



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-NINTH LEGISLATURE, 2018**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 2615, S.D. 1, RELATING TO TRANSIENT ACCOMMODATIONS TAX.

**BEFORE THE:**

SENATE COMMITTEE ON WAYS AND MEANS

**DATE:** Wednesday, February 21, 2018      **TIME:** 10:08 a.m.

**LOCATION:** State Capitol, Room 211

**TESTIFIER(S):** Russell A. Suzuki, Acting Attorney General, or  
Mary Bahng Yokota, Deputy Attorney General

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Chair Dela Cruz and Members of the Committee:

The Department of the Attorney General provides the following comments.

This bill, in part, amends subsection (a) to section 237D-4, Hawaii Revised Statutes (HRS), to require transient accommodations intermediaries (in addition to operators and plan managers) to “register with the director the name and physical address of each place of business within the State subject to this chapter” as a condition precedent to engaging or continuing in the business of furnishing transient accommodations or in business as a resort time share vacation plan. Page 4, lines 11-17. This bill also adds subsection (i) to the same statute, which requires transient accommodations intermediaries who market transient accommodations through a travel agency to “register with the director” but does not require the disclosure of the “the name and physical address of each place of business within the State subject to this chapter.” Page 9, line 16, through page 10, line 6.

To the extent the requirement under subsection (a) may apply to transient accommodations intermediaries who provide an electronic communication service (ECS) or remote computing service (RCS), this bill may be subject to challenge under the federal Stored Communications Act (SCA), 18 U.S.C. § 2701, et seq. Under the SCA, a person or entity providing an ECS or RCS is prohibited from knowingly disclosing information to the government unless certain requirements are met (e.g., subpoena, warrant, court order, or the lawful consent of the originator or intended

recipient of the information). The term ECS means “any service which provides to users thereof the ability to send or receive wire or electronic communications.” 18 U.S.C. § 2510(15). The term RCS means “the provision to the public of computer storage or processing services by means of an electronic communications system.” 18 U.S.C. § 2711(2).

To minimize the challenge under the SCA:

1. If the intent of the bill is to require transient accommodations intermediaries to register under the new subsection (i) without any requirement to disclose “the name and physical address of each place of business within the State subject to this chapter,” we recommend that the reference to the “transient accommodations intermediary” in subsection (a) on page 4, line 12, be deleted; or
2. If the intent of the bill is to subject the transient accommodations intermediaries to the requirement under subsection (a) or similar requirement to disclose “the name and physical address of each place of business within the State subject to this chapter,” the bill may be amended to require lawful consent or a subpoena before the transient accommodations intermediaries are required to disclose the information.

Thank you for the opportunity to provide comments.

# TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

**SUBJECT:** TRANSIENT ACCOMMODATIONS, Attach Liability to Intermediary

**BILL NUMBER:** SB 2615, SD-1

**INTRODUCED BY:** Senate Committees on Economic Development, Tourism, and Technology and Commerce, Consumer Protection, and Health

**EXECUTIVE SUMMARY:** Clarifies that the transient accommodations tax shall be calculated based on the gross rental price paid by a visitor. Specifies that the transient accommodations tax is to be collected from operators or transient accommodations intermediaries that collect whole or partial payment for transient accommodations. Trying to expand the tax base in such a manner may have the unintended effect of discouraging those who would like to bring tourists to Hawaii and take care of them here.

**SYNOPSIS:** Amends the definition of “gross rental” in section 237D-1, HRS, to clarify that it applies to the gross sale or gross charges collected from consumers, including but not limited to booking fees, cleaning fees, lodging fees, transient fees, or any other fees collected, but does not include fees collected for ground transportation, airfare, meals, excursions, tours, or other fees unrelated to the transient accommodations.

Changes the definition of “transient accommodations broker” in section 237D-1, HRS, to “transient accommodations intermediary” and defines one as any person or entity, including but not limited to persons who operate or market transient accommodations through wholesale travel companies, online websites, online travel agencies, online booking agencies, or booking platforms, that offers, lists, advertises, or accepts reservations or collects whole or partial payment for transient accommodations or resort time share vacation interests, units, or plans.

Also specifies in that definition that when transient accommodations are furnished at noncommissioned negotiated contract rates, the TAT shall apply to each operator and transient accommodations intermediary with respect to that person's respective portion of the proceeds, and no more.

Amends section 237D-2, HRS, to impose the tax upon every operator or transient accommodations intermediary who arranges transient accommodations at noncommissioned negotiated contract rates.

Amends section 237D-4, HRS, to impose a registration obligation on a transient accommodations intermediary the same as on an operator or plan manager. Also adds a new subsection (i) specifying that each transient accommodations intermediary who markets transient accommodations through a travel agency, as a condition precedent to entering into an arrangement to furnish transient accommodations at noncommissioned negotiated contract rates, shall register with the director of taxation.

Makes corresponding changes in nomenclature throughout chapter 237D, HRS.

EFFECTIVE DATE: This Act shall apply to taxable years beginning after December 31, 2018.

STAFF COMMENTS: This bill appears to be a reaction to the Hawai'i Supreme Court's decision *In re Travelocity.com, L.P.*, 346 P.3d 157 (Haw. 2015). The *Travelocity* case dealt with hotel rooms provided under a "merchant model." To illustrate what this model is and what the case held, suppose a hotelier wants to rent out a short-term rental for \$110. An online travel company (OTC) contracts to rent the room for \$100, at which point it becomes the OTC's obligation to pay the \$100 whether or not the OTC is able to find a tourist to put in the room.

Suppose the OTC is successful in finding a tourist, and OTC charges the tourist \$120 (something the hotelier wouldn't know and isn't told).

In this situation, the Department of Taxation assesses the OTC for TAT and GET on the \$120, although the hotelier was paying TAT and GET on the \$100. Our supreme court held that the OTC was not a hotel operator and was not liable for the TAT. The court also held that the OTC was subject to the GET, but that the room was provided at noncommissioned negotiated contract rates, triggering an "income splitting" provision providing that each of the parties involved is to pay the GET on what they keep. Thus, the OTC would pay GET on \$20, which is the spread between the tourist's price (\$120) and the room rent that was paid to the hotelier (\$100).

The concern that this bill seems to address is that TAT is now being paid on only \$100 when the tourist has parted with \$120 for a hotel room.

Stepping back for a second, consider Attorney General Opinion 65-6, from the days before the TAT even existed. There, the Attorney General considered the taxability of a local travel agent earning money in Hawaii for organizing a tour to the mainland including sending a local tour conductor with the group, and, conversely, a mainland travel agent organizing a tour to Hawaii. The Attorney General held that our GET applied to the local travel agent's commissions, even if they were earned partly because of the local tour conductor's services outside Hawaii; and, conversely, that it did not apply to the mainland travel agent's commissions, even if the mainland agent sent a tour conductor here.

The result appeared to be largely practical: if the state attempted to tax an out-of-state travel agent with no presence or only a fleeting presence within Hawaii, difficult federal constitutional questions would be presented.

That problem still has not gone away even with the technological advancements we now have. If the only connection an OTC has with Hawaii is a software platform used by Hawaii hotels and other customers, questions of practicality and constitutionality will be presented. These questions cannot be legislated away. If we attempt to grab and wring dry the travel agents and tour companies that have set up a branch in Hawaii when we can't do the same to travel agents and tour companies that never set foot on our shores, we run the very practical risk of discouraging those who want to take care of their tourist customers in Hawaii while employing local people, and encouraging those who stay offshore, take our tourists' money, and contribute much less to our culture and economy.

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As a technical matter, the Committee may wish to consider changing the reference to “transient accommodations remarketer” in the proposed new section 237D-4(i), HRS, to “transient accommodations intermediary” to make the terminology consistent.

Digested 2/19/2018

**SB-2615-SD-1**

Submitted on: 2/20/2018 10:02:18 AM

Testimony for WAM on 2/21/2018 10:08:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
John Chang	Testifying for Coalition for Equal Taxation	Oppose	No

Comments:

SB 2615 S.D. 1 --- OPPOSE

The Coalition for Equal Taxation has concern with the confidential information sharing required in this Bill. The information sought is protected by U.S. Constitution as well as State of Hawaii Constitution privacy protections. The Bill seeks to circumvent that benefit of privacy that would be provided to any other taxpayer.

The suggestion that this may be cured by directing a platform/intermediary to obtain "consent" is very problematic in a democratic society. It is literally suggesting that a platform/intermediary should obtain a **consent of their client to violate their constitutional rights** rather than the State or County go through the appropriate due process of obtaining a subpoena.

The attorney general has written:

**To avoid a challenge under the SCA, we suggest that this bill be amended to provide that transient accommodations intermediaries obtain prior written consent from their operators and plan managers to disclose all information required in chapter 237D, Hawaii Revised Statutes, or that the department be required to obtain a subpoena prior to disclosure of the information requested in this bill.**

This should be carefully considered.

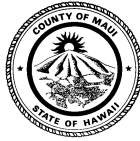
We respectfully request that this Bill be Deferred.

Council Chair  
Mike White

Vice-Chair  
Robert Carroll

Presiding Officer Pro Tempore  
Stacy Crivello

Councilmembers  
Alika Atay  
Elle Cochran  
Don S. Guzman  
Riki Hokama  
Kelly T. King  
Yuki Lei K. Sugimura



**COUNTY COUNCIL**  
COUNTY OF MAUI  
200 S. HIGH STREET  
WAILUKU, MAUI, HAWAII 96793  
[www.MauiCounty.us](http://www.MauiCounty.us)

February 20, 2018

TO: The Honorable Donovan M. Dela Cruz, Chair  
Senate Committee on Ways and Means

FROM: Mike White  
Council Chair

A handwritten signature in black ink, appearing to read "Mike White", is written over the printed name and title.

SUBJECT: **DECISION MAKING HEARING OF FEBRUARY 21, 2018; TESTIMONY IN SUPPORT AND OFFERING COMMENTS ON SB 2615, SD 1, RELATING TO TRANSIENT ACCOMMODATIONS TAX**

Thank you for the opportunity to testify in **support and offer comments** on this important measure. The purpose of this bill is to clarify that the transient accommodations tax ("TAT") shall be calculated based on the gross rental price paid by a visitor and specifies that the TAT is to be collected from operators or transient accommodations intermediaries that collect whole or partial payment for transient accommodations.

The Maui County Council has not had the opportunity to take a formal position on this proposed bill. Therefore, I am providing this testimony in my capacity as an individual member of the Maui County Council.

I **support** this measure for the following reasons:

1. When chapter 237D, Hawaii Revised Statutes ("HRS") was originally passed, it did not contemplate the variety of methods that would be developed to market and sell transient accommodations, or the number of parties involved. The proposed bill brings the HRS up to date with current technology, including online websites and booking methods.
2. As a result, the State does not collect the full amount of TAT from accommodation remarketers like Expedia, Pleasant Hawaiian Holidays, Delta Vacations, VRBO, Travelocity, or Orbitz. If an accommodation sells for \$200 per night, for example, the remarketer will generate their portion of the revenue by negotiating a net rate of say, \$150. While remarketers are required to pay the general excise tax on their \$50 share, they are not responsible for collecting or paying TAT on their share. Some companies collect the TAT from the visitor and keep it, and others do not collect TAT.

3. Through the way the law is currently written, TAT only needs to be paid to the State on the hypothetical wholesale price of \$150, not the \$200 market rate, despite consumers paying taxes on the higher amount. Remarketers currently pocket the difference between taxes collected and what is required to be paid to the State.
4. Rough calculations indicate the State is likely missing out on upwards of \$1,100 of revenue per hotel room, per year. The proposed bill taxes gross proceeds collected from consumers, including applicable fees, thus closing the current loophole for remarketers.
5. The proposed bill rightfully holds each party involved in a transaction explicitly accountable for the payment of the TAT on their portion of proceeds, whether it be local operators, travel agents, wholesale travel companies, or online booking agencies or platforms. This brings fairness to the applicability of the TAT in such transactions.
6. The proposal requires transient accommodations intermediaries to register a name and physical address of each place of business within the State. This could potentially aid enforcement efforts related to illegal transient accommodations, which has been an ongoing problem across the State.

For the foregoing reasons, I **support** this measure. However, I offer the following **comments**:

1. From Fiscal Year 2007 to 2017, the four counties collectively received a mere \$2.2 million increase in TAT, while expenses for fire, police, and park services alone have increased by more than \$260 million. The proposed bill fails to provide additional revenue to the counties to help support services and infrastructure vital to the booming visitor industry.
2. During the same period, the State's annual share of TAT revenue has increased by more than \$220 million. Collecting an increased amount of TAT revenue without providing an increased share to the Counties worsens an already unfair apportionment of TAT revenues.