



**LEGISLATIVE POSITION:**

**UNFAVORABLE**

**House Bill 1200**

**Digital Advertising Gross Revenues Tax - Exemption and Restriction**

**House Ways & Means Committee**

**Friday, February 26, 2021**

Dear Chairwoman Kaiser and Members of the Committee:

Founded in 1968, the Maryland Chamber of Commerce is the leading voice for business in Maryland. We are a statewide coalition of more than 5,000 members and federated partners, and we work to develop and promote strong public policy that ensures sustained economic recovery and growth for Maryland businesses, employees, and families.

As introduced, HB 1200 attempts to prevent the passing on of costs from a new digital advertising tax to customers in the form of a "separate fee, surcharge, or line-item". While HB 1200 attempts to prevent the passing on of this new tax incidence through direct methods, the bill fails to address any indirect avenues of passing on increased costs therefore, not addressing the concerns of increased costs for customers of digital advertising services. In fact, by preventing the passing on of costs as a separate charge, increased costs will likely be folded into product prices, leading to tax pyramiding. As product price increases so will the taxes paid for that product by consumers.

In addition to promising a false solution to increased costs for digital advertising customers, HB 1200 contains a litany of legal concerns.

- **Discriminates Against Interstate Commerce in Violation of the Commerce Clause:**  
The Commerce Clause of the U.S. Constitution prohibits state laws that discriminate against interstate commerce. A state law discriminates against interstate commerce if it favors in-state interests at the expense of out of state interests. The proposed anti pass-through provision of SB 737 would prevent an increase in the price of digital advertising to Maryland advertisers attributable to an increase in costs which the State itself created. Maryland therefore seeks to exact tax revenues from out-of-state sales of plaintiffs' products, but to shield its citizens from the economic impact of the tax. The practical effect of the prohibition would be the shifting the direct burden of the digital advertising tax from the taxpayer's Maryland customers to their out-of-State customers. It thus favors in-state customers and discriminates against of out-of-state customers in violation of the Commerce Clause of the U.S. Constitution.

- **Violates the First Amendment:**

The First Amendment to the U.S. Constitution generally prohibits laws “abridging the freedom of speech.” The cost-pass-through prohibition provisions of the bills would prohibit taxpayers from including on invoices given to their customers either a statement that the price of digital advertising services includes the new Maryland tax or from including a line-item on the invoice detailing the tax. These provisions thus would statutorily prohibit those subject to the tax from speaking to their customers about the tax in printed invoices. Such a prohibition on speaking cannot withstand scrutiny under the First Amendment to the U.S. Constitution.

- **Scope of Carve-outs Vague and Uncertain:**

The proposed amendments exclude “broadcast” and “news media” entities from the definition of “digital advertising services” subject to the gross receipts tax. The proposed amendments use a “primarily engaged in the business of” test in determining whether an entity is subject to the carve out and thus exempt from the tax. Since the carve-outs constitute an exemption from the tax, they would be narrowly construed. As many key terms are undefined, application of the carve-outs to a given business could be uncertain and lead to unintended consequences.

- **Exacerbates Previously Identified Legal and Constitutional Concerns with the Underlying Tax:**

The federal prohibition of the Internet Tax Freedom Act on state taxes that discriminate against electronic commerce is a chief legal obstacle to enforcement of the underlying tax. A tax discriminates against electronic commerce when it targets the internet and does not apply to similar offline commerce. The proposed amendments would exacerbate the targeting of the internet by specifically exempting radio and TV broadcasting advertising from the tax. Additionally, there is no rational basis for imposing the tax on internet advertising and exempting similarly situated radio and TV advertising, in further violation of the Equal Protection Clause of the U.S. Constitution. The same Equal Protection issue arises when treating aggregators and re-publishers of news content more harshly than “news media entities”.

- **Prohibited by the Bill of Attainder Clause:**

A constitutionally proscribed bill of attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. A state law is a bill of attainder if it serves no nonpunitive legislative purposes. Where no legitimate legislative purpose appears, the statute will be considered punitive. Here, the purpose of the proposed prohibition on passing the burden of tax onto Maryland



customers, conduct that otherwise would be lawful, clearly is to make the taxpayer and its shareholders suffer the burden of the tax. There is no discernable non-punitive purpose that would justify such a cost-pass-through prohibition making it a legislative punishment prohibited by Bill of Attainder Clause.

As HB 1200 clearly favors certain industries over others through its carve-out provisions, fails to address the bigger issue of increased costs on customers of digital advertising when they can least afford it, and further complicates the legal issues presenting with the digital advertising tax, the Chamber respectfully requests an **unfavorable report** on HB 1200.

