

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 1860
OFFERED BY MR. SMITH OF TEXAS**

Strike all after the enacting clause and insert the
following:

1 SEC. 1. SHORT TITLE.

2 This Act may be cited as the “Digital Goods and
3 Services Tax Fairness Act of 2012”.

**4 SEC. 2. MULTIPLE AND DISCRIMINATORY TAXES PROHIB-
5 ITED.**

6 No State or local jurisdiction shall impose multiple
7 or discriminatory taxes on or with respect to the sale or
8 use of a digital good or digital service.

**9 SEC. 3. RETAIL, SOURCING, AND OTHER LIMITATIONS AND
10 RULES.**

11 (a) **RETAIL LIMITATION.**—Taxes on or with respect
12 to the sale of digital goods or digital services may only
13 be imposed on or with respect to a sale to a customer.

14 (b) **TAXPAYER LIMITATION.**—Taxes on or with re-
15 spect to the sale of digital goods or digital services may
16 only be imposed on and collected only from a customer
17 or a seller.

18 (c) **SOURCING LIMITATION.**—

1 (1) IN GENERAL.—Taxes on or with respect to
2 the sale of a digital good or a digital service may be
3 imposed only by the State and local jurisdictions
4 whose territorial limits encompass the customer’s tax
5 address.

6 (2) MULTIPLE LOCATIONS.—If the sale of dig-
7 ital goods or digital services is made to multiple lo-
8 cations of a customer, whether simultaneously or
9 over a period of time, the seller may determine the
10 customer’s tax address or addresses using the ad-
11 dress or addresses of use as provided by the cus-
12 tomer.

13 (3) SELLER HELD HARMLESS.—A seller that
14 relies in good faith on information provided by a
15 customer to determine the customer’s tax address or
16 addresses shall not be held liable for any additional
17 tax based on a different determination of the cus-
18 tomer’s tax address or addresses.

19 (4) CUSTOMER LIABILITY.—Nothing in this act
20 precludes a State or local jurisdiction from collecting
21 from a customer any tax that would have been col-
22 lected by a seller if that seller had been provided
23 with the information necessary to accurately deter-
24 mine that customer’s tax address.

1 (d) LIMITATION ON EXPANSIVE INTERPRETATION.—

2 No tax on or with respect to the sale or use of tangible
3 personal property, telecommunications service, Internet
4 access service, or audio or video programming service may
5 be construed by any regulation, administrative ruling, or
6 otherwise, to be imposed on or with respect to the sale
7 or use of a digital good or a digital service. For purposes
8 of this Act, a transaction involving a digital good shall
9 be characterized solely as a transaction involving the pro-
10 vision of a digital service unless the transaction results
11 in the transfer or delivery of a complete copy, with the
12 right to use permanently or for a specified period, of the
13 digital good that is the subject of the transaction. No tax
14 on or with respect to the sale or use of a digital good may
15 be construed by any regulation, administrative ruling, or
16 otherwise, to be imposed on or with respect to the sale
17 or use of a digital service. The limitations provided by this
18 subsection shall not apply to any construction of a statute
19 that was approved by a judicial interpretation of that stat-
20 ute on or before the effective date of this Act.

21 (e) TREATMENT OF BUNDLED GOODS AND SERV-
22 ICES.—

23 (1) IN GENERAL.—Subject to paragraph (2), if
24 charges for digital goods or digital services are ag-
25 gregated with, and not separately stated from,

1 charges for other goods or services, then the charges
2 for digital goods or digital services may be taxed for
3 purposes of this Act at the same rate and on the
4 same basis as charges for the other goods or services
5 unless the seller can reasonably identify the charges
6 for the digital goods or digital services from its
7 books and records kept in the regular course of busi-
8 ness.

9 (2) CHARGES FOR DELIVERY AND TRANS-
10 PORT.—If the charge for a digital good or digital
11 service is aggregated with, and not separately stated
12 from, a charge for electronically delivering or trans-
13 porting the digital good, or providing the digital
14 service, to the customer, then the seller may either
15 apply paragraph (1) or treat the service of electronic
16 delivery or transport as a non-severable and inci-
17 dental component of the digital good or digital serv-
18 ice.

19 (f) TREATMENT OF DIGITAL CODE.—The tax treat-
20 ment of the sale of a digital code shall be the same as
21 the tax treatment of the sale of the digital good or digital
22 service to which the digital code relates. The sale of the
23 digital code shall be considered the sale transaction for
24 purposes of this Act.

1 **SEC. 4. DEFINITIONS.**

2 In this Act:

3 (1) CUSTOMER.—

4 (A) IN GENERAL.—Subject to subpara-
5 graph (B), the term “customer” means a per-
6 son that purchases a digital good or digital
7 service, for a purpose other than resale.

8 (B) END USER.—For the purpose of deter-
9 mining a place of primary use under section
10 6(2)(A), the term “customer” means the “end
11 user” (as such term is used in section 124 of
12 title 4, United States Code) of the purchased
13 digital good or digital service.

14 (2) CUSTOMER’S TAX ADDRESS.—The term
15 “customer’s tax address” means—

16 (A) with respect to digital goods or digital
17 services that are sold to a customer by a pro-
18 vider of mobile telecommunications service that
19 is subject to being sourced under section 117 of
20 title 4, United States Code, or for which the
21 charges are billed to the customer by such pro-
22 vider, and delivered or transferred electronically
23 by means of such provider’s mobile tele-
24 communications service, the customer’s place of
25 primary use, as defined in section 124 of such
26 title;

1 (B) if subparagraph (A) does not apply,
2 and if the digital good or digital service is re-
3 ceived by the customer at a business location of
4 the seller, such business location;

5 (C) if neither subparagraph (A) nor sub-
6 paragraph (B) applies, and if the location where
7 the digital good or digital service is received by
8 the customer is known to the seller, such loca-
9 tion;

10 (D) if none of subparagraphs (A) through
11 (C) applies, the customer's address that is ei-
12 ther known to the seller or, if not known, ob-
13 tained by the seller during the consummation of
14 the transaction, including the address of the
15 customer's payment instrument if no other ad-
16 dress is available;

17 (E) if an address is neither known nor ob-
18 tained as provided in subparagraph (D), the ad-
19 dress of the seller from which the digital good
20 or digital service was sold; and

21 (F) notwithstanding subparagraphs (A)
22 through (E), for digital goods that are delivered
23 or transferred, or digital services that are pro-
24 vided, to a person other than the customer, in-
25 cluding advertising services, the location of de-

1 livery, transfer, or provision if known or, other-
2 wise, the customer's address determined under
3 subparagraph (D) or (E).

4 (3) DELIVERED OR TRANSFERRED ELECTRONI-
5 CALLY; PROVIDED ELECTRONICALLY.—The term
6 “delivered or transferred electronically” means the
7 delivery or transfer of a digital good by means other
8 than tangible storage media, and the term “provided
9 electronically” means the provision of a digital serv-
10 ice remotely via electronic means.

11 (4) DIGITAL CODE.—The term “digital code”
12 means a code that conveys only the right to obtain
13 a single type of digital good or digital service.

14 (5) DIGITAL GOOD.—The term “digital good”
15 means any good or product that is delivered or
16 transferred electronically, including software, infor-
17 mation maintained in digital format, digital audio-
18 visual works, digital audio works, and digital books.

19 (6) DIGITAL SERVICE.—

20 (A) IN GENERAL.—The term “digital serv-
21 ice” means any service that is provided elec-
22 tronically, including the provision of remote ac-
23 cess to or use of a digital good.

24 (B) EXCEPTION.—

1 (i) IN GENERAL.—The term “digital
2 service” does not include telecommuni-
3 cations service, Internet access service, or
4 audio or video programming service.

5 (ii) AUDIO OR VIDEO PROGRAM-
6 MING.—For purposes of subclause (i), the
7 term “audio or video programming” means
8 programming provided by, or generally
9 considered comparable to programming
10 provided by, a radio or television broadcast
11 station.

12 (iii) TELECOMMUNICATIONS SERV-
13 ICE.—The term “telecommunications serv-
14 ice” means the electronic transmission,
15 conveyance, or routing of voice, data,
16 audio, video, or any other information or
17 signals to a point, or between or among
18 points. The term “telecommunications
19 service” includes such transmission, con-
20 veyance, or routing in which computer
21 processing applications are used to act on
22 the form, code or protocol of the content
23 for purposes of transmission, conveyance
24 or routing, without regard to whether such
25 service is referred to as voice over Internet

1 protocol service, but does not include either
2 (A) data processing and information serv-
3 ices that allow data to be generated, ac-
4 quired, stored, processed, or retrieved and
5 delivered by an electronic transmission to a
6 purchaser where such purchaser's primary
7 purpose for the underlying transaction is
8 the processed data or information, or (B)
9 digital goods.

10 (iv) VIDEO PROGRAMMING.—For pur-
11 poses of subclause (ii), the term “video
12 programming” shall not include interactive
13 on-demand services, as defined in para-
14 graph 12 of section 522 of title 47, United
15 States Code, pay-per-view services, or serv-
16 ices generally considered comparable to
17 such services regardless of the technology
18 used to provide such services.

19 (7) DISCRIMINATORY TAX.—

20 (A) IN GENERAL.—The term “discrimina-
21 tory tax” means any tax imposed by a State or
22 local jurisdiction—

23 (i) on or with respect to the sale or
24 use of any digital good at a higher rate
25 than is generally imposed on or with re-

1 spect to the sale or use of tangible per-
2 sonal property that is not delivered or
3 transferred electronically;

4 (ii) on or with respect to the sale or
5 use of any digital service—

6 (I) if there exists a substantially
7 similar service that is not a digital
8 service, at a higher rate than is im-
9 posed on such substantially similar
10 service; or

11 (II) otherwise, at a higher rate
12 than is generally imposed on or with
13 respect to the sale or use of tangible
14 personal property;

15 (iii) on or with respect to any seller of
16 digital goods or digital services at a higher
17 rate than is generally imposed on or with
18 respect to sellers of tangible personal prop-
19 erty or substantially similar services that
20 are not digital services;

21 (iv) on or with respect to any seller of
22 digital goods or digital services using a
23 broader tax base than is used for sellers of
24 tangible personal property or sellers of
25 substantially similar services that are not

1 digital services unless such broader tax
2 base is broader solely because it includes
3 such seller's sales of digital goods or dig-
4 ital services; or

5 (v) on or with respect to any sepa-
6 rately stated amount that is charged by
7 the seller of a specific digital good or dig-
8 ital service, and is directly related to elec-
9 tronically delivering or transporting that
10 good or providing that service, at a higher
11 rate than is generally ~~is~~ imposed on or with
12 respect to delivery charges, or shipping and
13 handling charges, on tangible personal
14 property.

15 (B) APPLICATION.—For purposes of this
16 paragraph, all taxes, tax rates, exemptions, de-
17 ductions, credits, incentives, exclusions, and
18 other similar factors shall be taken into account
19 in determining whether a tax is a discrimina-
20 tory tax.

21 (8) GENERALLY IMPOSED.—A tax shall not be
22 considered “generally imposed” if it is imposed only
23 on specific services, specific industries or business
24 segments, or specific types of property.

1 (9) MULTIPLE TAX.—The term “multiple tax”
2 means any tax that is imposed on or with respect to
3 the sale or use of a digital good or a digital service
4 by a State or local jurisdiction, for which such State
5 or local jurisdiction gives no credit with respect to
6 a tax that was previously paid on or with respect to
7 the sale or use of such digital good or digital service
8 to another State or local jurisdiction, unless the ter-
9 ritorial limits of the jurisdiction imposing the earlier
10 tax and the jurisdiction imposing the later tax both
11 encompass the same tax address of the customer. /

12 (10) PURCHASE FOR RESALE.—A digital good
13 or digital service is purchased for the purpose of re-
14 sale if such good or service is purchased for the pur-
15 pose of reselling it, or for using it as a component
16 part of or integration into another digital good or
17 digital service that is to be sold to another person,
18 and includes the purchase of a digital good or digital
19 service for further commercial broadcast, rebroad-
20 cast, streaming, restreaming, transmission, retrans-
21 mission, licensing, relicensing, reproduction, copying,
22 distribution, redistribution, or exhibition of the dig-
23 ital good or digital service, in whole or in part, to
24 another person.

1 (11) SALE AND PURCHASE.—The terms “sale”
2 and “purchase”, and all variations thereof, shall in-
3 clude lease, rent, and license, and corresponding
4 variations thereof.

5 (12) SELLER.—The term “seller” means a per-
6 son making sales of digital goods or digital services
7 and does not include a person that provides, on be-
8 half of another person, order taking, order fulfill-
9 ment, billing, or electronic delivery or transport serv-
10 ice with respect to the sale of a digital good or a dig-
11 ital service.

12 (13) STATE OR LOCAL JURISDICTION.—The
13 term “State or local jurisdiction” means any of the
14 several States, the District of Columbia, any terri-
15 tory or possession of the United States, a political
16 subdivision of any State, territory, or possession, or
17 any governmental entity or person acting on behalf
18 of such State, territory, possession, or subdivision
19 and with the authority to assess, impose, levy, or
20 collect taxes.

21 (14) TAX.—The term “tax” means any charge
22 imposed by any State or local jurisdictions for the
23 purpose of generating revenues for governmental
24 purposes, including any tax, charge, or fee levied as
25 a fixed charge or measured by gross amounts

1 charged, regardless of whether such tax, charge, or
2 fee is imposed on the seller or the customer and re-
3 gardless of the terminology used to describe the tax,
4 charge, or fee. Such term does not include a tax on
5 or measured by net income or an ad valorem tax.

6 **SEC. 5. EFFECTIVE DATE; APPLICATION.**

7 (a) GENERAL RULE.—This Act shall take effect 60
8 days after the date of the enactment of this Act.

9 (b) APPLICATION TO LIABILITIES AND PENDING
10 CASES.—Nothing in this Act shall affect liability for taxes
11 accrued and enforced before the effective date of this Act,
12 or affect ongoing litigation relating to such taxes, except
13 as provided in section 4(d) of this Act.

14 **SEC. 6. SENSE OF CONGRESS.**

15 It is the sense of Congress that each State shall take
16 reasonable steps necessary to prevent multiple taxation of
17 digital goods and digital services in situations where a for-
18 eign country has imposed a tax on such goods or services.

19 **SEC. 7. SAVINGS PROVISION.**

20 If any provision or part of this Act is held to be in-
21 valid or unenforceable by a court of competent jurisdiction
22 for any reason, such holding shall not affect the validity
23 or enforceability of any other provision or part of this Act.

