

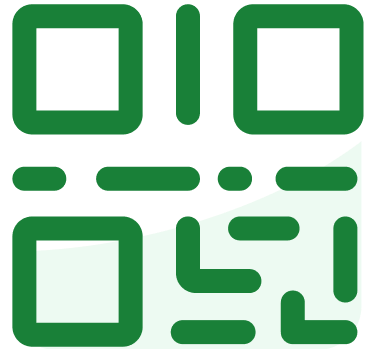
UNDERSTANDING THE BASICS OF THE INTERNET TAX FREEDOM ACT

Uniformity Committee Meeting
November 14, 2023
Montclair, New Jersey

Moderator: Nancy L. Prosser

Panelists:
Professor Andrew Appleby
Joseph Bishop-Henchman
Mark Nebergall
Jonathan W. White

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- We speak for ourselves.
- Our comments do not necessarily represent the views of our employers, past or present.
- Nothing in this presentation should be considered legal advice.

- Identify ITFA's key terms, cases, and other resources.
- Develop a shared understanding of the basics of ITFA.
- Develop consensus where possible.
- Set the stage for further discussion.
- Create a record for future reference.

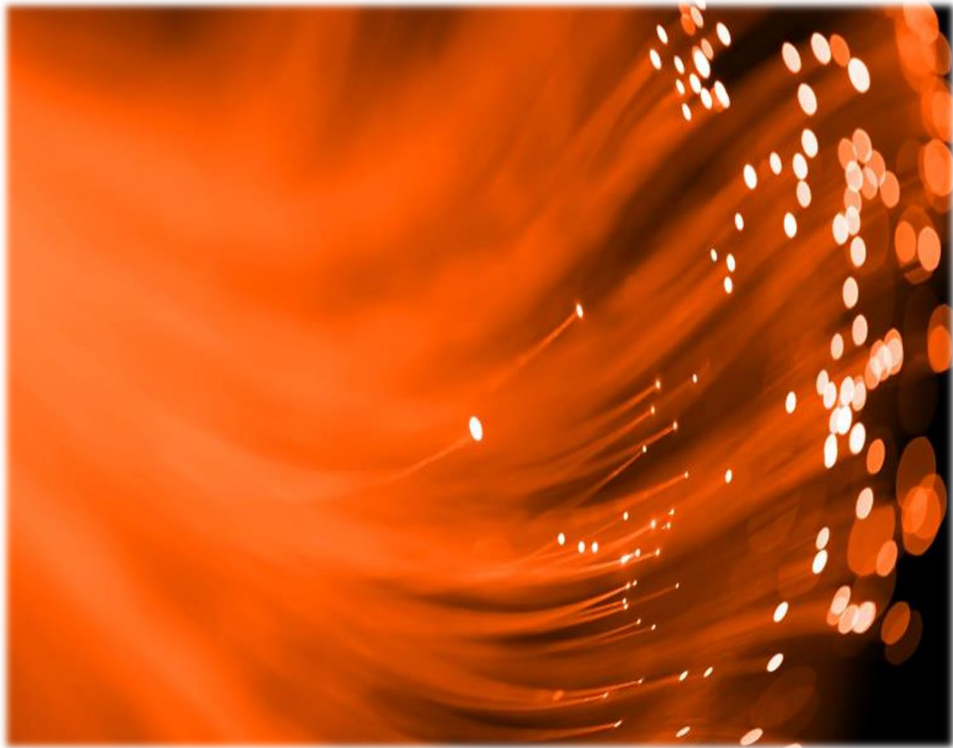
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Rate your level of understanding of ITFA:

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The Internet Tax Freedom Act (ITFA) – The Big Picture



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- Preempts “taxes on Internet access.”
- Preempts “multiple or discriminatory taxes on “electronic commerce.”
- The US Congress has assigned no agency to interpret ITFA, so there is no authoritative source of guidance on the meaning or application of this federal law; state and federal courts are the official source of guidance.

Key Language and Terms

No State or political subdivision may impose any of the following taxes:

- (1) Taxes on **Internet access**.
- (2) **Multiple or discriminatory taxes on electronic commerce**.

Four Key Terms:

- (1) Internet access.
- (2) Multiple taxes.
- (3) Discriminatory taxes.
- (4) Electronic commerce.



Author's own work

Key Terms - “Internet access” (paraphrased)

- (A) means a service that **enables users to connect to the Internet** to access content, information, or other services offered over the Internet;
- (B) includes the **purchase, use or sale of telecommunications** by a provider of a service described in subparagraph (A) to the extent such telecommunications are purchased, used or sold —
 - (i) to provide such service; or
 - (ii) to otherwise enable users to access content, information or other services offered over the internet;
- (C) includes **services incidental to providing an Internet connection** when furnished with an Internet connection, such as a **home page, electronic mail and instant messaging** (including voice- and video-capable electronic mail and instant messaging), **video clips, and personal electronic storage capacity**;

- (D) does not include **voice, audio or video programming, or other products and services** (except services described in subparagraph (A), (B), (C), or (E)) that utilize Internet protocol or any successor protocol and **for which there is a charge**, regardless of whether such charge is separately stated or aggregated with the charge for services described in subparagraph (A), (B), (C), or (E); and
- (E) includes a **homepage, electronic mail and instant messaging** (including voice- or video-capable electronic mail and instant messaging), **video clips, and personal electronic storage capacity**, that are provided **independently or not packaged with Internet access**.

Key Terms - “Multiple tax”

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.



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Key Terms – “Discriminatory tax” (paraphrased)

(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;

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

- (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;

- (B)** any tax imposed by a State or political subdivision thereof, if —
- (i) 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 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 of online services.

Key Terms – “Electronic commerce”

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.



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“Taxes 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. “Tax on Internet access” does not include a tax levied upon or measured by net income, capital stock, net worth, or property value.

The ITFA Legacy Clause

ITFA previously contained two versions of a legacy clause allowing certain preexisting taxes to remain in place.

The ITFA legacy clause has now fully expired.

Do you agree what was just presented represents the key language in ITFA that is important today?



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Do you agree we have captured the key language relevant to ITFA and the taxation of digital products? If not, what is missing?

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Performance Marketing Ass’n v. Hamer, 998 N.E.2d 54 (Ill. 2013).

Labell v. City of Chicago, 147 N.E.3d 732 (Ill. App. Ct. 2019).

Gartner, Inc. v. Dep’t of Revenue, 455 P.3d 1179 (Wash. Ct. App. 2020).

Comptroller of Maryland v. Comcast, No. SCM-REG-0032-2022 (Md. Cir. Ct. Oct. 20, 2022), *rev’d on procedural grounds*, No. C-02-CV-21-000509 (July 12, 2023).

ADP, LLC v. Arizona Department of Revenue, No. 1 CA-TX 21-0009 (January 31, 2023).

Alltel Communications LLC v. Montana Dep't of Revenue, No. 4-2010-981, First Judicial Dist. Ct. Montana, Lewis and Clark Cty. (Feb. 22, 2012).

IMT, Inc. v. City of Lumberton, 724 S.E.2d 588 (N.C. Ct. App. 2012), *rev'd on other grounds*, 738 S.E.2d 156 (N.C. 2013).

In the Matter of the Petition of Verizon New York Inc., DTA No. 829240 (N.Y. Tax Appeals 2023).

J2 Cloud Servs., Inc. v. Comm’r of Revenue, Dkt. No. C325426 (Mass. App. Tax. Bd. Feb 27, 2019).

j2 Global Communications Inc. v. City of Los Angeles, 218 Cal. App. 4th 328 (Cal. Ct. App. 2013).

Apple, Inc. v. Romy S. Manuel, Dkt. No. L01283 (La. Bd. of Tax Appeals 2023).



Have we captured the key cases?

Do you have any other cases to share?

Are any of the cases presented irrelevant or obsolete?

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Do you agree we have captured the key cases? If not, what is missing?

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Secondary Sources – Introductory Material

- Congressional Research Service, *The Internet Tax Freedom Act: In Brief*, April 13, 2016.
- Congressional Research Service, *The Internet Tax Freedom Act and Federal Preemption*, October 18, 2021.
- Congressional Research Service, *Taxation of Internet Sales and Access: Legal Issues*, April 10, 2015.



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Ancient History:

Matthew G. McLaughlin, *The Internet Tax Freedom Act: The Congress Takes a Byte Out of the Net*, 48 Cath. U.L. Rev. 209 (1999).

Brian Fagan, *Taxation of Electronic Commerce: Avoiding an Inroad Upon Federalism*, 49 Drake L. Rev. 465 (2000).

Joseph R. Feehan, *Surfing Around the Sales Tax Byte: The Internet Tax Freedom Act, Sales Tax Jurisdiction and the Role of Congress*, 12 Alb. L.J. Sci. & Tech. 619 (2002).

Recent History:

Walter Hellerstein and Andrew Appleby, *The Internet Tax Freedom Act at 25*, 107 State Tax Notes 7 (2023).

Discriminatory Tax:

- Ohio Department of Revenue, ST 2020-01: Internet Tax Freedom Act Summary – June 2020.

Internet Access:

- New York Department of Taxation and Finance, TSB-M-08(4.1)C (August 29, 2008).
- Florida Department of Revenue, Technical Assistance Advisement TAA 14A19-002 (May 22, 2014).
- Colo. DOR, Pvt. Ltr. Rul. PLR-15-003 (Feb. 4, 2015); and Colo. DOR, Pvt. Ltr. Rul. PLR-15-001 (Feb. 4, 2015).
- Illinois Department of Revenue, General Information Letter No. ST 15-0034-GIL (June 18, 2015).
- Virginia Department of Taxation, Ruling of the Tax Commissioner, Pub. Doc. No. 16-195 (Oct. 13, 2016).

Genna Autumn Conti, *Tapping the Netflix Binge: Cities Binging on Taxing Streaming Services Violate Federal Law*, Rutgers U.L. Rev. 1653 (2016).

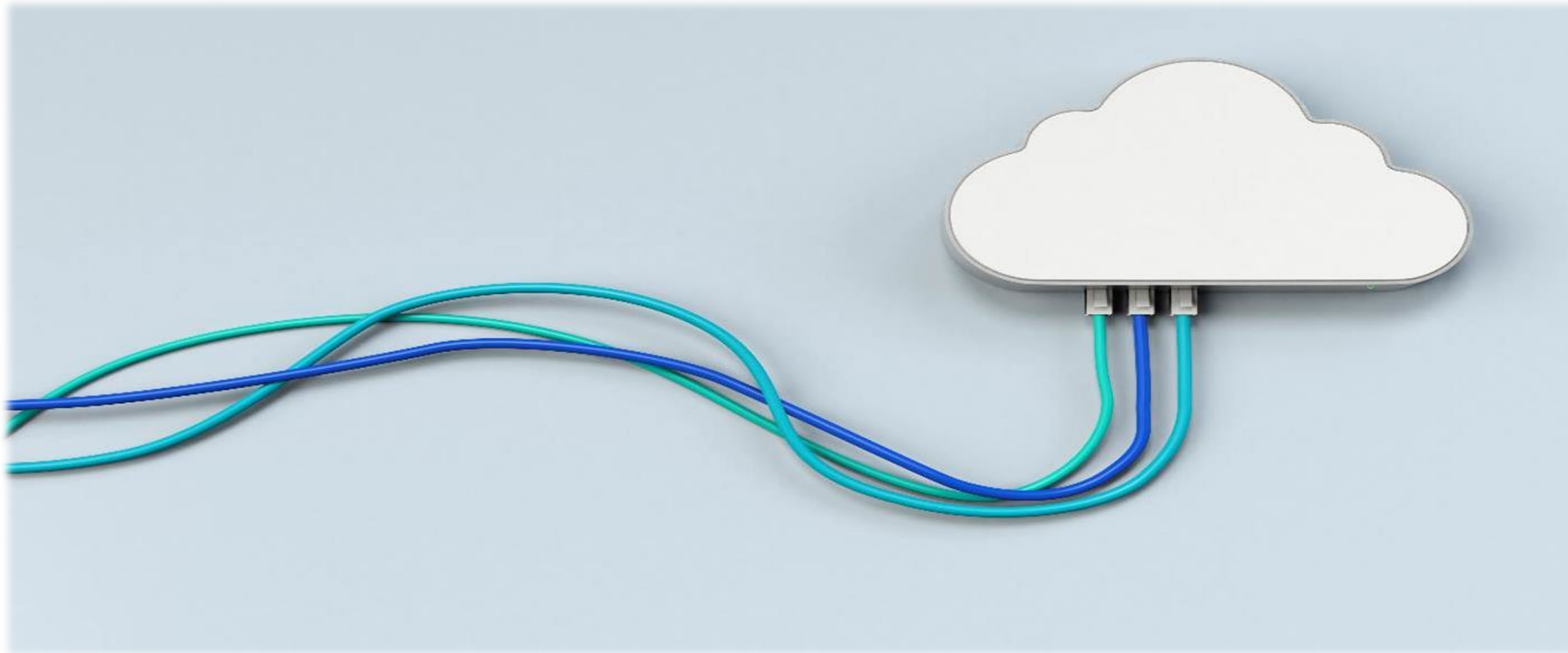
Salvatore Cocchiaro, *Saved by Labell: Local Taxation of Video Streaming Services*, 87 Fordham L. Rev. 1613 (2019).

Center on Budget and Policy Priorities, *Making the Internet Tax Freedom Act Permanent in the Form Currently Proposed Would Lead to a Substantial Revenue Loss for States and Localities*, October 20, 2003.



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Do you have any other secondary or administrative resources to share?



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What are other secondary sources on ITFA that are helpful?

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1. What advice would you give the MTC work group about ITFA as we work on our uniformity project?
2. What advice do you give to businesses about ITFA?
3. What advice to legislators or policy makers?

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What do you want to know about ITFA in relation to the MTC uniformity project?

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1. Focusing on what ITFA covers in terms of the preemption language – what are your thoughts?
2. What do people need to know?
3. What are the risks and areas of possible dispute?
4. Who has the burden of proof?

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What are your thoughts on the preemption language?

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1. Focusing on what ITFA covers in terms of the anti-discrimination language – what are your thoughts?
2. What do people need to know?
3. What are the risks and areas of possible dispute?
4. Who has the burden of proof?

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What are your thoughts about the anti-discrimination language?

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What have we missed? Other thoughts?



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Any other thoughts to share about ITFA or other questions you have relating to the MTC uniformity project?

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