LAW360 Tax Authority

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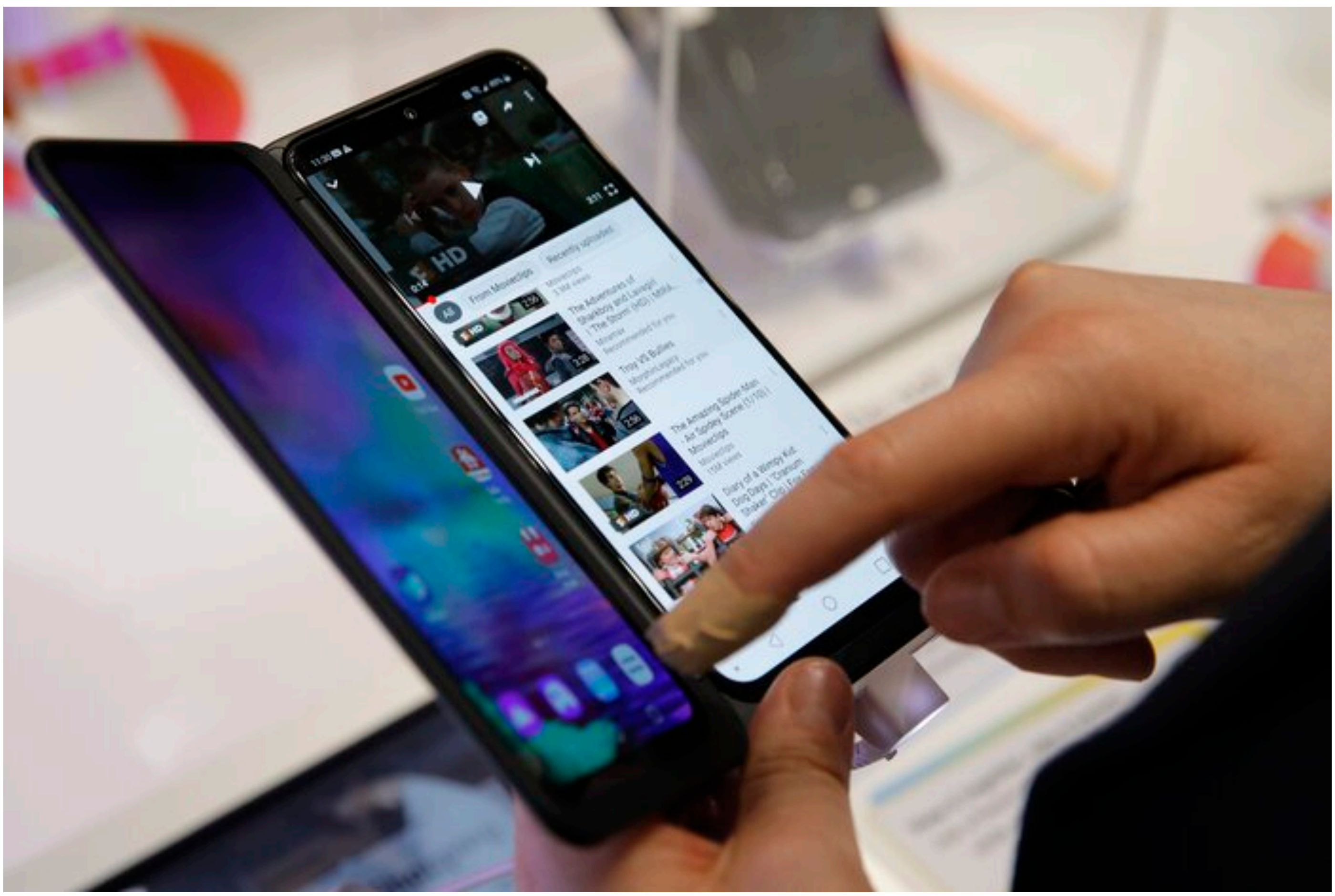
NM To Propose Rules Taxing Digital Advertising Services

By **Paul Williams**

Law360 (August 3, 2022, 7:14 PM EDT) -- New Mexico will propose regulations next week to tax digital advertising services, a spokesperson for the state's tax agency told Law360 on Wednesday, a move that could make it the second state in the nation to tax such online activity.

The rules are expected to be published Aug. 9, said Charlie Moore, a New Mexico Taxation and Revenue Department spokesperson. Moore was responding to questions from Law360 after Mark Chaiken, the department's director of tax policy, said Tuesday that digital advertising tax regulations were forthcoming.



If New Mexico does proceed with taxing digital advertising services, it could be on safer legal footing than Maryland, a tax policy think-tank official told Law360. (AP Photo/John Locher)

"We'll be having a public hearing on those in September, and we're looking very much forward to getting input on that from the business community," Chaiken said during a roundtable discussion of state tax administrators at a Multistate Tax Commission uniformity committee meeting held in Anchorage, Alaska, and online.

Chaiken said New Mexico could tax digital advertising without fear of running afoul of the Internet Tax Freedom Act , or ITFA, because the state already taxes broadcast and print advertising services. ITFA bars discriminatory taxes on electronic commerce, meaning a state can't tax a digital service if its nondigital counterpart isn't taxed. Maryland, which enacted the nation's first digital advertising tax, is **facing two court challenges** that have raised ITFA claims against the tax.

"The idea for the update is to make sure we're treating digital advertising receipts the way we treat broadcast and print advertising receipts," Moore said. "The industry, and others, will have the opportunity to weigh in on the proposed regulations during the adoption process."

The public hearing will be Sept. 8 and the regulations could become effective in October if they are adopted, Moore said.

If New Mexico does proceed with taxing digital advertising services, it could be on safer legal footing than Maryland regarding ITFA, Richard Anklam, president and executive director of the New Mexico Tax Research Institute, a tax policy think tank, told Law360. Unlike Maryland, which **enacted a specific tax** with varying rates aimed at digital advertising, New Mexico's gross receipts tax, which functions as a sales tax that is imposed on the seller, is broad-based and already encompasses advertising, Anklam said.

"New Mexico already attempts to tax everything. The state wouldn't be targeting digital advertising," he said. "It already taxes all services in general within the breadth of the imposition of the gross receipts tax."

Although digital advertising services are in New Mexico's tax base, the state insulates them from tax by offering certain deductions, Anklam said. The state didn't enact a law to do away with those deductions, he said, but added that it may be able to tax digital advertising services by fleshing out rules pertaining to how the state's shift to destination-based sourcing last year, which was part of **a 2019 law**, applies to them.

Stephen Kranz of McDermott Will & Emery LLP, one of the attorneys representing the U.S. Chamber of Commerce and other trade groups that are challenging Maryland's tax in federal court, acknowledged that New Mexico's tax landscape is distinct from Maryland's. However, he said there are unanswered questions about the tax's potential administration that will need to be answered.

"Sure, New Mexico has a broad tax base already. But have they truly evaluated whether their proposal violates ITFA? If so, I hope they address sourcing in a way that companies can comply with," Kranz said, adding that Maryland is "not a state to copy" regarding sourcing.

"The devil is in the details," he said.

Maryland's final regulations for the tax, **adopted in December**, source the tax based on information that companies have "within their possession or control which most reliably identifies a device's location." Among the ways to identify a device are through internet protocol, commonly known as an IP address; geolocation data, the place the device is registered to; and any cookies, or pieces of identifying data, on the device. The regulations also provide that "any other comparable information" could be used to decide where the device is located.

--Additional reporting by Maria Koklanaris and Michael Nunes. Editing by Neil Cohen.