



April 2, 2020

URGENT – VETO REQUEST

The Honorable Larry Hogan
 Governor
 100 State Circle
 Annapolis, Maryland 21301-1925

Dear Governor Hogan:

We write as a broad cross section of national media and advertising trade associations and as members of The Advertising Coalition to express our strong opposition to enactment of a new and unprecedented state tax on digital advertising. This tax would be imposed on the gross revenues of both Maryland and non-Maryland businesses. Our national associations represent virtually every segment of the media and advertising industries in our country and in the State of

Maryland. Many of our members are headquartered in Maryland or do substantial business in the state.

We strongly urge you to veto House Bill 732.

HB 732 Should Be Vetoed Because It Violates the Due Process, Equal Protection, and Commerce Clauses, and the First Amendment, of the U.S. Constitution and Would Undermine and Strongly Erode Economic and Job Activity in Maryland.

The Advertising Coalition understands and respects the commitment the Maryland General Assembly has made to provide a broad infusion of new revenues to upgrade education programs throughout the State. Nevertheless, we urge you to reject the General Assembly's proposed payment structure, which would impose a heavy tax on commercial digital advertising that will affect Maryland residents and every Maryland business. This tax, with its high rate and narrow base, would deal a severe blow to the advertising industry that constitutes a critical, vibrant, and productive economic force helping to drive the State's economy.

HB 732 Should Be Vetoed Because It Would Undermine and Strongly Erode Maryland's Economy When Businesses Are Facing Extraordinary Challenges

Advertising is clearly one of the major driving forces of Maryland economic activity and job creation. Advertising expenditures generate \$101.5 billion of sales in Maryland – that represents 14.6 percent of the \$693.1 billion in total annual economic output for the State. These numbers are derived from research that utilizes an economic model developed by Nobel Laureate for Economics, Dr. Lawrence R. Klein. This research also demonstrates that sales of products and services generated by advertising help to support the jobs of 393,667 Marylanders; that is nearly 15 percent of the 2.6 million jobs in the State.

This proposed tax therefore would severely undermine the economy of the state of Maryland by placing a major burden on the effort to sell. The proposed tax on digital advertising represents one of the most serious threats to commercial advertising in several decades. If Maryland were to enact this tax on advertising, it would become the first state or locality in the United States to impose a targeted, punitive tax on the gross revenue derived from digital advertising services.

In addition, this legislation has very serious legal defects. Many of its problems were highlighted by the Maryland Attorney General in a memorandum to Senator Serafini dated February 7, 2020. The statute's legal invalidity would entangle the State in protracted litigation and jeopardize its ability to derive any revenue from the tax.

The following are just some of the major legal issues that HB 732 raises:

- **Internet Tax Freedom Act Preemption:** The legislation is preempted by the federal Internet Tax Freedom Act (ITFA) (47 U.S.C. 151, note), which prohibits discriminatory taxes on electronic commerce. Because Maryland proposes to tax digital advertising but not to tax non-digital advertising, the proposed levy would illegally discriminate against electronic commerce. The Attorney General memorandum acknowledged "some real risk that [the law] would be held preempted."

- **Discrimination Against Interstate and Foreign Commerce:** The legislation discriminates against interstate and foreign commerce, in violation of the U.S. Constitution. The dormant Commerce Clause protects companies from states taxing out-of-state companies at a higher rate than their domestic counterparts, and the Foreign Commerce Clause considers whether a tax creates risk of multiple taxation and impairs the ability of the United States to speak with one voice on the international stage. This legislation imposes a tax on Maryland digital advertising revenues, but with a tax rate that escalates substantially based on an arbitrary level of a company's *global* annual gross revenues. It is thus specifically designed to tax larger, more global advertising service providers at a significantly higher tax rate than their domestic counterparts even if they had the exact same or lesser Maryland advertising activity. The U.S. government previously has voiced its strong opposition to digital advertising tax proposals that have been enacted or considered by other countries around the world.
- **First Amendment Violation:** The legislation violates the First Amendment to the U.S. Constitution. The key witness supporting the legislation presented by the Senate sponsors, Professor Paul Romer, described as his goal the suppression of digital advertising speech and social networks supported by advertising because he considers them "a haven for dangerous misinformation and hate speech." The U.S. Supreme Court has stricken down state taxes that invade First Amendment freedoms, including an advertising gross receipts tax on newspapers with high circulation. To survive, taxes cannot impose a special tax on First Amendment activities or have the purpose of interfering with First Amendment activities. This new, targeted, punitive tax inherently targets protected First Amendment activities and therefore is unconstitutional.

Indeed, the Attorney General's memorandum acknowledged that, "the proposed tax would not be the least restrictive means to raise revenue for education," and that an argument could be made that the proposal "'singles out' a First Amendment interest for a special tax." The memorandum suggested a safe harbor to avoid First Amendment concerns: "to include a tax on digital advertising services as a part of a more broadly applicable gross receipts or sales tax on a wider array of goods and/or services." But the General Assembly disregarded the Attorney General's suggestion and instead adopted this highly targeted punitive tax.

Even if one could set aside the proposed tax's structural, implementation, and legal deficiencies, the real burden of the new tax will fall on Maryland residents and Maryland businesses who are consumers of advertising services within a digital interface. Advertising service providers can be expected to pass the tax onto their customers, including Maryland brick-and-mortar businesses that seek to reach new customers online. A study by Deloitte Taj of France's digital advertising tax confirms this projected outcome. This study found that 55 percent of the tax burden from a tax on digital advertising would be passed on to end consumers in the form of higher prices for every good and service they use, online or offline. It is important to note that France has suspended its digital tax through the end of this year.

These problems are why the National Taxpayers Union Foundation called this bill "poorly constructed," why the Tax Foundation described this bill as "vaguely worded, legally dubious," and why eminent Professor Richard Pomp, author of nine editions of the textbook *State and Local Taxation*, called this digital advertising tax proposal "not worth doing [and] especially not worth doing poorly."

In normal times, this proposed tax would seriously undermine Maryland's economy. Now in a period where Maryland and the rest of the nation face a massive pandemic which has already forced the shutdown or significant revenue losses throughout the economy, the adverse impacts will clearly be enormously magnified for every business in Maryland. This is an ill-conceived new tax that comes at a time when the State of Maryland and the Nation should be shepherding and safeguarding our vital resources and focusing on the health and economic security of our citizens.

We strongly urge you to veto HB 732.

Respectfully,

Association of National Advertisers
American Advertising Federation
American Advertising Federation – Baltimore
American Advertising Federation – Greater Frederick
American Association of Advertising Agencies
Coalition for Healthcare Communication
CompTIA
Connecticut Broadcasters Association
Consumer Brands Association
Interactive Advertising Bureau
Internet Association
Internet Coalition
Maryland-DC-Delaware Broadcaster Association
Maryland Retailers Association
MPA – The Association of Magazine Media
Motion Picture Association – America
National Association of Broadcasters
National Newspaper Association
NCTA – The Internet & Television Association
Network Advertising Initiative
News Media Alliance
TechNet
The Advertising Coalition
Urban One, Inc.