Maryland State Senators Miller and Ferguson have introduced legislation (Senate Bill 2) that would impose a new Digital Advertising Gross Revenues Tax for all taxable years beginning after December 31, 2020. If signed into law, Maryland would become the first state to impose a tax that targets digital advertising. Senate Bill 2 was read for the first time in the Budget and Taxation Committee on January 8, 2020.

**Summary of Senate Bill 2**

Senate Bill 2 would create a new Digital Advertising Gross Revenues Tax, which would be imposed on a person’s annual gross revenues derived from digital advertising services in Maryland. “Digital advertising services” includes “advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services.” “Digital interface” is defined as “any type of software, including a website, part of a website, or application, that a user is able to access.” “Annual gross revenues” is defined as “income or revenue from all sources, before any expenses or taxes, computed according to generally accepted accounting principles.”

**Tax Rate:** The tax rate varies depending on the person’s global annual gross revenues:

1. For global annual gross revenues of $100,000,000–$1,000,000,000: 2.5% of the assessable base (i.e., the annual gross revenues derived from digital advertising services in Maryland);

2. For global annual gross revenues of $1,000,000,001–$5,000,000,000: 5% of the assessable base;

3. For global annual gross revenues of $5,000,000,001–$15,000,000,000: 7.5% of the assessable base; and

4. For global annual gross revenues exceeding $15,000,000,000: 10% of the assessable base.

**EVERSHEDS SUTHERLAND OBSERVATION:** The proposed Digital Advertising Gross Revenues Tax is similar to the controversial French DST, which applies to: (1) digital activities that enable customers to interact in order to transfer goods or provide services; and (2) advertising services. The French tax also has similar thresholds to the Maryland tax, requiring that the companies generate more than...
€750,000,000 digital revenues worldwide, of which at least €25,000,000 are deemed to be generated in France. As digital taxes grow in popularity worldwide, Maryland is the first state to target digital advertising.

Sourcing: The two-part test to determine whether a digital advertising service occurs in Maryland focuses on the user’s location. Digital advertising services are provided in Maryland if they “appear on the device of a user: (1) with an Internet Protocol address that indicates that the user’s device is located in the State; or (2) who is known or reasonably suspected to be using the device in the State.” “User” is defined as “an individual or any other person who accesses a digital interface with a device.” The act does not explain what a “device” is, nor how the taxpayer or the Comptroller could know or reasonably suspect a user to use a “device” in Maryland. Also, because the definition of “user” is broad and does not incorporate just individuals, taxpayers may have difficulty identifying where a corporation uses its devices.

**EVERSHEDS SUTHERLAND OBSERVATION:** The proposed Digital Advertising Gross Revenues Tax may be unlawful for at least two reasons. First, the sourcing provision may unconstitutionally allow two states to tax the same transaction (i.e., (1) the user’s device has an IP address that indicates that it is located in State A, but (2) the user is known or reasonably suspected to be using that device in State B). Second, the tax may violate the Internet Tax Freedom Act’s prohibition on the discriminatory taxation of electronic commerce. The tax is imposed on “digital advertising,” but not similar non-digital advertising, such as newspaper ads or billboards.

Return Filing and Payment: Maryland would require taxpayers to file annual returns, along with quarterly estimated tax returns and payments, if the taxpayer has annual gross revenues derived from digital advertising services in Maryland of at least $1,000,000.

**EVERSHEDS SUTHERLAND OBSERVATION:** Because of the minimum thresholds for the tax rate and return filing, the tax would be limited to persons who have: (1) global annual gross revenues of at least $100,000,000; and (2) annual gross revenues derived from digital advertising services in Maryland of at least $1,000,000.

After sufficient tax revenue is distributed to fund the tax’s administration, the remaining amount would be earmarked to the Blueprint for Maryland’s Future Fund, which funds early childhood, primary, and secondary education.

Eversheds Sutherland will continue to follow Maryland Senate Bill 2 and the proposed Digital Advertising Gross Revenues Tax this session.
If you have any questions about this legal alert, please feel free to contact any of the attorneys listed under 'Related People/Contributors' or the Eversheds Sutherland attorney with whom you regularly work.