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Gail Cole • Feb. 03, 2021



As it did in 2020, New York is looking to tax digital advertising services. Two bills introduced last week would broaden the state's sales tax to digital advertising services. Another would tax gross revenue derived from digital advertising services in the state.

Extending sales tax to digital advertising services

[Assembly Bill 734](#) and [Senate Bill 302](#) seek to impose a sales tax on digital advertising in order to fund a zero-interest education loan refinancing program.

The bills would tax sales of digital advertising services in the state, including banner

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to sales made and uses occurring on and after that date. The act would automatically expire after five years.

Taxing revenue derived from digital advertising services

[Senate Bill 1124](#) would tax annual gross revenue derived from digital advertising services in the state, such as banner advertising, interstitial advertising, search engine advertising, and other comparable advertising services that use personal information about the people the ads are targeting. Unlike A734 and S302, S1124 doesn't reference political ads.

The digital ad tax would be on a sliding scale and apply to persons with global annual gross revenues of \$100 million or more, except governmental entities or “a unit or instrumentality of a governmental entity.” The tax rates would be:

- 2.5% of the assessable base for a person with global annual gross revenues of \$100 million through \$1 billion
- 5% of the assessable base for a person with global annual gross revenues of \$1 billion through \$5 billion
- 7.5% of the assessable base for a person with global annual gross revenues of \$5 billion through \$15 billion
- 10% of the assessable base for a person with global annual gross revenues exceeding \$15 billion
- If enacted as written, the tax would apply to taxable years beginning on and after January 1, 2022.

Do the New York digital advertising services bills have a shot?

It's unclear whether there's enough support in the New York Assembly to pass any of the bills described above. Similar measures introduced during the 2019–2020 legislative session failed to make it out of committee.

There are at least two potential sticky wickets with digital advertising services taxes:

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passing legislation that discriminates against or excessively burdens interstate commerce.

On a more nuts-and-bolts level, it can be challenging for businesses and tax authorities to determine the precise location of digital advertising services for tax purposes. For example, IP addresses don't always pinpoint location, which can be especially problematic for consumers located near the state border. It's also not clear how the tax would apply if a New York resident viewed a digital ad from a handheld device while traveling outside the state, or if an out-of-state resident viewed a digital ad from a device while in New York.

According to Scott Peterson, vice president of government relations at Avalara, sourcing is perhaps the most critical issue facing a digital advertising services tax. "The constitutional arguments can likely be overcome by expanding the type of advertising subject to tax, but that only exacerbates the sourcing challenge.

Advertising, even in its nondigital form, can be very targeted (e.g., an individual email or letter), very local (e.g., a local newspaper or television station), or available to all (e.g., a Super Bowl ad). It's often inherently interstate in nature — even a local television ad may be seen by people in multiple states where that channel may be viewed. Before a state can tax any interstate activity, someone must determine that state's share of the total cost of the advertising. Each type of ad and each format creates Each type of ad and each format requires a different analysis."

Other states interested in taxing digital advertising services

New York wasn't the only state that attempted to tax digital advertising services in 2020, and it likely won't be the only one to try in 2021.

[Maryland lawmakers successfully passed a digital advertising services tax](#) last year, only to have it vetoed by the governor. There may be enough support to override the

veto during the upcoming legislative session, though the backlash to the proposed

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In South Dakota, where most services are already subject to tax, a proposal to eliminate the exemption for advertising services was struck from [House Bill 1284](#) on the grounds that it would “cause economic distortion, raise production costs, and place businesses at a competitive disadvantage” (hat tip to the [Eversheds Sutherland SALT Shaker](#)).

The COVID-19 pandemic has caused “[steep declines](#)” in state revenues while also [increasing expenditures](#) on food assistance programs, health care, unemployment, and other services. Although states may be reluctant to impose new taxes on struggling businesses, many do need to secure more revenue. Taxes on digital advertising services, like those under consideration in New York, could help.

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Gail Cole has been researching, writing, and reporting tax news for Avalara since 2012. She's on a mission to uncover unusual tax facts and make complex laws and legislation more digestible for accounting and business professionals — or anyone interested in learning about tax compliance. [Get more sales tax news from the Avalara blog.](#)

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