

March 11, 2020

Dear Members of the Maryland Legislature,

I write on behalf of the members of the Association of National Advertisers (ANA) regarding Maryland Senate Bill 2, recently approved by the Senate Committee on Budget and Tax. In its current form, this bill has very serious defects and should not be adopted.

ANA recognizes that the House Ways and Means Committee and Senate Budget and Tax Committee have taken steps to modify the original version of the bill. These efforts were to respond to concerns with the use of Internet Protocol addresses to determine whether a device is being used within the State of Maryland. In addition, the changes eliminate some ambiguous language regarding device use – namely, the “reasonably suspected” test for use – that would be very difficult, if not impossible, to apply.

Despite these changes, SB 2 continues to raise very serious legal and constitutional questions that should lead to the Maryland legislature rejecting this inappropriate tax initiative.

The bill appears punitive in nature, because it targets digital advertising – just the kind of discriminatory tax scheme that is precluded by the federal Permanent Internet Tax Freedom Act (47 U.S.C. 151, note). That Act’s ban on discriminatory taxes prohibits additional taxes or an alternative tax rate on a good, service, or information delivered electronically that differs from the tax or rate applied to the same, or similar, good, service, or information that is purchased through “traditional” commerce. That clearly is not the case with the new digital advertising tax that the Committee attempts to require.

There also are multiple significant problems with the bill’s calculation of taxing digital advertising. First, the tax is based in part on gross revenues throughout the *entire* United States, rather than concentrating on activities within the State, which would be the appropriate foundation for any tax that Maryland might impose. In addition, the legislation establishes digital advertising gross revenue tax rate thresholds based on *global* revenues – again, utilizing an inapt calculation not focused on State-based advertising activities. The bill, in addition, seems to target various large entities merely because of their size and breadth of operations by utilizing only a revenue threshold for tax assessment. These provisions implicate activities over which the State does not possess jurisdiction, in violation of the Commerce Clause of the U.S. Constitution. By segregating digital advertising from other kinds of speech, the bill raises concerns about protection of speech under the First Amendment and inequitable treatment of one sector of the economy. These are just a few of the apparent legal and constitutional infirmities ANA has identified in the bill.

Senate Bill 2 is clearly counterproductive, in that it taxes an activity – advertising – whose purpose is to generate sales and economic activity with significant benefits for Maryland. Advertising expenditures account for more than \$100 billion of Maryland economic output and sales, and advertising supports nearly 400,000 Maryland jobs. Placing a tax on advertising would burden the selling effort and undermine sales within the State, thereby limiting sales tax revenues. We believe that the proposed new tax would, if enacted, be found to be illegal. Even if this approach were to be upheld, it would undermine sales in the state and lower sales tax revenue. Clearly the benefits that advertising produces for the residents of Maryland should not be undercut in this way.

In short, the legislation should be strongly rejected because of its legal impediments and its negative policy-related implications for the State. ANA appreciates your consideration of our views, and we would be happy to provide additional information should you require it.

Sincerely,

A handwritten signature in black ink, appearing to read "D. L. Jaffe". The signature is fluid and cursive, with the first name "Daniel" and last name "Jaffe" clearly legible.

Daniel L. Jaffe
Group Executive Vice President, Government Relations
Association of National Advertisers (ANA)