

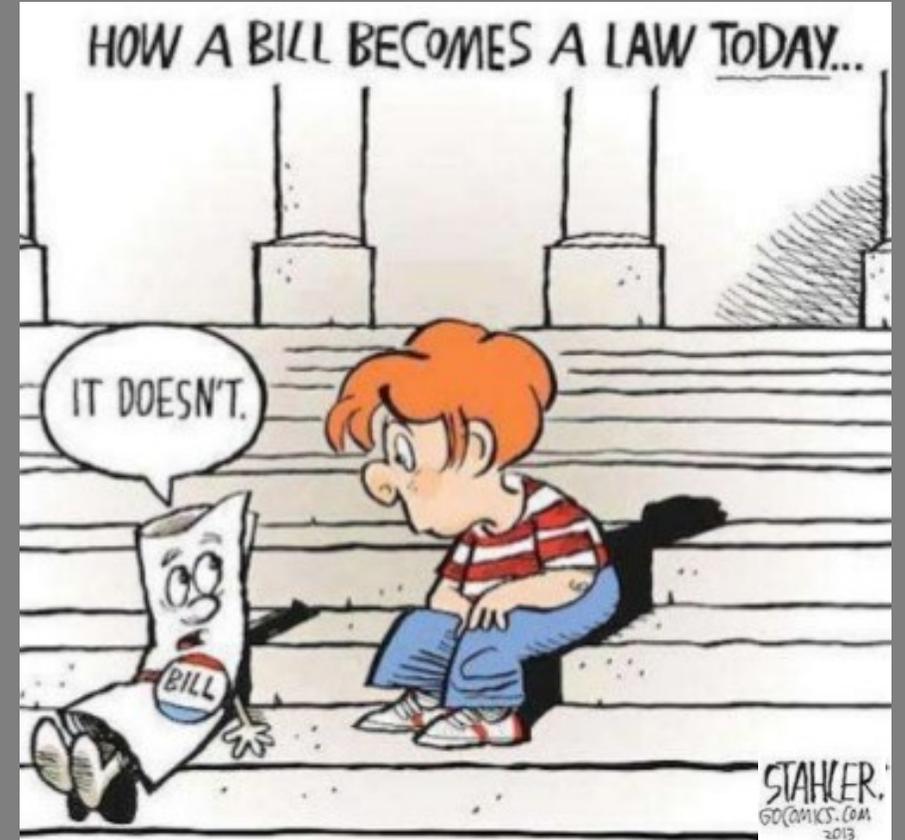
STATE DIGITAL ADVERTISING TAX UPDATE

JUNE 2021



AGENDA

- 01 Overview
- 02 2021 Legislative Results Summary
- 03 Key States to Watch
- 04 Conclusion
- 05 Appendix





OVERVIEW

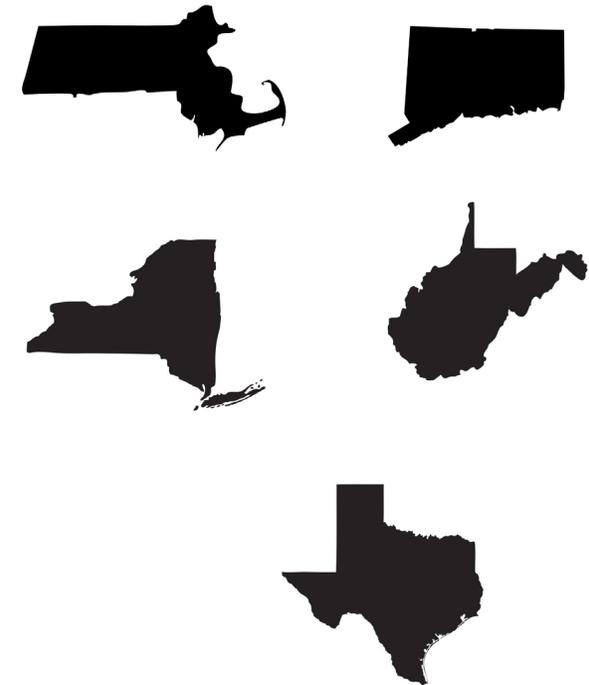
2021 LEGISLATIVE TRENDS

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U.S. State Digital Advertising Taxes

Graduated Gross Excise Tax (CT, MA, NY, TX, WV)

- Minimum In-State Gross Revenue Requirement
 - Most states start at \$1M in-state gross annual revenue
 - **MA** (HD3210) starts at \$100K
- Entity Minimum Annual Global Gross Revenue Thresholds (25M to 100M)
 - Most states impose at \$100M (including MD-H.B. 732)
 - **MT** (HB 363) \$25M, **MA** (HD3210) \$50M, **MA** (HD 3601) \$25M
- Most graduated rates start at 2.5% (\$100M-1B) and grow to 10% (>\$15B)
 - Most rates follow 2020 MD bill standard
 - **MA** (HD3210) graduated tax rates start at 5% (annual gross revenue \$50M to \$100M) and grow to 15% (annual gross revenue >\$200M)
 - **NY** (SB 1124) tax is limited to advertising on a digital interface “that use(s) personal information about the people the ads are being served to”; this significantly limits tax base compared to other state bills.



U.S. State Digital Advertising Taxes

Flat Gross Excise Tax

- **MA** (HD 3601)
 - **5% flat excise tax** on annual assessable revenue within MA
 - Total annual global gross revenue >\$25M
- **CT** (HB 6187)
 - **10% flat excise tax** on annual assessable revenue within CT
 - Total annual global gross revenues >\$10B
 - BIG TECH focused



U.S. State Digital Advertising Taxes

Sales Tax Exemption Removal

- **NY** (AB 734/ SB 302)- Imposes undefined rate of sales tax on “digital advertising services.” Resales would not be subject to the tax.
- **TX** (S.B. 1711)- Expands the state’s 6.25 percent ad valorem tax to “advertising services” including internet advertising.
- Similar approach taken in 2020 by legislators in **NE, SD, DC**.

Social Media Providers Surcharge Tax

- **AR** and **IN** introduced bills to levy a 7% tax on a social media provider's gross revenue from social media advertising services.



U.S. State Digital Advertising Taxes

Tax on Personal Data Sale

- Percentage of annual gross receipts/gross income (all domestic and foreign sources) multiplied by % of data addresses who reside in the state.
- **WA** (HB 1303) 1.8% (gross income)
- **NY** (SB6727) 2% (gross receipts)
- **OR** (HB 2392) 5% (gross receipts)

Tax on Personal Data Possession (Intangible Property Tax)

- **NY** (A06199/S04959) monthly excise tax on the collection of personal consumer data. \$0.05 to \$0.50 per NY consumer based on volume of data.
- **WA & NY** laws require registration of data brokers within the state. VT & CA already have data broker registries with fees totaling \$100 and \$400/annually respectively.



Key Questions Remain

Sourcing the Viewer's Location

- How will businesses and Departments of Revenue determine the location of taxable advertising?
- The viewer's IP address may not identify exactly where that person is (i.e. people living on the border of a state may be mistaken for living in the other state).
- VPNs and other methods of connecting to the Internet render IP addresses unreliable for evidencing geography. Because of sourcing difficulties, states might instead consider a proxy for customer location or source to the advertiser's location.

Key Questions Remain

Constitutionality

State Digital Tax laws may conflict with existing state and federal laws regulating commerce.

- **Internet Tax Freedom Act**, a federal law that prohibits discriminatory taxes on electronic commerce. Taxes that apply to only digital advertising services may violate this law.
- **Commerce Clause of US Constitution**, a firm must have some connection—nexus, in legalese-- to a state before that state is allowed to tax it. In its 2018 decision in *South Dakota v. Wayfair*, SCOTUS allowed states to require online retailers to collect sales tax from residents who buy from them, even if the seller doesn't have physical presence in their state. But can a firm be said to be doing business in a state just because someone looked at an ad on a device while located in that state? What if that firm collects or sells data from the user who opened the ad?
- **Dormant Commerce Clause** is violated because it shifts the burden of the tax to out-of-state customers.
- Other legal conflicts include the **Contract Clause**, **Equal Protection Clause**, and **Due Process Clause**



2021 LEGISLATIVE SEASON RESULTS

AT A GLANCE

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Many State Digital Ad Laws Introduced; None Pass

- **No new state digital advertising taxes have been enacted to date in 2021.**
 - Many states are taking a wait and see approach with legal challenges against Maryland's new law.
 - Some policymakers fear new taxes can decelerate post-COVID recovery in some economy sectors.
 - NE legislatures seem to have appetite to pass a tax, but governors fear perception of raising taxes (CT & MA).
 - Slow rolling passing new laws due to tough lessons learned from implementation of Wayfair online sales tax case.
- **No new states added excise taxes for data possession or data sales in 2021.**
- Several European countries have already implemented or are considering implementing digital ad taxes (see Appendix).

MD Law Forges Ahead; Bellwether for Other States

- The MD Legislature overrode Governor Larry Hogan's (R) veto of the nation's first state digital advertising tax in February 2021.
- HB/S.787 delayed law's effective start date to January 1, 2022; It also exempted broadcast and news media entities' digital advertisement services and prohibited the pass-through of the tax via a separate charge.
- **Legal Update:** The US. Chamber, the Internet Association, the Computer and Communications Industry Association, and NetChoice are suing to strike down the law, arguing the levy violates the Internet Tax Freedom Act by imposing "discriminatory taxes" on e-commerce. **Venable indicates the lawsuit is more likely than not to succeed.**
- **Regs Update:** MD Comptroller spokesperson said June 3 that digital advertising tax guidance will not be released until at least July after false reports came out that it would be released the week of May 31.
- A fiscal analysis drafted by Maryland's Legislature estimated the tax to generate \$250 million annually.



KEY STATES TO WATCH

2022 & BEYOND

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Connecticut



- Both chambers of the Connecticut Legislature held hearings on digital advertising bills this year.
- The Finance, Revenue and Bonding Committee in mid-April had proposed two state income tax surcharges on households earning more than \$500,000, and a new levy on digital media ads, to pay for urban investments.
- Tax language was dropped at the 11th hour during final 2022-2023 Biennial Budget negotiations due to Governor Lamont's insistence on not levying new business and income taxes.
- **Prediction:** 2023 Budget possibility for 2024 implementation; If Governor Lamont runs for reelection, his commitment to avoid levying new taxes may be unsustainable. Contingent on unsuccessful MD bill legal challenge.



New York

- In 2021, several legislative proposals were introduced in New York to tax digital advertising and consumer data brokers. Proposals included a graduated gross revenue tax, flat gross revenue tax, data sales tax, data possession tax.
- NY legislature is still in session but has passed its FY 2022 budget without these taxes included.
- Some NY proposals limit digital ad tax to advertisement services that use personal information about the people to whom the ads are directed.
- Many NY bills (and other states) include certain registration and self-reporting requirements, and certain exceptions and carve-out language to avoid sourcing and federal law issues plaguing MD law.
- **Prediction:** Passage in 2021 is less likely now that budget has been passed. Expect digital ad and consumer data possession taxes to be a reoccurring policy proposal for the future FY 2023 budget discussions.

Washington



- The Gross Income Tax on Data Sales bill had 10 Democratic co-sponsors and a public hearing.
- Legislature is looking to expand eligibility for state's new business and occupation (B&O) tax surcharge; The B&O tax framework was created in 2019 to fund education and workforce training programs.
- Data privacy continues to be on the legislature radar.
- Tech heavy state, so revenue potential is high.
- **Prediction:** Passage in 2021 is less likely now that budget has been passed. Expect consumer data possession taxes to be a reoccurring policy proposal for the future FY 2023 budget discussions.



CONCLUSION

FINAL THOUGHTS

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Conclusion

- With COVID-19 hitting state revenues in 2020 & 2021, states are exploring new tax proposals to raise revenue. As states floated new advertising taxes even before the pandemic, it would not be surprising for some states pass new tax laws during the 2022 legislative session.
- Because advertising taxes are still nascent, states will have numerous challenges. Some legislators may be concerned about the taxes' economic impact on local media dependent on advertising revenue.
- If states do pass the taxes, those taxes must then survive potential conflicts with federal and U.S. constitutional law. A new, unique tax is worthless if it cannot survive a legal challenge.
- If MD law stands up against legal challenges, the flood gates may open for new state digital taxes.

Questions?

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APPENDIX

EUROPEAN DIGITAL AD TAX LAWS

European Digital Advertising Taxes

Country	Tax Rate	Scope	Global Revenue Threshold	Domestic Revenue Threshold	Status
Austria (AT)	5%	Online advertising	€750 million (US \$840 million)	€25 million (\$28 million)	Implemented (Effective from January 2020)
Belgium (BE)	3%	Selling of user data	€750 million (\$840 million)	€5 million (\$5.6 million)	Proposed (A DST was first introduced in January 2019 but was rejected in March 2019; an adjusted DST proposal was reintroduced in June 2020; however, the new government, sworn in October 1, 2020, has announced it will wait for a global solution)
Czech Republic (CZ)	5%	<ul style="list-style-type: none"> Targeted advertising Use of multilateral digital interfaces Provision of user data (additional thresholds apply)	€750 million (\$840 million)	CZK 100 million (\$4 million)	Proposed (Discussions delayed due to COVID-19 pandemic; there is a proposed amendment that reduces the tax rate from 7% to 5%)
France (FR)	3%	<ul style="list-style-type: none"> Provision of a digital interface Advertising services based on users' data 	€750 million (\$840 million)	€25 million (\$28 million)	Implemented (Retroactively applicable as of January 1, 2019)
Hungary (HU)	7.5%	Advertising revenue	HUF 100 million (\$344,000))	N/A	Implemented (As a temporary measure, the advertisement tax rate has been reduced to 0%, effective from July 1, 2019 through December 31, 2022)
Italy (IT)	3%	<ul style="list-style-type: none"> Advertising on a digital interface Multilateral digital interface that allows users to buy/sell goods and services Transmission of user data generated from using a digital interface 	€750 million (\$840 million)	€5.5 million (\$6 million)	Implemented (Effective from January 2020)
Latvia (LV)	3%	—	—	—	Announced/Shows Intentions (The Latvian government commissioned a study to determine the increase of tax revenue based on the assumption that the country levies a 3% DST)

European Digital Advertising Taxes

Country	Tax Rate	Scope	Global Revenue Threshold	Domestic Revenue Threshold	Status
Norway (NO)	—	—	—	—	Announced/Shows Intentions (Plans to introduce a unilateral measure in 2021 if the OECD does not reach a consensus solution in 2020)
Poland (PL)	1.5%	Audiovisual media service and audiovisual commercial communication	—	—	Implemented (Effective from July 2020; there is a separate proposal to tax advertisement revenues of broadcasters, tech companies, and publishers)
Slovakia (SK)	—	—	—	—	Proposed (The Ministry of Finance opened a consultation on a proposal to introduce a DST on revenue of nonresidents from provision of services such as advertising, online platforms, and sale of user data; however, there were no further steps taken and none of the political parties has put forward digital tax as its priority agenda)
Slovenia (SI)	—	—	—	—	Announced/Shows Intentions (The Ministry of Finance announced a government proposal to submit a draft bill to the National Assembly introducing a digital services tax by April 1, 2020; however, there has been no development so far)
Spain (ES)	3%	<ul style="list-style-type: none"> · Online advertising services · Sale of online advertising · Sale of user data 	€750 million (\$840 million)	€3 million (\$3 million)	Implemented (Effective from January 2021)

European Digital Advertising Taxes

Country	Tax Rate	Scope	Global Revenue Threshold	Domestic Revenue Threshold	Status
Spain (ES)	3%	<ul style="list-style-type: none">· Online advertising services· Sale of online advertising· Sale of user data	€750 million (\$840 million)	€3 million (\$3 million)	Implemented (Effective from January 2021)
Turkey (TR)	7.5%	Online services including advertisements, sales of content, and paid services on social media websites	€750 million (\$840 million)	TRY 20 million (\$4 million)	Implemented (Effective from March 2020; the president can reduce the DST rate as low as 1% or increase it as much as 15%)
United Kingdom (GB)	2%	<ul style="list-style-type: none">· Social media platforms· Internet search engine· Online marketplace	£500 million (\$638 million)	£25 million (\$32 million)	Implemented (Retroactively applicable as of April 1, 2020)