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**State Online Advertising Laws: Wrong Policies, Wrong Time**

by

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**Introduction and Summary**

Advertising motivates and informs consumer spending. And, as an industry, advertising employs a significant number of people. With many brick-and-mortar establishments closed due to the novel coronavirus, online shopping – supported and propelled by online advertising – is the source of much of the activity keeping our economy afloat during this extraordinary time. Moving forward, a successful return to any semblance of "normal" hinges upon consumption levels, both on- and offline, rapidly approaching pre-pandemic levels. Online advertising can play a key role in that recovery, but misguided state laws, both passed and pending, threaten its effectiveness at this critical moment when the nation's economy is reeling.

Such state laws would be problematic even under the best economic circumstances, but at present they risk undermining a timely recovery. At a minimum, state officials in California and Maine should postpone the enforcement of unreasonably burdensome and costly restrictions on online advertising. Lawmakers in Maryland and New York, meanwhile, ought to reject legislative proposals that would impose discriminatory taxes on online advertising.

## Now Is Not the Time to Burden Online Advertising

The nation eagerly anticipates a return, if not quite to the old reality, then at least to a time of renewed economic vibrancy. Generally speaking, advertising helps define and inform consumer preferences and motivates spending to satisfy consumer demand. Online advertising, in particular, does so with great effectiveness, even when people are unable or unwilling to leave their homes to shop. Various efforts at the national level seek to stimulate the economy through the infusion of federal funds. In contrast, online advertising can unleash marketplace forces to kickstart and maintain that recovery – as long as the government does not add costly burdens that make it less available.

Unfortunately, numerous industries will feel the impact of COVID-19 for months to come. As heavily affected sectors of the economy – including airlines, hotels, tourist destinations, dining, and entertainment venues – respond to decreased revenues, advertising spending inevitably will fall. Barry Diller, Chairman of the Expedia Group, has indicated that "Expedia will slash ad spending this year, joining a chorus of advertisers that are putting campaigns on hold or cancelling spend altogether." Expedia typically spends \$5 billion annually, but "won't spend \$1 billion on advertising probably this year," Diller said.<sup>1</sup> Similarly, a survey conducted by the Interactive Advertising Bureau revealed that "98% of Sellers anticipate U. S. ad sales revenue to decrease – including supply side / ad network revenue – against original 2020 plans due to Coronavirus outbreak."<sup>2</sup>

Thus, at the very moment that we need to jumpstart the economy through reinvigorated consumer spending, the hard truth is that businesses lack the financial resources needed to fund advertising that helps support consumer demand. Making matters worse, overreaching costly state privacy and tax laws are poised to constrain and burden online advertising. As I have described previously, these are bad ideas, plain and simple. But in the current context, they could be disastrous.

Below I highlight looming oversight that, absent mitigating action, will saddle online advertising with severe restrictions, resource-diverting compliance challenges, and discriminatory taxes – when all efforts instead should be focused on encouraging economic activity.

CALIFORNIA: Governor Gavin Newsom in 2018 signed into law the California Consumer Privacy Act (CCPA). As I explained in detail in an October 28, 2019 *Perspectives from FSF Scholars*, there are many problems with the CCPA.<sup>3</sup> Perhaps most relevant for current purposes

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<sup>1</sup> Megan Graham, "Barry Diller: Expedia normally spends \$5 billion on ads but probably 'won't spend \$1 billion' this year," *CNBC* (April 16, 2020), available at <https://www.cnbc.com/2020/04/16/barry-diller-expedia-wont-even-spend-1-billion-on-ads-this-year.html>.

<sup>2</sup> Interactive Advertising Bureau, "Coronavirus: Ad Revenue Impact On Publishers & Other Sellers," (April 15, 2020), available at <https://www.iab.com/wp-content/uploads/2020/04/IAB-Coronavirus-Impact-Buy-vs.-Sell-4.15.20FINAL.pdf>, at 6. See also Heather Kelly, "Advertising adjusts for a new reality: Sweatpants for staying home and toilet paper that cares," *The Washington Post* (April 25, 2020), available at <https://www.washingtonpost.com/technology/2020/04/25/ads-coronavirus-change/> ("Ad sales are expected to drop 2.8 percent this year, according to media researcher Magna Global – an amount that would be much smaller without an expected \$4.9 billion of political ads later in the year.").

<sup>3</sup> See generally Andrew Long, "California's Heavy-Handed Approach to Protecting Consumer Privacy: Exhibit A in the Case for Federal Preemption," *Perspectives from FSF Scholars*, Vol. 14, No. 35 (October 28, 2019), available at

are the associated compliance costs: according to Attorney General Becerra's office, they could surpass \$16 billion in just the first decade.<sup>4</sup> Those costs are exacerbated by the fact that the administrative process to establish implementing rules – and thus provide businesses the certainty needed to achieve compliance – continues to drag on.<sup>5</sup>

The CCPA became effective on January 1, but the Attorney General may not initiate enforcement until July 1. I recently noted on the Free State Foundation's blog that, in light of COVID-19 and the still-unfinished state of the rules, a group of 66 trade associations, companies and other organizations asked the AG to delay enforcement until 2021.<sup>6</sup> Unfortunately, to date he has been unwilling to do so.<sup>7</sup> As a result, businesses must dedicate limited resources to trying to figure out complicated compliance obligations – and thus away from promoting consumption – at a time when many are struggling to remain afloat.

MAINE: In 2019, Maine passed a privacy law that applies solely to broadband Internet service providers (ISPs). Barring judicial intervention, it becomes effective on July 1. In an April 9 *Perspectives from FSF Scholars*, I explained how the advertising market – and, by direct extension, consumers – will suffer harm from this constitutionally suspect legislation, which prohibits ISPs from providing meaningful competition to the edge providers that dominate online advertising.<sup>8</sup> In addition, like the CCPA, the Maine law fails to provide ISPs sufficient clarity to achieve compliance.<sup>9</sup> Consumers would be better off if ISPs could focus on responding to the increased demands on their networks rather than efforts to interpret, and stay on the right side of, vague new obligations.

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<https://freestatefoundation.org/wp-content/uploads/2019/10/California's-Heavy-Handed-Approach-to-Protecting-Consumer-Privacy---Exhibit-A-in-the-Case-for-Federal-Preemption-102819.pdf>. See also *id.* at 1 ("[The CCPA] creates regulatory uncertainty, prevents privacy protections from evolving over time, imposes significant and unjustified costs, diverts resources away from uses that benefit consumers, deters investment and innovation, and threatens the continued existence of the ad-supported online experience that consumers clearly prefer.").

<sup>4</sup> See *California Department of Justice, Notice of Proposed Rulemaking Action, Title 11. Law, Division 1. Attorney General* (published October 11, 2019), at 12, available at

<https://www.oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-nopa.pdf>.

<sup>5</sup> See, e.g., Peter McLaughlin, "CCPA Draft Regulations 3.0: One small step forward and one massive step back," *HeyDataData* (March 19, 2020), available at <https://heydatadata.com/2020/03/19/ccpa-draft-regulations-3-0-one-small-step-forward-and-one-massive-step-back/#page=1> ("A mind is a terrible thing to waste, as is time, and this v3 of the CCPA rules shows respect for neither.").

<sup>6</sup> Andrew Long, "Will Enforcement of California's Privacy Law Precede Final Rules?," *The Free State Foundation Blog* (April 13, 2020), available at <https://freestatefoundation.blogspot.com/2020/04/will-enforcement-of-californias-privacy.html>.

<sup>7</sup> See *id.* (noting that a spokesperson for the AG's office in mid-March indicated that "[r]ight now, we're committed to enforcing the law upon finalizing the rules or July 1, whichever comes first"). Notably, however, the AG on April 10 "issued an alert reminding consumers of their data privacy rights amidst the COVID-19 public health emergency" and noting that "[a]s the health emergency leads more people to look online to work, shop, connect with family and friends and be entertained, it is more important than ever for consumers to know their rights under the [CCPA]". Press Release, "Attorney General Becerra Reminds Consumers of their Data Privacy Rights During the COVID-19 Public Health Emergency" (April 10, 2020), available at <https://oag.ca.gov/news/press-releases/attorney-general-becerra-reminds-consumers-their-data-privacy-rights-during>.

<sup>8</sup> See generally Andrew Long, "Maine's ISP-Only Privacy Law Will Not Protect Consumers," *Perspectives from FSF Scholars*, Vol. 15, No. 17 (April 9, 2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/04/Maines-ISP-Only-Privacy-Law-Will-Not-Protect-Consumers-040920.pdf>.

<sup>9</sup> See *id.* at 6 (explaining that the law "includes poorly drafted and overly broad statutory provisions that make compliance difficult, if not impossible").

MARYLAND: Maryland lawmakers passed a tax that singles out digital advertising just over a month ago. Free State Foundation President Randolph May and I argued in a March 13 post to our blog that that legislation raises serious legal questions, imposes a double tax that would suppress commerce within the state, encourages advertisers to redirect their efforts to other jurisdictions, and includes vague language that would render compliance costly, at best.<sup>10</sup> In a subsequent March 30 op-ed in *The Baltimore Sun*, we urged Governor Hogan to veto the bill.<sup>11</sup> He has not yet taken action.

When this legislation was passed, the coronavirus had begun to disrupt daily life – in fact, the vote occurred at the harried end of a session cut short by public health concerns<sup>12</sup> – but the gravity of its economic impact was not yet apparent. (It is doubtful that we appreciate its full extent even today.) In the interim, the economic landscape has been altered beyond recognition. As Jake Ward, President of the Connected Commerce Council, wrote on April 15:

Maryland's economy just hit a COVID-19 brick wall. Businesses are struggling, baseball stadiums are empty, and employees are being furloughed and laid off statewide. With Governor Hogan ordering non-essential businesses to close and employees to work from home, Maryland small businesses are working overtime with digital business tools and e-commerce, trying to stay alive – at least until federal grant and loan funds are flowing. In these trying times, it is mind boggling that policymakers would enact a digital advertising tax that will hurt small businesses when they need affordable marketing solutions the most.<sup>13</sup>

Moreover, this statute, and restrictions on online advertising generally, don't just harm consumers indirectly through inefficiencies and higher costs. They also jeopardize directly residents' sources of income at a most inopportune time. In a March 11 letter to members of the Maryland legislature, the Association of American Advertisers (ANA) pointed out that "advertising supports nearly 400,000 Maryland jobs."<sup>14</sup> If it becomes law, Maryland's first-of-its-

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<sup>10</sup> Randolph May & Andrew Long, "Maryland's Proposed Digital Advertising Tax Would Do Harm," The Free State Foundation Blog (March 13, 2020), available at <https://freestatefoundation.blogspot.com/2020/03/marylands-proposed-tax-on-digital.html> (concluding that the then-proposed legislation "would require the state to expend substantial sums on legal fees; likely never go into effect; lead to higher prices if it did; shift advertising spending to other states; harm both consumers and businesses, in particular those dependent upon ad revenue; and undermine popular ad-supported business models").

<sup>11</sup> Randolph May & Andrew Long, "Maryland's digital ad tax is a bad idea, and Gov. Hogan should veto it," *The Baltimore Sun* (March 30, 2020), available at <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0330-maryland-digital-ad-tax-20200330-2xwdsodxynefnof53p3rs6njvi-story.html>.

<sup>12</sup> See Erin Cox, et. al., "With session abbreviated by coronavirus, Md. lawmakers speed through 500 bills," *The Washington Post* (March 18, 2020), available at [https://www.washingtonpost.com/local/md-politics/historic-session-abbreviated-by-coronavirus-md-lawmakers-speed-through-500-bills/2020/03/18/aba64d70-691d-11ea-abef-020f086a3fab\\_story.html](https://www.washingtonpost.com/local/md-politics/historic-session-abbreviated-by-coronavirus-md-lawmakers-speed-through-500-bills/2020/03/18/aba64d70-691d-11ea-abef-020f086a3fab_story.html) ("Working with a skeleton crew, in conditions that defied social distancing guidelines, Maryland's 188 lawmakers passed about 500 bills in a matter of days this week....").

<sup>13</sup> Jake Ward, "Opinion: The Wrong Time For a Small Business Digital Tax," *Maryland Matters* (April 15, 2020), available at <https://www.marylandmatters.org/2020/04/15/opinion-the-wrong-time-for-a-small-business-digital-tax/>.

<sup>14</sup> Letter from Daniel L. Jaffe, Group Executive Vice President, Government Relations, Association of National Advertisers (ANA), to Members of the Maryland Legislature (March 11, 2020), available at <https://www.ana.net/getfile/29840>.

kind digital ad tax will increase advertising costs and, by extension, the costs of advertised goods and services. In turn, this will result in less revenue to pay employees.

NEW YORK: On April 13, State Senator Kevin Thomas introduced S.8166,<sup>15</sup> a proposal to include "digital advertising services" within the sales tax base in order to fund a zero-interest debt refinancing program for student loan holders. State Assembly member Daniel Rosenthal sponsored identical legislation on April 22.<sup>16</sup> Should it become law, S.8166 would go into effect after only thirty days.<sup>17</sup>

A month earlier, State Senator and Deputy Majority Leader Michael Gianaris introduced S.8056, a bill nearly identical to that passed by the Maryland General Assembly. The one exception: it would apply only to targeted advertising, defined as "advertisement services ... that use personal information about the people the ads are being served to."<sup>18</sup>

These would be problematical measures under any circumstances. Now, in particular, is not the time to discourage online advertising through discriminatory taxation.

## Conclusion

The American economy requires substantial support to recover from the impact of COVID-19. Public officials therefore must foster – not constrain – online advertising's capacity to propel informed spending by consumers. They also need to consider the number of people that advertising employs: according to the ANA, in 2014 "[s]ales of products and services stimulated by advertising supported 20 million jobs, or 14 percent of the total jobs in the country."<sup>19</sup> Flawed initiatives that interfere with the efficient operation of online-advertising driven commerce, whether through excessive and ill-defined limitations on the use of personal data or discriminatory taxes, will suppress the effectiveness of online advertising – thereby dampening consumer satisfaction and demand – and jeopardize jobs at the most inopportune moment. At a minimum, such proposals should be tabled for the foreseeable future.

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<sup>15</sup> New York State Senate Bill S8166, 2019-2020 Legislative Session (introduced April 13, 2020), available at <https://legislation.nysenate.gov/pdf/bills/2019/s8166>.

<sup>16</sup> See James Nani, "NY Assembly Bill Would Subject Digital Ads To Sales Tax," *Law360* (April 22, 2020), available at [https://www.law360.com/tax-authority/state-local/articles/1266480/ny-assembly-bill-would-subject-digital-ads-to-sales-tax?nl\\_pk=6c53a5ef-4408-4c59-9d64-77b4cfd643e1&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=tax-authority/state-local](https://www.law360.com/tax-authority/state-local/articles/1266480/ny-assembly-bill-would-subject-digital-ads-to-sales-tax?nl_pk=6c53a5ef-4408-4c59-9d64-77b4cfd643e1&utm_source=newsletter&utm_medium=email&utm_campaign=tax-authority/state-local)

(subscription required). See also New York State Assembly Bill A10321, 2019-2020 Legislative Session (introduced April 22, 2020), available at [https://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A10321&term=2019&Summary=Y&Text=Y](https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10321&term=2019&Summary=Y&Text=Y).

<sup>17</sup> See generally Joe Bishop-Henchman & Stephen P. Kranz, "The Digital Advertising Tax Trend Continues: New York Introduces Another Bill," *Inside Salt* (April 15, 2020), available at <https://www.insidesalt.com/2020/04/the-digital-advertising-tax-trend-continues-new-york-introduces-another-bill/>.

<sup>18</sup> New York State Senate Bill S8056, § 2 (defining "digital advertising services"), 2019-2020 Legislative Session (introduced March 13, 2020), available at [https://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=S08056&term=2019&Summary=Y&Text=Y](https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S08056&term=2019&Summary=Y&Text=Y).

<sup>19</sup> Association of National Advertisers, "The Role of Advertising in America" (2017), available at <https://www.ana.net/getfile/24576>.