

Maryland Proposed Digital Ad Tax Amendments

S.B. 787, H.B.1200

Summary of Carve-Out Provisions

Summary of bill: SB787 and HB 1200, recently filed in the Maryland General Assembly by Senate President Bill Ferguson and House Majority Leader Eric Luedtke, would exclude television and radio broadcast stations and newsgathering organizations from the scope of the tax. The bill is set for a hearing in the Senate Budget and Taxation Committee on February 17, 2021 at 1:00. If the Governor's veto of the underlying digital advertising tax is overridden, and the bills were to pass, they would become effective July 1, 2021. As discussed below, the amendments carving certain advertisers out of the tax's scope are vague and uncertain and could exacerbate previously identified legal and constitutional concerns with the underlying tax.

- **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. Because the carve-outs constitute an exemption from the tax, they would be narrowly construed. As further discussed below, because many key terms are undefined, application of the carve-outs to a given business could be uncertain and lead to unintended consequences.
- **No Definition of “Entity:”** Only “entities” primarily engaged in broadcasting or news gathering are eligible for the proposed exemptions. The amendments have no definition for “entity” explaining how that term is to be applied to a business comprised of several separate subsidiaries. A business might have the eligible functions of ownership of broadcasting stations or news media isolated in separate subsidiaries. Such a business might be able to avoid application of the “primarily engaged in the business of” test to the overall business and exempt the digital advertising revenue earned by the subsidiary. Alternatively, a business not organized using separate subsidiaries could restructure and escape taxation by separately incorporating the exemption-eligible functions.
- **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 republishers of news content more harshly than “news media entities.”