined as automatic data processing, electronic information services, and computer services remain subject to the Ohio sales and use tax.

### **Internet Access Providers**

"Electronic commerce"<sup>5</sup> includes Internet access. The language in Sections 1101(a)(1) and 1105(3) of the ITFA clearly address the sales tax on the charges for Internet Access Providers (IAPs) that provide customers with access by use of telecommunications equipment to their computer equipment in order to be connected to the Internet. Therefore, beginning July 1, 2020, to the extent an IAP is providing its service to a consumer for the consumer's use in business, the IAP is providing an electronic information service that will no longer be subject to Ohio's sales and use tax.

### **On-line Service Providers and Proprietary Services**

On-line Service Providers (OSPs) may provide Internet access as well as access to certain proprietary services provided by the OSP. "Internet access" also includes services that are *incidental to the provision of the service* of enabling users to connect to the Internet<sup>6</sup>. The analysis must be whether the proprietary service is incidental to the provision of the Internet access. To the extent the OSP also provides automatic data processing or electronic information services that are accompanying but not a significant part of the OSPs service of access to the Internet, the OSP is providing automatic data processing or electronic information service that will no longer be subject to Ohio's sales and use tax.

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<sup>5</sup> 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. See Section 1105(3) of the ITFA.

<sup>6</sup> See Section 1105(5)(B) of the ITFA.

*Multiple or Discriminatory Taxes on Electronic Commerce*

Finally, OSPs that provide certain proprietary services over the Internet but not the Internet access, itself, will be evaluated by determining whether the activity is a multiple or discriminatory tax on electronic commerce. Automatic data processing or electronic information services would no longer be subject to Ohio's sales and use tax if the service that is performed over the Internet had an end result that was not legally collectible on a transaction involving similar property, goods, services, or information accomplished through other means.

For example, a wholesaler may need to obtain the value of an item that will be accepted as a trade-in. The wholesaler may purchase from an OSP the ability to access computer equipment to obtain a range of values. Part of the subscription allows for the wholesaler to log into an account and obtain a value by entering certain parameters. The access to the data and equipment meets the definition of an electronic information service. This service would remain taxable on July 1, 2020 because if the range of values was supplied to an individual in a tangible format, the provision of this tangible item would be taxable under R.C. 5739.01(B)(1).

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