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Time to Talk Tax: State Digital Advertising Taxes Proliferate

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Although this is not a tax blog, we would like to alert our readers who may be (blissfully) unaware of the recent wave of state digital advertising taxes sweeping the United States. Here, we examine common themes/targets, discuss legal challenges and present practical takeaways.

So far, three states (Maryland, Washington and Utah) have enacted taxes targeting digital advertising services. While the three taxes vary and are nuanced, some common key themes and targets have emerged:

- Large Platforms: These taxes often target "large" platforms/distributors, in terms of overall general revenue and "in-state" digital advertising revenue. For example, the Maryland Digital Advertising Gross Revenues Tax is imposed on entities with global annual gross revenues of $100M or more, that also have Maryland digital advertising service revenue of $1M or more annually. Md. Code Ann., Tax-Gen §§ 7.5-103, 7.5-201(a). Similarly, Utah's Targeted Advertising Tax imposes tax on entities with gross receipts of $100M or more from all targeting advertising that also have $1M or more from in-state targeted advertising, so long as the entity's gross receipts from all targeting advertising constitute at least 50% of the entity's total gross receipts. Utah Code Ann. §§ 59-35-101(6), 59-35-201(1). By contrast, Washington's tax on advertising services is not limited to "large" platforms. The Washington tax does not have a "threshold" and is imposed regardless of the size of the business or its in-state advertising revenue. *See* Wash. Rev. Code § 82.04.050(3)(k).
- "Digital" Advertising Only: The taxes specifically target advertising in the "digital" space. For instance, Maryland taxes "advertising services on a digital interface, banner advertising, search engine advertising and "other comparable advertising services." Md. Code Ann., Tax-Gen § 7.5-101(e). By recently adopted regulation, the Maryland Comptroller confirmed that the tax is imposed on only "programmatic" advertising (i.e., automated and using algorithms based on advertiser-defined parameters) and "visual" digital advertising services. While Washington's tax is broadly imposed on "all digital and nondigital services related to … advertisements," it "carves-out" from taxation non-digital and non-Internet based advertising such as advertising services related to traditional media (newspapers, radio, television) and billboard and in-store display advertising. Wash. Rev. Code § 82.04.050(3)(k). Unlike Maryland, Washington's tax is not

limited to "programmatic" advertising and therefore includes "non-programmatic" digital advertising. Unlike Maryland and Washington, Utah's tax does not use the word "digital," but its definition of taxable advertising means digital, Internet-based advertising. *See* Utah Code Ann. § 59-35-101(5) (imposing tax on an entity that sells advertising space through a bidding process, obtains/develops individualized data profiles to deliver advertisements, and delivers the advertisement to a recipient who has the ability to "interface" with the advertisement through a link or QR code).

- Pass-Through Aspect: While platforms/distributors displaying the advertising are the parties obligated to pay the tax to the state and file applicable returns, generally the cost of the tax can be passed onto or collected from a customer. *See* Md. Code Ann., Tax-Gen §§ 7.5-102(a), 7.5-201(a), 7.5-301(a); Wash. Rev. Code § 82.08.050; Utah Code Ann. §§ 59-35-201(4), 59-35-202; *but see Chamber of Commerce of United States v. Lierman*, No. 21-CV-00410-LKG, (D. Md. Oct. 15, 2025) (federal district court ruled statutory provision prohibiting a taxpayer from "directly" passing on the cost of the Maryland tax to a customer "by means of a separate fee, surcharge or line-item" "facially violates the First Amendment" and Maryland is "permanently enjoined from enforcing [the prohibition] against the Plaintiffs' member companies, current and future").

Similar to Maryland, Washington, and Utah, a number of other states recently have proposed digital advertising taxes, including Illinois (S.B.3353 & H.B. 4894, new tax on gross receipts derived from digital advertising services); Pennsylvania (H.B. 1678, extending gross receipts tax to companies providing "digital advertising services"); Minnesota (H.F. 4343 & S.F. 4787, extending sales tax to "all digital and nondigital advertising services" but carving out advertising services related to print, radio and television media); and Michigan (State of Michigan Executive Budget Fiscal Year 2027, new tax on digital advertising).

In addition to taxes targeting digital advertising, states (and localities) have enacted and proposed other types of digital services taxes, including taxes on social media companies/platforms and taxes broadly imposed on companies collecting consumer data. Chicago recently enacted a first-of-its kind Social Media Amusement Tax "on social media businesses that collect consumer data on more than 100,000 Chicago consumers in a calendar year, based on the number of Chicago consumers from whom a social media platform business collects consumer data within a calendar month." Chi. Mun. Code § 4-156-1020(b). "Social media business" is broadly defined (*see id*. §. 4-156-1010), and the tax also has several "carve-outs," including those for "bona fide news website, application, or platform"; Internet search and service providers; certain streaming services and gaming, among others. Across the country, various "copycat" or similar taxes recently have been proposed including in Illinois (Ill. State Budget Fiscal Year 2027, "Social Media Platform Fee") and Minnesota (S.F. 5052 & H.F. 5055, "Social Media Consumer Data Collection Tax").

Various legal challenges to these taxes have been filed and are pending in courts across the country. Maryland's digital advertising tax, enacted in 2021, immediately was challenged in court. The merits of the tax currently are pending before the Maryland Tax Court, where plaintiffs have raised claims challenging the tax under the Internet Tax Freedom Act ("ITFA") and various Constitutional provisions including the Commerce Clause, Due Process Clause and Equal Protection Clause.

The ITFA challenge argues that by targeting Internet-based advertising, the tax violates the ITFA by discriminating against electronic commerce and treating it less favorably than non-electronic commerce. In the Maryland litigation, the original trial court judge ruled that the tax violated the ITFA. The judge found that digital advertising is so similar to traditional advertising that taxing digital while not taxing other advertising amounts to discrimination under the ITFA. The judge was reported to say during the hearing that "Puppies are puppies and advertising is advertising." This ruling was vacated on procedural grounds. *Comcast v. Comptroller of Treasury of Md.*, No. C-02-CV-21-000509 (Md. Cir. Ct. Oct. 20, 2022), vacated per curiam for lack of jurisdiction, 483 Md. 485, 294 A.3d 1108 (2023).

Further, Washington's advertising tax and Chicago's social media tax are being litigated in state courts. *See* Complaint for Declaratory Relief, *Comcast Cable Communications Management, LLC v. State of Washington*, case no. 25-2-03584-34 (filed in Thurston County Superior Court, Sept. 9, 2025) & Complaint of Declaratory Judgement and Injunctive Relief, *NetChoice v. City of Chicago*, case no. 2026CH02417 (filed in Cook County Circuit Court, Mar. 13, 2026) (both cases raising similar arguments on those raised in the Maryland litigation). The Utah tax, effective May 6, 2026, and imposed starting January 1, 2027, will almost certainly follow Maryland and Washington to the courthouse.

<u>Practical Takeaways:</u> Whether a business is subject to these taxes requires fact investigation and a nuanced inquiry that depends on the particular tax at issue. Given the breadth of these taxes, it is prudent to confirm what activities may be subject to tax. However, there are potential caveats and carve-outs mitigating taxation that should be explored as well. Additionally, there are numerous challenges, including those based on the ITFA and the U.S. Constitution, that potential taxpayers should consider raising.

For additional information and advice about the digital services taxes discussed here, or otherwise, please feel free to reach out to the blog post's authors or your Kilpatrick attorney contact.