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April 22, 2020

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 732

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 732. We write this letter to address some provisions that we believe could raise concerns for a reviewing court if the bill is challenged, although it is our view that these provisions are not clearly unconstitutional.[1] Further, if these provisions were challenged and a court were to find any of them unconstitutional, it is our view that each of the provisions would be severable from the remainder of the bill.

House Bill 732 imposes a tax on the gross revenues of specified digital advertising, increases various taxes imposed on cigarettes, electronic smoking devices ("ESD") and other tobacco products ("OTP"), and requires the Governor to include at least $18.25 million in annual funding for the Tobacco Use Prevention and Cessation Program beginning in fiscal 2022. In addition, Section 5 of the bill states it is the intent of the General Assembly that the Comptroller distribute, as necessary, the fiscal 2021 tobacco taxes generated by the bill, including the sales tax imposed on ESD, to the Revenue Stabilization Account—i.e., the Rainy Day Fund—and to the expenditure accounts of the appropriate units of State government to fund costs associated with COVID-19.

Single Subject

Article III, § 29 of the Maryland Constitution provides, in relevant part, that "every Law enacted by the General Assembly shall embrace but one subject." The Court of Appeals has said that an act meets the single subject requirement if its provisions are "germane" to the same subject

[1] We apply a "not clearly unconstitutional" standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

matter. *Migdal v. State*, 358 Md. 308, 317 (2000); *Porten Sullivan Corp. v. State*, 318 Md. 387, 407 (1990). "Germane" means "in close relationship, appropriate, relative, pertinent." *Porten Sullivan*, 318 Md. at 402. Two matters can be regarded as a single subject because of a direct connection between them or because they each have a direct connection to a broader common subject.

The rule traditionally has been "given … a liberal construction so as not to interfere with or impede legislative action." *Id*. at 13. "That liberal approach is intended to accommodate a significant range and degree of political compromise that necessarily attends the legislative process in a healthy, robust democracy." *Id*. at 14. The requirement, however, has not lost its force. *Porten Sullivan*, 318 Md. at 402. The Court of Appeals has rejected arguments that relevance to a broad subject, such as corporations, can be sufficient. *Migdal*, 358 Md. at 319. The Court has looked to factors such as whether the challenged portions of the legislation failed as an independent proposal, and whether the legislation put legislators in the position of voting for, or the Governor in the position of signing, legislation containing provisions that they would not otherwise support—i.e., that the bill was the result of legislative log-rolling. *Id*. at 321.

In our view, the tax measures in this bill could be said to relate to the "one subject" of raising State revenues. Nevertheless, because the tax measures were originally introduced in separate bills and given the arguably controversial nature of the digital advertising tax measure, there is a slight risk that a court could view the legislation as log-rolling and conclude that the bill violates Art. III, § 29. At the same time, we note that the opposition of the bill in the House when it contained only the tobacco tax measures was nearly the same as when the House voted on the bill again after it was amended in the Senate to include the digital advertising tax.[2]

Digital Advertising Tax

House Bill 732 would enact a new "digital advertising gross revenues tax." The tax would be "imposed on annual gross revenues of a person derived from digital advertising services in the State." Digital advertising services are defined in the bill to include "advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services." The annual gross revenues derived from digital advertising services is set out in a formula in the bill. *See* new Tax-General Article ("TG"), § 7.5-102(b) at page 23, lines 10-20.

[2] The vote in the House for the tobacco tax only version of the bill was 89-44 in favor; the vote for the bill as amended by the Senate to include the digital advertising tax was 88-47. House Bill 695, which proposed the digital advertising tax was not acted on in committee; the Senate cross-file bill, Senate Bill 2, had passed Second Reader with Amendments on the Senate Floor. Additionally, it should be noted that the 2020 legislative session ended nearly 3 weeks early for the first time since the Civil War due to the declared State of Emergency and Existence of Catastrophic Health Emergency posed by the COVID-19 disease. Accordingly, some legislative measures addressing similar topics were combined due to time constraints.

The rate for the tax is on an escalating percentage based on the person's global annual gross revenues. (Page 23, lines 25-31, and page 24, lines 1-2.) The bill requires "[e]ach person that, in a calendar year, has annual gross revenues derived from digital advertising services in the state of at least $1,000,000" to file a tax return. The revenue from the tax would be put into the Blueprint for Maryland's Future Fund, identified in Education Article § 5-219(g).

With regard to the digital advertising tax, we discuss below three grounds on which there is some risk that a reviewing court would find that the tax is unconstitutional: (1) preemption under the federal Internet Tax Freedom Act; (2) the Commerce Clause; and, (3) the First Amendment.[3]

The Internet Tax Freedom Act

The Internet Tax Freedom Act ("ITFA"), which is codified at 47 U.S.C. § 151 (note), among other things prohibits discriminatory taxes on electronic commerce. The definition of "discriminatory tax" as relevant here is any tax imposed by a State or political subdivision thereof on electronic commerce that "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." § 1105(2)(A)(i). "Electronic commerce" is defined as "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." § 1105(3).

Whether House Bill 732 imposes a tax on a "transaction conducted over the Internet or through Internet access" that is "not generally imposed and legally collectible by" Maryland "on transactions involving similar" services that are "accomplished through other means," ITFA § 1105(2), (3), will likely depend on what the reviewing court would find to be the "transaction" on which the tax is imposed. If, for example, a court were to find that the relevant "transaction" being taxed for purposes of the ITFA is the transmission of digital advertising to a user, then that transaction would presumably be one that occurs over the internet or through internet access, and the tax would likely be discriminatory within the meaning of the ITFA, unless advertising over the internet is different enough from advertising via other means that the two types of advertising would not qualify as transactions of "similar" services.

It is also possible, however, that a reviewing court would find the relevant "transaction" for purposes of the ITFA to be the sale of the advertising services from which the revenue subject to taxation is derived instead of the transmission of the advertising itself. That is, the proposed tax applies to the revenue derived from providing digital advertising services in Maryland regardless of whether the advertiser purchases those advertising services from the taxpayer over the internet or through some other means. Thus, the tax could arguably be characterized as "generally imposed and legally collectible" by Maryland without regard to whether the transaction is conducted over

[3] We also considered the Due Process Clause as well as the Equal Protection Clause but do not believe a reviewing court would find the bill unconstitutional on either of these two grounds.

the internet. If a court were to characterize the tax in that way, the court would be unlikely to find any discrimination against "electronic commerce" as defined by the Act.[4]

We also note that there is generally an "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). That presumption "applies with particular force when," as here, "Congress has legislated in a field traditionally occupied by the States." *Id.* Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption." *Id.* (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). Given that presumption against preemption and the lack of any direct authority interpreting the ITFA in the context of a tax on digital advertising services, the proposed digital advertising tax in House Bill 732 would not be clearly preempted by federal law.

The Commerce Clause

We also considered whether the bill violates the Commerce Clause of the U.S. Constitution, which grants Congress the authority to regulate interstate commerce. The Commerce Clause "has long been understood, as well, to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.'" *Barclays Bank PLC v. Franchise Tax Bd. of Cal.,* 512 U.S. 298, 310 (1994) (quoting *Southern Pac. Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761 (1945)). That "'negative command, known as the dormant Commerce Clause,' prohibits States from legislating in ways that impede the flow of interstate commerce." *Star Sci. Inc. v. Beales,* 278 F.3d 339,355 (4th Cir. 2002) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 179 (1995)).

A tax is valid for purposes of the Commerce Clause so long as it (1) applies to an "activity with a substantial nexus with the taxing State," (2) is "fairly apportioned," (3) "does not discriminate against interstate commerce," and (4) is "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady,* 430 U.S 274, 279 (1977).

As to the first prong, after the Supreme Court's recent decision in *Wayfair,* it is now clear that this nexus requirement is essentially the same as the nexus requirement under the Due Process

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[4] There is also an exception to the ITFA's moratorium on discriminatory taxes "in the case of any person or entity who knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors unless such person or entity has restricted access by minors to material that is harmful to minors" by (A) "requiring use of a credit card, debit account, adult access code, or adult personal identification number; "(B) by accepting a digital certificate that verifies age; or "(C) by any other reasonable measures that are feasible under available technology." ITFA § 1101(d). Thus, to the extent that any taxpayers fit into that exception, those taxpayers would not be protected by the ITFA.

Clause. In the *Wayfair* case, the Supreme Court held that a physical presence is not an absolute constitutional requirement to satisfy the nexus prong under the dormant Commerce Clause. *See South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080, 2099 (2018). Instead, a tax must merely meet the four-prong *Complete Auto* test to be constitutional under the dormant Commerce Clause. *Id.* The Court found that South Dakota's sales-and-use-tax statute unquestionably satisfied that prong, because the "quantity of business" targeted by the law (i.e., $100,000 worth of sales of goods into South Dakota or 200 or more separate transactions) "could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota." *Id.* Likewise, the proposed tax in House Bill 732 is likely to satisfy the Commerce Clause's nexus requirement.

As to the second prong, a tax is fairly apportioned if it is levied only on interstate activity that reasonably represents the activity within the taxing state. *See, e.g., Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 169 (1983). To determine whether a tax satisfies this standard, a court typically will first examine whether the tax is "internally consistent," i.e., whether, if every state adopted the same tax, that hypothetical state of affairs would "place interstate commerce at a disadvantage" as compared with intrastate commerce. *Jefferson Lines, Inc.,* 514 U.S. at 185. If the tax is internally consistent, the court will then examine whether the tax is "externally consistent," i.e., "whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Id.* That second inquiry focuses on "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg v. Sweet,* 488 U.S. 252,262 (1989).

Here, with respect to internal consistency, the proposed tax appears intended to ensure that the State is only taxing the revenue earned from digital advertising services in the State of Maryland. If each State imposed the same apportionment formula outlined in the bill, each state would only be taxing the revenue from digital advertising services directed to that state, and there would be no double taxation of the same advertising services. Thus, the tax would pass the internal consistency test. Of course, because the bill requires the Comptroller to issue regulations to determine whether revenues are derived from Maryland, the Comptroller will have to ensure that the eventual regulations meet the internal consistency test.

With respect to external consistency, the tax appears to pass that test because it is designed to ensure that the State reaches only the revenue that is fairly attributable to economic activity in Maryland, i.e., the revenue from digital advertising services in Maryland, as based on "apportionment fraction" that is itself designed to ensure that the taxpayer is taxed only in proportion to its activity in Maryland. *See, e.g., Complete Auto,* 430 U.S. at 287 (approving apportionment based on gross receipts). Although the Comptroller's eventual regulations will have to meet this test as well, the Supreme Court has consistently held that "States have wide latitude in the selection of apportionment formulas and that a formula-produced assessment will only be disturbed when the taxpayer has proved by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportion to the business transacted . . . in that State or has led to a grossly distorted result." *Moorman Mfg. Co., v. G.D. Bair*, 437 U.S. 267, 274 (1978) (internal quotation marks omitted).

As to the third prong, the proposed tax does not discriminate against interstate commerce. The tax, on its face, does not tax only those activities that occur in interstate commerce and does not tax interstate activities differently from intrastate ones. As such, the proposed tax would apply both to a Maryland-based provider of digital advertising services and a non-Maryland-based provider. The tax, therefore, is neutral on its face.[5]

Finally, as to the fourth prong, the tax is fairly related to the services provided by the State. Given that the tax applies only to revenue from digital advertising in the State and the entities providing digital advertising services are availing themselves of the State's markets, including the State's telecommunications and digital infrastructure, the tax is fairly related to services provided by the State. As the Supreme Court has said, "the relevant inquiry" under this prong "is not" to weigh "the *amount* of the tax" with "the *value* of the benefits allegedly bestowed" by the State so as to determine whether the amount of the tax exceeds the value provided to the taxpayer. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625 (1981) (emphasis in original). Rather, the question is merely whether "the *measure* of the tax" is "reasonably related to the extent of the contact" with the taxing state. *Id.* at 626 (emphasis in original). Here, because the proposed tax is to be measured based on the revenue earned from digital advertising in Maryland, this requirement will be satisfied.

[5] Although though such a scheme would not discriminate against interstate commerce on its face, the dormant Commerce Clause also applies to tax regimes that have the "purpose" or "effect" of discriminating against interstate commerce. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citations omitted). If, therefore, a taxpayer could prove that the bill's thresholds operate in practice to favor in-state interests over similarly situated out-of-state interests, the taxpayer could potentially raise an issue under the discrimination prong. But where a statute is evenhanded on its face, a plaintiff must present "substantial" evidence to prove such a claim. *Direct Marketing Ass'n v. Brohl*, 814 F.3d 1129, 1142 (10th Cir. 2016) (citation omitted). Moreover, "[t]he fact that the burden of a state regulation falls on . . . interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (internal quotation omitted). Unless a plaintiff can prove that the tax actually operates to impose "different treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," the tax will, at most, constitute an incidental burden on interstate commerce. *Oregon Waste Sys., Inc. v. Department of Envt'l Quality*, 511 U.S. 93, 99 (1994). And when a law merely imposes an incidental burden on interstate commerce, the tax will be upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338-39 (2008) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Therefore, the proposed tax does not clearly discriminate against interstate commerce.

First Amendment

Finally, we considered whether the proposed tax raises any concerns under the First Amendment (and the analogous protections in Maryland's Declaration of Rights). In deciding whether the tax violates the First Amendment, a threshold question would be whether it even places a constitutionally significant burden on speech in the first place or instead merely imposes a tax on economic *conduct*. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) (emphasizing that the First Amendment protects only speech and conduct that is "inherently expressive" in nature, not pure economic conduct). The tax here is not a direct restriction or regulation of speech; it instead is a tax on revenue derived from economic activity in the marketplace. In fact, the Court of Special Appeals recently held that a Baltimore City tax imposed on billboard owners for the privilege of selling space on their outdoor advertising displays in the City burdened only conduct, not speech. *Clear Channel Outdoor, Inc. v. Dept. of Finance of Baltimore City,* 244 Md. App. 304 (Ct. Spec. App. 2020). Although billboards are of course a form of advertising, the court concluded that the tax was imposed not on speech but on "the privilege to charge others a fee to use billboard space" and that "the taxation of Clear Channel's business privileges lacks 'sufficient communicative elements' for the First Amendment to come 'into play.'" *Id.* at 315 (internal quotations omitted); *see also In re Advisory Opinion to the Governor*, 509 So.2d 292, 306 (Fla. 1987) (upholding the extension of Florida's general sales tax to advertising services and, in doing so, noting that "the tax is levied upon those in the business of trafficking in first amendment expression rather than upon the exercise of the right to free speech itself").[6] Applying the same rationale here, the proposed tax is a tax solely on the conduct of providing advertising services, not on speech, and would not be subject to any heightened scrutiny under the First Amendment.

Even if the proposed tax implicated the First Amendment, however, it would not be clearly unconstitutional. For example, although the Supreme Court applied strict scrutiny to a tax that imposed a "financial disincentive" to engage in or publish "speech of a particular content," *Simon & Schuster, Inc. v. Members of N.Y. State Crimes Victims Bd.*, 502 U.S. 105, 116 (1991), the tax here—even assuming it imposes a financial disincentive for advertising—is not content-based. A law is content-based under the First Amendment only if it "applies to particular speech because of the topic discussed or the idea or message expressed" or if the law "cannot be justified without reference to the content of the regulated speech." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (internal quotation omitted). And under that standard, the tax here is not content-based, because it would apply to all paid advertising—that is, commercial advertising, campaign advertising, issue advocacy, etc.—on all topics, regardless of the subject matter discussed or the idea or message expressed. *See Clear Channel*, 244 Md. App. at 315 (finding that the Baltimore City billboard tax was content-neutral because it is "applicable whenever an outdoor advertiser charges a third party to use its space, regardless of the content that is displayed"); *see also Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1199-1200 (9th Cir. 2016)

[6] *But see Vermont Soc. of Ass'n Executives v. Milne*, 779 A.2d 20 (Vt. 2001) (striking down a tax on lobbyists).

(concluding that mobile billboard advertising law was not content-based because "the word 'advertising'" merely "refers to the activity of displaying a message to the public, not to any particular content that may be displayed").

Similarly, if a court were to find that the First Amendment were implicated, then it might analyze the tax under the test established in *United States v. O'Brien*, 391 U.S. 367 (1968), but the proposed tax here would not be clearly unconstitutional under that test either. Under that test, a law will pass muster if it is within the constitutional power of the government, furthers a substantial government interest, that interest is unrelated to the suppression of protected expression, and any incidental restrictions on protected expression are no greater than essential to further the interest. *Id.* The last prong of the test does not require the restriction in question to be the least restrictive means of advancing the government's interest. *Rumsfeld*, 547 U.S. at 67. Instead, it merely requires that "the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

Here, the State has a substantial interest in raising revenue for education. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) (characterizing the interest in raising revenue as "important"); *Astro Limousine Serv., Inc. v. Hillsborough County Aviation Auth.*, 678 F. Supp. 1561, 1565 (M.D. Fla.) ("Revenue-raising is undoubtedly a legitimate and substantial government objective."). That interest is also unrelated to the suppression of protected expression. As a result, the only question under *O'Brien* would be whether the tax "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rumsfeld*, 547 U.S. at 67 (internal quotation omitted). Although the proposed tax would not be the least restrictive means to raise revenue for education, the tax need not be the least restrictive means of achieving the government's goal. *See id.* Instead, the tax is permissible so long as it is "narrowly tailor[ed]" to the government's objective, that is, if "the means chosen do not burden substantially more speech than is necessary to further" the government's interest. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994) (internal quotation marks omitted). Under that standard, a strong argument can be made that the tax would be constitutional. After all, the actual burden on speech here, if any, would likely be minimal. The tax does not prohibit or restrict any speech, and it does not preclude the earning of revenue by selling advertising space to others; it merely taxes that revenue.

Finally, even if the First Amendment were implicated, the bill does not discriminate among speakers by imposing a tax on the revenue from digital advertising but not on other forms of advertising, such as print or broadcast advertising. Under established Supreme Court doctrine, "differential taxation of First Amendment speakers is constitutionally suspect" only "when it threatens to suppress the expression of particular ideas or viewpoints." *Leathers*, 499 U.S. at 447. And that threat arises only when the tax (1) "single[s] out the press," (2) targets a small group of speakers," or (3) "discriminates on the basis of the content of taxpayer speech." *Id.*; *see also Clear Channel*, 244 Md. App. at 315-16 (finding that the billboard tax in Baltimore City would pass the

Leathers test even if the First Amendment were to apply). The proposed advertising tax likely would not run afoul of this doctrine.

As to the first prong, the proposed tax does not single out the press. Press entities may be affected if they provide digital advertising services and otherwise meet the revenue thresholds set forth in the bill, but the tax here would also apply to other entities that provide digital advertising services. The tax proposed here is also distinguishable from a decision of the Maryland Court of Appeals that struck down a Baltimore City tax on the sale of advertising space in newspapers and certain other media on the ground that the tax disproportionately burdened the press. *City of Baltimore v. A.S. Abell Co.*, 218 Md. 273 (1958). In *Abell*, Baltimore City imposed two related taxes: (1) a sales tax on advertisers for the purchase of advertising space in "all newspapers, magazines, periodicals, programs, directories and other printed matter published in Baltimore" and on "any intrastate radio or television broadcast originating in the City of Baltimore and directed to persons in the State of Maryland" and (2) a gross receipts tax on the revenues earned by the sellers of that same advertising space. *Id.* at 277-78. In practice, between 90 and 95 percent of the burden of the taxes fell on newspapers, radio stations, and television stations. *Id.* at 288. Given that disproportionate burden on the press, the Court held that the taxes violated the First Amendment by singling out the press for a special burden not borne by other businesses. *Id.* at 288-89. The Court also explained, however, that a "general" tax would have be permissible, even if it would have an incidental effect on the press. *Id.* at 287-88. Here, the proposed tax would apply to all digital advertising services, not just those that are likely to impose a disproportionate burden on the press. Thus, in contrast to *Abell*, it is unlikely that the proposed tax in House Bill 732 would impose the same kind of disproportionate burden on the press.

Similarly, as to the second prong, the proposed tax on its face does not seem to target a small group of speakers such that it would "threaten[] to suppress the expression of particular ideas or viewpoints." *Leathers*, 499 U.S. at 447. The tax would apply to the revenue from the sales of all digital advertising space by all entities that sell such digital advertising space in Maryland (or at least all of those entities that do a certain amount of business above a certain threshold). Although the tax applies only to digital advertising, not other means of advertising, that distinction seems unlikely to target a small group of speakers. Indeed, the Supreme Court has suggested that a law may be sufficiently "general" when it applies to a wide enough array of speakers that the government cannot use the tax as a tool to penalize particular speakers for their ideas or viewpoints. *See Leathers*, 499 U.S. at 449 (finding that a tax that applied to a "large number of cable operators offering a wide variety of programming" did not pose a risk of censorship). That appears to be the case here.

Finally, as to the third prong, the tax does not discriminate among speakers on the basis of the content of the taxpayer's speech. As noted above, the tax applies to revenue from all sales of digital advertising services, regardless of the specific purpose of the advertising, the topic addressed in the advertising, or the message expressed by the advertising. Thus, even if the First

Amendment were implicated, the proposed tax would not be clearly unconstitutional under the First Amendment.

FY 2021 Funding for COVID-19 Costs

We also write to address a provision in the bill that expresses the intent of the General Assembly with respect to the distribution of revenues collected in fiscal year 2021. While that provision expresses an intent that certain revenues be distributed to the expenditure accounts of State units, "if necessary," it is our view that the revenues may be expended only in accordance with a valid appropriation, and Section 5 neither appropriates money nor requires that an appropriation be included in the annual Budget Bill.

Section 5 of the bill states:

> That it is the intent of the General Assembly that the Comptroller distribute, as necessary, the sales and use tax and tobacco tax collected in fiscal year 2021 under Section 1 of this Act to:
> (1) the expenditure accounts of the appropriate units of State government to fund costs associated with the Coronavirus Disease 2019 (COVID-19); and
> (2) the Revenue Stabilization Account established under § 7-311 of the State Finance and Procurement Article.

Under the State Constitution, there are two types of laws that can appropriate money from the Treasury: (1) the annual Budget Bill, which is initiated by the Governor, or (2) a supplementary appropriation bill, which is initiated by the General Assembly. Md. Const., Art. III, § 52(2), (5), and (8). A law requiring that the Governor include funding for a program in the annual Budget Bill – i.e., a funding mandate – must have been enacted at least one year before the fiscal year to which it applies. Md. Const. Art. III, § 52(11) and (12). Because House Bill 732 was not enacted before July 1, 2019, the start of fiscal year 2020, it cannot mandate funding for the fiscal year 2021 budget. Moreover, it has long been the advice of this Office that a law requiring the Governor to include a minimum level of funding in the Budget Bill is enforceable only if it "clearly prescribe[s] a dollar amount or an objective basis from which a level of funding can easily be computed." 65 *Opinions of the Attorney General* 108, 110 (1980). As Section 5 does not refer to a specific dollar amount or provide an objective basis from which an amount can be computed, but appears to leave the allocation of funds to the Comptroller's discretion, it is our view that Section 5 does not mandate funding in the Budget Bill.

It is further our view that Section 5 cannot be construed as a supplementary appropriation. Supplementary appropriation bills are governed by Md. Const., Art. III, § 52(8), which provides that such a bill must levy a tax for its support, must be limited to a single work, object or purpose, and may not be passed before the Budget Bill. Although House Bill 732 does levy a tax, it passed the General Assembly before final passage of the Budget Bill (Senate Bill 190).

Notwithstanding the expression of legislative intent in Section 5 of the bill regarding the distribution of fiscal year 2021 revenues, it is our view that those revenues may be expended only in accordance with a valid appropriation. If House Bill 732 is enacted, a portion of the fiscal year 2021 revenues might, for example, be distributed to the expenditure account of a State unit to provide revenue support for an existing appropriation, as long as the expenditures are "associated with" COVID-19. Section 5, however, does not itself provide the legal authorization to withdraw money from the State Treasury.

Conclusion

Overall, while there is some risk a reviewing court would find some provisions of House Bill 732 to be unconstitutional, those provisions are not clearly unconstitutional.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith
Keiffer J. Mitchell, Jr.
Victoria L. Gruber