



To:	Executive Committee
From:	Roxanne Bland, MTC Counsel
Date:	November 29, 2012
Subject:	H.R. 1002, Wireless Tax Fairness Act of 2011

H.R. 1002, S. 543, the Wireless Tax Fairness Act, was introduced by Zoe Lofgren (D-CA) and has 236 cosponsors. WTFA imposes a 5-year moratorium for any “new discriminatory tax” “on or with respect to” mobile service, mobile service providers and mobile service property by state and local jurisdictions, unless the tax is imposed and enforced before the Act’s enactment. The purpose of the moratorium is to “freeze” existing telecommunications tax regimes in place to give state and local governments and industry the opportunity to make meaningful reforms. The bill is patterned after 49 U.S.C. 11501 (the 4R Act), and the drafters have analogized it as such. H.R. 1002 passed the House on November 1, 2011, and is now pending in the Senate Finance Committee. The bill:

- Imposes a 5-year moratorium on “new discriminatory taxes” on mobile services, mobile service providers and mobile property.
- “mobile services” is defined extremely broadly to include not just what we think of as cell service providers, but also “any other service that is primarily intended for receipt on, transmission from, or use with a mobile telephone or other mobile device, including but not limited to the receipt of a digital good.
- “new discriminatory tax” is also defined extremely broadly to include any income, sales, gross receipts or property tax that is imposed on “mobile services” and is not generally imposed or is imposed at a lower rate on any “other services or transactions involving tangible personal property.” Would a cell tax be “discriminatory” under this definition if there are exemptions from an otherwise generally applicable tax for any other service or type of transaction? Indeed, the bill provides that “all taxes, tax rates, exemptions, deductions, credits, incentives, exclusions, and other similar factors shall be taken into account in determining whether a tax is a new discriminatory tax.”
- Contains “grandfather clause” under which all taxes currently imposed and enforced on mobile service, service providers and property are preserved during the 5-year moratorium. Any rate change, extension, sunset or redefinition could void the grandfather clause.
- Constrains state and local taxing authority, interferes with decision-making and administration, and confers an unfair advantage on one industry.

- States and local jurisdictions that do not currently tax mobile services, service providers and property are forced to design their regimes based on these new restrictions instead of on their own needs.

112<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 1002

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## AN ACT

To restrict any State or local jurisdiction from imposing a new discriminatory tax on cell phone services, providers, or property.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Wireless Tax Fairness  
3 Act of 2011”.

4 **SEC. 2. FINDINGS.**

5 Congress finds the following:

6 (1) It is appropriate to exercise congressional  
7 enforcement authority under section 5 of the 14th  
8 Amendment to the Constitution of the United States  
9 and Congress’ plenary power under article I, section  
10 8, clause 3 of the Constitution of the United States  
11 (commonly known as the “commerce clause”) in  
12 order to ensure that States and political subdivisions  
13 thereof do not discriminate against providers and  
14 consumers of mobile services by imposing new selec-  
15 tive and excessive taxes and other burdens on such  
16 providers and consumers.

17 (2) In light of the history and pattern of dis-  
18 criminatory taxation faced by providers and con-  
19 sumers of mobile services, the prohibitions against  
20 and remedies to correct discriminatory State and  
21 local taxation in section 306 of the Railroad Revital-  
22 ization and Regulatory Reform Act of 1976 (49  
23 U.S.C. 11501) provide an appropriate analogy for  
24 congressional action, and similar Federal legislative  
25 measures are warranted that will prohibit imposing  
26 new discriminatory taxes on providers and con-

1       sumers of mobile services and that will assure an ef-  
2       fective, uniform remedy.

3       **SEC. 3. MORATORIUM.**

4       (a) IN GENERAL.—No State or local jurisdiction shall  
5       impose a new discriminatory tax on or with respect to mo-  
6       bile services, mobile service providers, or mobile service  
7       property, during the 5-year period beginning on the date  
8       of enactment of this Act.

9       (b) DEFINITIONS.—In this Act:

10           (1) MOBILE SERVICE.—The term “mobile serv-  
11       ice” means commercial mobile radio service, as such  
12       term is defined in section 20.3 of title 47, Code of  
13       Federal Regulations, as in effect on the date of en-  
14       actment of this Act, or any other service that is pri-  
15       marily intended for receipt on, transmission from, or  
16       use with a mobile telephone or other mobile device,  
17       including but not limited to the receipt of a digital  
18       good.

19           (2) MOBILE SERVICE PROPERTY.—The term  
20       “mobile service property” means all property used  
21       by a mobile service provider in connection with its  
22       business of providing mobile services, whether real,  
23       personal, tangible, or intangible (including goodwill,  
24       licenses, customer lists, and other similar intangible  
25       property associated with such business).

1           (3) MOBILE SERVICE PROVIDER.—The term  
2           “mobile service provider” means any entity that sells  
3           or provides mobile services, but only to the extent  
4           that such entity sells or provides mobile services.

5           (4) NEW DISCRIMINATORY TAX.—The term  
6           “new discriminatory tax” means a tax imposed by a  
7           State or local jurisdiction that is imposed on or with  
8           respect to, or is measured by, the charges, receipts,  
9           or revenues from or value of—

10                   (A) a mobile service and is not generally  
11                   imposed, or is generally imposed at a lower  
12                   rate, on or with respect to, or measured by, the  
13                   charges, receipts, or revenues from other serv-  
14                   ices or transactions involving tangible personal  
15                   property;

16                   (B) a mobile service provider and is not  
17                   generally imposed, or is generally imposed at a  
18                   lower rate, on other persons that are engaged  
19                   in businesses other than the provision of mobile  
20                   services; or

21                   (C) a mobile service property and is not  
22                   generally imposed, or is generally imposed at a  
23                   lower rate, on or with respect to, or measured  
24                   by the value of, other property that is devoted  
25                   to a commercial or industrial use and subject to

1 a property tax levy, except public utility prop-  
2 erty owned by a public utility subject to rate of  
3 return regulation by a State or Federal regu-  
4 latory authority;

5 unless such tax was imposed and actually enforced  
6 on mobile services, mobile service providers, or mo-  
7 bile service property prior to the date of enactment  
8 of this Act.

9 (5) STATE OR LOCAL JURISDICTION.—The term  
10 “State or local jurisdiction” means any of the sev-  
11 eral States, the District of Columbia, any territory  
12 or possession of the United States, a political sub-  
13 division of any State, territory, or possession, or any  
14 governmental entity or person acting on behalf of  
15 such State, territory, possession, or subdivision that  
16 has the authority to assess, impose, levy, or collect  
17 taxes or fees.

18 (6) TAX.—

19 (A) IN GENERAL.—The term “tax” means  
20 a charge imposed by a governmental entity for  
21 the purpose of generating revenues for govern-  
22 mental purposes, and excludes a fee imposed on  
23 a particular entity or class of entities for a spe-  
24 cific privilege, service, or benefit conferred ex-  
25 clusively on such entity or class of entities.

1 (B) EXCLUSION.—The term “tax” does  
2 not include any fee or charge—

3 (i) used to preserve and advance Fed-  
4 eral universal service or similar State pro-  
5 grams authorized by section 254 of the  
6 Communications Act of 1934 (47 U.S.C.  
7 254); or

8 (ii) specifically dedicated by a State or  
9 local jurisdiction for the support of E-911  
10 communications systems.

11 (c) RULES OF CONSTRUCTION.—

12 (1) DETERMINATION.—For purposes of sub-  
13 section (b)(4), all taxes, tax rates, exemptions, de-  
14 ductions, credits, incentives, exclusions, and other  
15 similar factors shall be taken into account in deter-  
16 mining whether a tax is a new discriminatory tax.

17 (2) APPLICATION OF PRINCIPLES.—Except as  
18 otherwise provided in this Act, in determining  
19 whether a tax on mobile service property is a new  
20 discriminatory tax for purposes of subsection  
21 (b)(4)(C), principles similar to those set forth in sec-  
22 tion 306 of the Railroad Revitalization and Regu-  
23 latory Reform Act of 1976 (49 U.S.C. 11501) shall  
24 apply.



1           (3) EXCLUSIONS.—Notwithstanding any other  
2 provision of this Act—

3           (A) the term “generally imposed” as used  
4 in subsection (b)(4) shall not apply to any tax  
5 imposed only on—

6                   (i) specific services;

7                   (ii) specific industries or business seg-  
8 ments; or

9                   (iii) specific types of property; and

10          (B) the term “new discriminatory tax”  
11 shall not include a new tax or the modification  
12 of an existing tax that either—

13                   (i)(I) replaces one or more taxes that  
14 had been imposed on mobile services, mo-  
15 bile service providers, or mobile service  
16 property; and

17                   (II) is designed so that, based on in-  
18 formation available at the time of the en-  
19 actment of such new tax or such modifica-  
20 tion, the amount of tax revenues generated  
21 thereby with respect to such mobile serv-  
22 ices, mobile service providers, or mobile  
23 service property is reasonably expected to  
24 not exceed the amount of tax revenues that  
25 would have been generated by the respec-

1           tive replaced tax or taxes with respect to  
2           such mobile services, mobile service pro-  
3           viders, or mobile service property; or

4           (ii) is a local jurisdiction tax that may  
5           not be imposed without voter approval,  
6           provides for at least 90 days' prior notice  
7           to mobile service providers, and is required  
8           by law to be collected from mobile service  
9           customers.

10 **SEC. 4. ENFORCEMENT.**

11           Notwithstanding any provision of section 1341 of title  
12 28, United States Code, or the constitution or laws of any  
13 State, the district courts of the United States shall have  
14 jurisdiction, without regard to amount in controversy or  
15 citizenship of the parties, to grant such mandatory or pro-  
16 hibitive injunctive relief, interim equitable relief, and de-  
17 claratory judgments as may be necessary to prevent, re-  
18 strain, or terminate any acts in violation of this Act.

19           (1) JURISDICTION.—Such jurisdiction shall not  
20           be exclusive of the jurisdiction which any Federal or  
21           State court may have in the absence of this section.

22           (2) BURDEN OF PROOF.—The burden of proof  
23           in any proceeding brought under this Act shall be  
24           upon the party seeking relief and shall be by a pre-  
25           ponderance of the evidence on all issues of fact.

1           (3) RELIEF.—In granting relief against a tax  
2           which is discriminatory or excessive under this Act  
3           with respect to tax rate or amount only, the court  
4           shall prevent, restrain, or terminate the imposition,  
5           levy, or collection of not more than the discrimina-  
6           tory or excessive portion of the tax as determined by  
7           the court.

8 **SEC. 5. GAO STUDY.**

9           (a) STUDY.—The Comptroller General of the United  
10          States shall conduct a study, throughout the 5-year period  
11          beginning on the date of the enactment of this Act, to  
12          determine—

13                 (1) how, and the extent to which, taxes imposed  
14                 by local and State jurisdictions on mobile services,  
15                 mobile service providers, or mobile property, impact  
16                 the costs consumers pay for mobile services; and

17                 (2) the extent to which the moratorium on dis-  
18                 crimatory mobile services taxes established in this  
19                 Act has any impact on the costs consumers pay for  
20                 mobile services.

21          (b) REPORT.—Not later than 6 years after the date  
22          of the enactment of this Act, the Comptroller General shall  
23          submit, to the Committee on the Judiciary of the House  
24          of Representatives and Committee on the Judiciary of the  
25          Senate, a report containing the results of the study re-

1 quired subsection (a) and shall include in such report rec-  
2 ommendations for any changes to laws and regulations re-  
3 lating to such results.

Passed the House of Representatives November 1,  
2011.

Attest:

*Clerk.*



112<sup>TH</sup> CONGRESS  
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