

FLOOR STATEMENT OF CONGRESSMAN RICK BOUCHER
ON INTRODUCTION OF H.R. _____,
THE BUSINESS ACTIVITY TAX SIMPLIFICATION ACT OF 2009

February 13, 2009

Madam Speaker, I rise to introduce the Business Activity Tax Simplification Act of 2009, a measure with far-reaching consequences for businesses throughout our nation.

Traditionally, states and localities have levied corporate income, franchise and other taxes only on those businesses that have a physical presence in the taxing jurisdiction. The growth of the Internet and interstate business transactions has made it possible for businesses to conduct transactions without the constraints of geopolitical boundaries. As a result, recently some states have attempted to expand their tax base by assessing business activity taxes against out-of-state companies that have customers but no property or employees in the taxing state. Both large and small companies are facing an increasingly unpredictable tax

environment for businesses, which hinders business expansion and threatens the continued development of e-commerce.

The legislation we are introducing today, which I am pleased to champion with my colleague and good friend Mr. Goodlatte – as well as Mr. Artur Davis, Ms. Bachmann, Ms. Herseth-Sandlin, Mr. Jones, Mr. Bobby Scott, Mr. Jordan, Mr. Weiner, Mr. Pence and Mr. Joe Wilson – will bring certainty to today’s increasingly chaotic tax environment for businesses by clarifying that the states cannot attempt to tax the income of a company that has no physical presence within the taxing state’s borders.

Our legislation sets forth clear, specific standards to govern when businesses should be obliged to pay business activity taxes to a state. Generally, a business must use employees or services in a state for more than 15 days in a calendar year before it is liable to pay business activity taxes to that jurisdiction.

The Business Activity Tax Simplification Act also modernizes legislation which Congress enacted 50 years ago that set clear, uniform standards for when states could tax out-of-state businesses for the solicitation of orders for sales. Like the economy of its time, the scope of Public Law 86-272 was limited to income

taxes on tangible personal property. Our nation's economy has changed dramatically over the past half-century, and this outdated statute needs to be modernized to apply equally to the sale of intangible property and services, and to other business activity taxes.

I want to emphasize that the Business Activity Tax Simplification Act does not diminish the ability of states and localities to collect tax revenue. Rather, it rationalizes and makes more predictable the process of doing so.

The lack of clarity in current law has led to sometimes absurd results. A collection agent with the New Jersey Department of Taxation stopped a refrigerated truck on the New Jersey turnpike, loaded with product belonging to Smithfield Foods, a company headquartered in my state of Virginia. The agent held the truck and its driver for several hours and demanded that, to release the truck, Smithfield had to wire \$150,000 immediately to the New Jersey Department of Taxation. The agent claimed that he had the right to hold the truck and its contents because Smithfield had failed properly to file New Jersey tax returns.

Smithfield informed the New Jersey agent that his claim was unfounded. It explained that Public Law 86-272 protected it from New Jersey income taxation because it only engaged in solicitation in New Jersey and had no physical operations in the state. The agent refused to accept this explanation; however, he finally agreed to release the truck and its driver in return for \$8,000.

Smithfield appealed this aggressive and incorrect application of Public Law 86-272 to the New Jersey State tax commissioner. Ultimately, New Jersey accepted Smithfield's contention that it has no physical presence in the state and is not subject to New Jersey income tax. It issued Smithfield a refund and an apology for its roadside justice system, but not before Smithfield had invested much time and expense in resolving a situation which should not have arisen under current law. Our measure will help avoid such scenarios in the future by clarifying the physical presence standard embodied in Public Law 86-272.

New Jersey has used similar tactics against out-of-state companies selling intangible goods to its residents, a situation not covered by 86-272. It has argued that a mom-and-pop South Carolina software company with no physical presence in any states other than South Carolina and Georgia, owes a minimum of \$600 per year in corporate income taxes and fees based only on the sale of licensed software

to a New Jersey entity, and that the company would owe such tax every year that its software was in use in the state, even for those years in which the company had no income from any customer in New Jersey.

The Louisiana Department of Revenue has threatened to assess business activity taxes on several out-of-state companies based merely on the fact that they broadcast programming into the state, arguing that the companies are exploiting the Louisiana market because the programming is seen or heard by individuals in Louisiana.

Several states attempt to assess business activity taxes on out-of-state credit card companies based on the fact that their customers reside in the taxing jurisdiction and on arguments that the credit card company has engaged in the “substantial privilege of carrying on business” in the state.

The Business Activity Tax Simplification Act offers Members the opportunity to put an end to nonsensical situations like these. In doing so, we will provide certainty to both U.S. businesses and to states, thereby fostering economic growth and development. I thank Mr. Goodlatte and the original cosponsors of the

Business Activity Tax Simplification Act for their support, and I urge each of my colleagues to assist us in enacting this much needed bipartisan legislation.