

DAVID Y. IGE  
GOVERNOR

DOUGLAS S. CHIN  
LIEUTENANT GOVERNOR



LINDA CHU TAKAYAMA  
DIRECTOR

DAMIEN A. ELEFANTE  
DEPUTY DIRECTOR

**RECEIVED**  
**Date & Time**  
Mar 19, 2018, 10:00 am

**STATE OF HAWAII**  
**DEPARTMENT OF TAXATION**  
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HONOLULU, HAWAII 96813  
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To: The Honorable Richard H.K. Onishi, Chair  
and Members of the House Committee on Tourism

Date: Tuesday, March 20, 2018  
Time: 9:15 A.M.  
Place: Conference Room 429, State Capitol

From: Linda Chu Takayama, Director  
Department of Taxation

Re: S.B. 2699, S.D. 2, Relating to the Transient Accommodations Tax

The Department of Taxation (Department) supports the intent of S.B. 2699, S.D. 2, and offers the following comments for the Committee's consideration.

### **Summary of S.B. 2699, S.D. 2**

The following is a summary of key points of the bill, which is effective upon approval and applies to taxable years beginning after December 31, 2018.

#### **Definitions**

- "Transient accommodations intermediary" replaces the definition of "transient accommodations broker" and is defined as any person who offers, lists, advertises, markets, accepts reservations for, or collects whole or partial payment for transient accommodations or resort time share vacation interests, units, or plans, including travel agencies, tour packagers, wholesale travel companies, online websites, online travel agencies, online booking agencies, and booking platforms.
- "Gross rental" or "gross rental proceeds" in Hawaii Revised Statutes (HRS) section 237D-1 is amended as including the gross amount collected from the consumer, including booking fees, resort fees, cleaning fees, lodging fees, transient fees, and other fees, but excluding fees for ground transportation, airfare, meals, excursions, tours, or other fees unrelated to the transient accommodations.
- "Resort fee" is defined as any charge, whether or not mandatory, imposed by an operator to a transient for the use of the transient accommodation's property, services, or amenities.

### Imposition of TAT

- The TAT will be imposed on transient accommodations intermediaries who arrange transient accommodations at noncommissioned negotiated contract rates.
- When transient accommodations are furnished through transient accommodations intermediaries at noncommissioned negotiated contract rates, the TAT will apply to each person with respect to that person's portion of the proceeds.

### Registration

- Transient accommodations intermediaries will be required to register with the Department.

### **Background**

Under current law, the imposition of the TAT on transient accommodations sold through a travel agency or tour packager varies depending on whether the transaction was on a commissioned or noncommissioned basis. In Travelocity.com, L.P. v. Director of Taxation, 135 Hawaii 88 (2015), the Hawaii Supreme Court explained that a "commission" is a "fee paid to an agent or employee for a particular transaction, usually as a percentage of the money received by the transaction." Travelocity, 135 Hawaii at 111 (quoting Black's Law Dictionary 327 (10th ed. 2014) (internal quotations omitted)). The court further explained that a "noncommissioned rate" is "an amount of money paid to an entity or person other than an agent or an employee." Travelocity, 135 Hawaii at 111. The court clarified that unlike a commissioned transaction, in which a fee is usually paid as a percentage of the income received, in a noncommissioned transaction, a hotel has no means of knowing what the travel agent's mark-up will be. In sum, when a hotel pays a travel agent for a room on a commission basis, the room rate is readily definable, but in a noncommissioned transaction, the hotel has no means of knowing the travel agent's markup and actual room rate. Id.

When transient accommodations are furnished through arrangements made by a travel agency or tour packager at noncommissioned negotiated contract rates, the TAT is imposed solely on the operator on its share of the proceeds. There is no tax imposed on the travel agency's or tour packager's share of proceeds. In comparison, when transient accommodations are furnished through a travel agency or tour packager on a commissioned basis, the TAT is imposed on the gross proceeds of the operator, including the commission paid to the travel agency or tour packager. Similarly, when transient accommodations are sold directly by the operator, the TAT is imposed on the gross proceeds of the operator. Accordingly, the TAT imposed on a unit will differ depending on whether the unit was sold directly by the operator, sold by a travel agent or tour packager on a commissioned basis, or sold by a travel agent or tour packager on a noncommissioned basis.

For example, if a room is sold for \$100 to a guest directly by a hotel, the hotel will owe \$10.25 in TAT (10.25 percent of \$100). Similarly, if a room is sold for \$100 by a travel agency who earns a \$20 commission on the transaction, the hotel will owe \$10.25 in TAT (10.25 percent of \$100). If, however, the same room is sold for \$100 by an online travel company (OTC) who has a noncommissioned agreement with the hotel and keeps \$20 from the transaction, the hotel

will owe \$8.20 in TAT (10.25 percent of \$80); the \$20 kept by the OTC is not subject to TAT. These concepts are illustrated in the following table.

Type of Transaction	Amount Paid by Guest	Amount Kept by Travel Agency	Amount Kept by Operator	TAT Base	TAT Due
Direct sale by hotel	\$100	\$0	\$100	\$100	\$10.25
Sold by travel agent on commissioned basis	\$100	\$20	\$80	\$100	\$10.25
Sold by travel agent on noncommissioned basis	\$100	\$20	\$80	\$80	\$8.20

### Comments

First, the Department suggests amending the definition of “resort fees” to specify that the fees include *mandatory* charges for the use of the transient accommodation’s property, services, or amenities. The bill currently defines “gross rental” as including all fees (including resort fees) collected from consumers, except for fees unrelated to the transient accommodation. If a fee imposed by the operator of a transient accommodation is mandatory, it more than likely will be related to the transient accommodation. For example, resort fees for in-room water and coffee, use of an in-room safe, pool towels, fitness center access, parking, and housekeeping are related to the transient accommodation and are typically mandatory. In contrast, a fee that is optional is usually unrelated to the furnishing of the transient accommodation, such as a fee to participate in a yoga session. Defining resort fees as mandatory fees will provide taxpayers with a bright-line rule that will simplify the analysis of whether a fee is related to the transient accommodation, thereby promoting compliance and easing administration and enforcement.

Second, the Department notes that HRS section 237D-4 contains two separate provisions regarding the registration of transient accommodations intermediaries—subsections (a) and (i). Subsection (i) requires transient accommodations intermediaries to register before entering into arrangements to furnish transient accommodations at noncommissioned negotiated contract rates. This provision makes sense because transient accommodations intermediaries are required to pay TAT on their portion of noncommissioned transactions pursuant to the amendments made in Sections 1 and 2 of the bill. Subsection (a), however, requires transient accommodations intermediaries to register before “furnishing” transient accommodations, which is a function of an operator, not an intermediary. The amendment to HRS section 237D-4(a) is therefore superfluous, as operators are already required to register under this section.

If the intent of the amendments to HRS section 237D-4(a) is to require transient accommodations intermediaries to register the addresses of the transient accommodations for which they book or accept reservations, the Department suggests the following amendments to sections HRS 237D-4(a) and (i):

(a) Each operator~~[,]~~ or plan manager~~[, or transient accommodations intermediary that has obtained prior consent from each operator and plan manager working with the transient accommodations intermediary,]~~ 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, shall register with the director the name and physical address of each place of business within the State subject to this chapter. The operator or plan manager shall make a one-time payment as follows:

- (1) \$5 for each registration for transient accommodations consisting of one to five units;
- (2) \$15 for each registration for transient accommodations consisting of six or more units; and
- (3) \$15 for each resort time share vacation plan within the State;

upon receipt of which the director shall issue a certificate of registration in a form as the director determines, attesting that the registration has been made. The registration shall not be transferable and shall be valid only for the operator or plan manager in whose name it is issued and for the transaction of business at the place designated therein. Acquisition of additional transient accommodation units after payment of the one-time fee shall not result in additional fees.

. . .

(i) Each transient accommodations intermediary, as a condition precedent to entering into an arrangement to furnish transient accommodations at noncommissioned negotiated contract rates, shall register with the director. The transient accommodations intermediary shall provide the physical address of each transient accommodation for which it will enter into an arrangement to furnish the transient accommodation at noncommissioned negotiated contract rates; provided that the transient accommodations intermediary has obtained prior consent from the operator or plan manager to disclose the address of the transient

accommodation. The transient accommodations intermediary shall make a one-time payment of \$15 for each registration, upon receipt of which the director shall issue a certificate of registration in a form as the director determines, attesting that the registration has been made. The registration shall not be transferable and shall be valid only for the transient accommodations intermediary in whose name it is issued.

Finally, the Department notes that it is able to administer this measure with its current effective date. Thank you for the opportunity to provide comments.



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**David Y. Ige**  
*Governor*

**George D. Szigeti**  
*President and Chief Executive Officer*

**LATE**

**RECEIVED**  
**Date & Time**  
Mar 20, 2018, 8:19 am

Statement of  
**George D. Szigeti**  
Chief Executive Officer  
Hawai'i Tourism Authority  
on  
**SB2699 SD2**  
**Relating to the Transient Accommodations Tax**  
House Committee on Tourism  
Tuesday, March 20, 2018  
9:15 a.m.  
Conference Room 429

Chair Onishi, Vice-Chair Fukumoto and Committee Members:

The Hawai'i Tourism Authority (HTA) **opposes SB2699 SD2**, which would impose the Transient Accommodations Tax (TAT) on hotel resort fees that are calculated separately from the advertised rate, calculate the TAT based on gross rentals and require that TAT is collected from operators or transient accommodations intermediaries who arrange transient accommodations at noncommissioned negotiated contract rates.

HTA is opposed to measures that would increase the cost for residents and visitors to vacation in the Hawaiian Islands. A direct relationship exists between the number of visitors booking nights in transient accommodations and TAT revenues, which are generated by nights spent in transient accommodations. Last year, Hawai'i's visitor industry supported 204,000 jobs and brought \$1.96 billion in tax revenue. It is important to keep in mind the potential effect of deterring visitors from choosing Hawai'i as a destination if the cost of booking nights in transient accommodations were increased.

Mahalo for the opportunity to offer this testimony.

**LATE**



**HAWAI'I LODGING & TOURISM**  
ASSOCIATION

**RECEIVED**  
**Date & Time**

Mar 20, 2018, 8:18 am

Testimony of

Mufi Hannemann  
President & CEO  
Hawai'i Lodging & Tourism Association

before the  
Committee on Tourism

March 20, 2018

Senate Bill 2699 SD2: Relating to the Transient Accommodations Tax

Chair Onishi, Vice Chair Fukumoto, and committee members:

On behalf of the Hawai'i Lodging & Tourism Association, the state's largest private-sector visitor industry organization with nearly 700 members, thank you for the opportunity to testify on Senate Bill 2699 SD2, which seeks to apply the transient accommodations tax to all hotel resort fees as well as specifies that the transient accommodations tax be collected from operators or transient accommodations intermediaries who arrange transient accommodations at noncommissioned negotiated contract rates.

We appreciate the language that is being proposed regarding closing the TAT loophole on online travel and booking companies who arrange transient accommodations at noncommissioned negotiated rates. However, we would like to voice our **strong opposition** to the imposition of the TAT on resort fees. We oppose this provision for the following reasons:

- The TAT is not applied to the resort fee because this charge is not part of a guest room or transient accommodation. It is for services or products used by guests, such as the use of gym and spa facilities, wifi, shuttle services, and so forth. However, the hotels do collect and remit to the state the general excise tax on these resort fees.
- Many lodging properties have decided to recover some of the costs of guest amenities through the resort fee. This fee customarily includes a bundle of services that would cost more individually if they were not grouped. Hotel surveys have revealed that guests prefer an all-inclusive resort fee rather than being charged for each service used, as was the practice in the past.
- Hotels have been transparent about these resort fees. They are fully disclosed on hotel websites, as well as on online booking engines and at the time of check-in.
- As an industry, we opposed a similar proposal in 2013 and again in 2014. Since then, our industry has continued to experience increased costs of doing business in terms of employee payroll and benefits, construction and maintenance, utilities, and higher taxes.

- The visitor industry, and Hawai‘i’s economy as a whole, have enjoyed six consecutive years of growth, meaning that TAT revenues have grown commensurately and so has the amount of revenue being diverted to the general fund. Not only is additional revenue being generated, but the visitor industry has to finance the City and County of Honolulu’s rail project and is being asked to fund public education. This common practice of the hospitality industry footing the bill for new mandates and to balance the budget with the only overarching justification given that the State needs the money is a dangerous pattern with no end in sight. Last session it was a new increase to the TAT, this year it’s the TAT on resort fees, what will it be next year?
- Legislators promised that the TAT would revert back to 7.75 percent in 2015, but that provision died and we have since been on the watch for ever more increases. In fiscal year 2013, the general fund allocation from the TAT was 41.9%, five years later it ballooned to 52.3% and in fiscal year 2018 it grew to 60.4%.

The visitor industry is the economic driver for our economy. It generates more than 204,000 jobs, and raises \$545 million through the TAT alone, a tax that was just raised at the beginning of the year and is levied solely on the hotel, resort, and timeshare industry.

The visitor industry is a fragile and highly competitive industry and we are one of the highest taxed leisure and resort destinations in the country. Adding additional taxes on an already expensive destination only puts us at a disadvantage in the local and global markets.

Rather than continuing to balance the budget on the backs of the hospitality industry, if both legislative chambers came together with the Governor’s concurrence, resolving the tax collection issue with transient vacation rentals would generate the additional revenue you seek.

For these reasons, we oppose the imposition of the TAT on Resort Fees and respectfully ask that you remove this provision from the measure.

Mahalo for the opportunity to offer this testimony.

Sincerely,



Mufi Hannemann  
President & CEO



Gregg Nelson  
Chairman of the Board



Glenn Vergara  
Chairperson Elect



Michael Jokovich  
Vice Chairperson



Bonnie Kiyabu  
Oahu Chapter Chairperson



Angela Nolan  
Maui Chapter Chairperson



Steve Yamarell  
Hawai‘i Island Chapter Chairperson



Jim Braman  
Kaua‘i Chapter Chairperson



Harris Chan, Area Vice President, Hawaii & French Polynesia, Marriott International  
Cheryl Williams, General Manager, The Royal Hawaiian Resort  
Michael Czarcinski, General Manager, The Westin Moana Surftrider  
Fredrick Orr, General Manager, The Sheraton Princess Kaiulani  
Tetsuji Yamazaki, General Manager, The Sheraton Maui  
Tomo Kuriyama, Deputy General Manager, The Sheraton Waikiki  
Rob Robinson, Managing Director, Alohilani Resort  
Matthew Grauso, General Manager, Alohilani Resort  
Roy Yamamoto, General Manager, Ambassador Hotel  
Kurt Kishaba, General Manager, Pearl Hotel Waikiki  
Jim Paulon, General Manager Courtyard Marriott Waikiki  
Kelly Hoen, Area General Manager, Outrigger Reef Waikiki Beach Resort & Outrigger Waikiki Beach Resort  
Revell K. Newton, General Manager, Outrigger Waikiki Beach Resort  
Chryssaldo Thomas, Resort Manager, Outrigger Waikiki Beach Resort  
Simeon Miranda, General Manager, Embassy Suites by Hilton Waikiki Beach Walk  
Dan King, General Manager, Grand Hyatt Kaua`i Resort & Spa  
Doug Sears, General Manager, Hyatt Regency Waikiki Beach Resort & Spa  
Robin Graf, Vice President of Operations, Castle Resorts & Hotels  
Matthew Bailey, President & COO, Aqua-Aston Hospitality  
Jeff Caminos, VP Operations, Aqua-Aston Hospitality  
Susan Cowan, VP Operations, Aqua-Aston Hospitality  
Patrick Kozuma, General Manager, Aston Waikiki Beach Tower  
Kaniela Neves, General Manager, Aston at the Waikiki Banyan  
Chip Crosby, General Manager, Aston Waikiki Circle  
Terry Dowsett, General Manager, Aston at the Executive Center Hotel  
Doug Okada, General Manager, Aston Waikiki Sunset  
Tim Clark, General Manager, Aqua Aloha Surf Waikiki  
Lendy Ma, General Manager, Aqua Ewa Beach Hotel & Aqua White Sands Hotel  
Wes Kawakami, General Manager, Ilikai Hotel  
Wade Gesteuyala, General Manager, Hampton Inn & Suites by Hilton  
Clem Lagundimao, General Manager, Luana Waikiki Hotel & Suites  
Ward Almeida, General Manager, Lotus Honolulu at Diamond Head  
Alberto Roque, Area General Manager, Pagoda Hotel  
Patty Maher, General Manager, Aqua Palma Waikiki  
Miho Kamanao-Espiritu, General Manager, Aqua Park Shore Waikiki  
Brian Kovaloff, General Manager, Aqua Skyline at Island Colony  
Lynette Eastman, General Manager, The Surfjack Hotel & Swim Club  
Mark Mrantz, General Manager, Aston Kaanapali Shores  
Brian Cox, General Manager, Aston Mahana at Kaanapali  
Steven Berger, General Manager, Aston at the Maui Banyan  
Greg Peros, General Manager, Aqua Maui Beach Hotel  
Dawn Kane, VP, Principal Broker, Maui Condo & Home  
Dennis Costa, General Manager, Aston Maui Hill  
Lyn Molina, General Manager, Aston at Papakea & Aston Paki Maui  
Grant James, General Manager, Aqua Kauai Beach Resort  
Lori Morita, General Manager, Aston Islander on the Beach  
Kyoko Kimura, Sr. Director Owner Relations, Aqua-Aston Hospitality  
Michael Wilding, General Manager, Doubletree by Hilton Alana – Waikiki Beach

The Following is a list of hotels represented by the Hawaii Lodging & Tourism Association:

Aqua-Aston Hospitality, LLC	Aston at the Executive Centre Hotel
Castle Resorts & Hotels	Aston at the Maui Banyan
Colony Capital, LLC	Aston at the Waikiki Banyan
Halekulani Corporation	Aston at The Whaler on Kaanapali Beach
Hawaiian Hotels & Resorts, LLC	Aston Islander on the Beach
Highgate Hotels	Aston Kaanapali Shores
Hilton Grand Vacations	Aston Kona by the Sea
InterContinental Hotels Group	Aston Mahana at Kaanapali
Ko Olina Resort	Aston Maui Hill
Kyo-ya Company LLC	Aston Maui Kaanapali Villas
Kyo-ya Management Company, Ltd.	Aston Shores at Waikoloa
Lucky Hotels U.S.A. Co., Ltd.	Aston Waikiki Beach Hotel
Marriott International, Inc.	Aston Waikiki Beach Tower
Outrigger Enterprises Group	Aston Waikiki Beachside Hotel
Prince Resorts Hawaii, Inc.	Aston Waikiki Circle Hotel
Pulama Lana`i	Aston Waikiki Sunset
Sasada International, LLC	Aston Waikoloa Colony Villas
Aina Nalu Lahaina by Outrigger	Aulani, a Disney Resort & Spa
Airport Honolulu Hotel	Best Western Pioneer Inn
Ala Moana Hotel	Best Western The Plaza Hotel
Alohilani Resort Waikiki Beach	Breakers Hotel
Ambassador Hotel Waikiki	Coconut Waikiki Hotel
Andaz Maui at Wailea Resort	Courtyard by Marriott Kaua'i at Coconut Beach
Aqua Aloha Surf Waikiki	Courtyard by Marriott King Kamehameha's Kona Beach
Aqua Bamboo & Spa	Courtyard by Marriott Waikiki Beach
Aqua Kauai Beach Resort	Courtyard Oahu North Shore
Aqua Oasis	Doubletree by Hilton Alana Waikiki Hotel
Aqua Pacific Monarch	Embassy Suites by Hilton Oahu Kapolei
Aqua Palms Waikiki	Embassy Suites by Hilton Waikiki Beach Walk
Aqua Park Shore Waikiki	Ewa Hotel Waikiki - A Lite Hotel
Aqua Skyline at Island Colony	Fairmont Orchid Hawaii
Aqua White Sands Hotel	Four Seasons Resort Lana`i
Aston at Papakea Resort	Four Seasons Resort Maui
Aston at Poipu Kai	Four Seasons Resort O'ahu at Ko Olina

Grand Hyatt Kauai Resort & Spa  
Grand Nanioloa Hotel  
Grand Wailea  
Hale Koa Hotel  
Halekulani  
Hampton Inn & Suites, Kapolei  
Hapuna Beach Prince Hotel  
Hilton Garden Inn Kauai Wailua Bay  
Hilton Garden Inn Waikiki Beach  
Hilton Grand Vacations at Waikoloa Beach Resort  
Hilton Grand Vacations Club  
Hilton Hawaiian Village Waikiki Beach Resort  
Hilton Waikiki Beach  
Hilton Waikoloa Village Resort & Spa  
Hokulani Waikiki by Hilton Grand Vacations Club  
Holiday Inn Express Waikiki  
Holiday Inn Waikiki Beachcomber Resort  
Honua Kai Resort & Spa  
Hotel Coral Reef Resort  
Hotel Renew by Aston  
Hotel Wailea Maui  
Hyatt Centric Waikiki Beach  
Hyatt Place Waikiki Beach  
Hyatt Regency Maui Resort & Spa  
Hyatt Regency Waikiki Beach Resort & Spa  
Ilikai Hotel and Luxury Suites  
Ilima Hotel  
Ka`anapali Beach Club  
Ka`anapali Beach Hotel  
Kahana Falls  
Kauai Marriott Resort & Beach Club  
Kiahuna Plantation Resort by Castle Resorts  
Ko`a Kea Hotel & Resort  
Kona Coast Resort  
Lawai Beach Resort  
Lotus Honolulu at Diamond Head  
Luana Waikiki Hotel and Suites  
Marriott's Kauai Lagoons, Kalanipu'u  
Marriott's Ko Olina Beach Club  
Marriott's Maui Ocean Club  
Marriott's Waiohai Beach Club  
Maui Beach Hotel  
Maui Coast Hotel  
Maui Condo & Home, LLC  
Maui Eldorado Kaanapali by Outrigger  
Mauna Kea Resort  
Mauna Lani Resort  
Mauna Loa Village IOA  
Moana Surfrider, A Westin Resort & Spa  
Montage Kapalua Bay  
Napili Kai Beach Resort  
OHANA Waikiki East by Outrigger  
OHANA Waikiki Malia  
Ohia Waikiki Hotel  
Outrigger Kiahuna Plantation  
Outrigger Napili Shores  
Outrigger Palms at Wailea  
Outrigger Reef Waikiki Beach Resort  
Outrigger Regency on Beachwalk  
Outrigger Royal Sea Cliff  
Outrigger Waikiki Beach Resort  
Pacific Marina Inn  
Pagoda Hotel  
Pearl Hotel Waikiki  
Plantation Hale Suites  
Prince Waikiki  
Queen Kapiolani  
Raintree - Kona Reef Raintree Vacation Club  
Ramada Plaza Waikiki  
Royal Grove Hotel  
Royal Kahana Maui by Outrigger  
Royal Kona Resort  
Royal Lahaina Resort  
Sheraton Kauai Resort  
Sheraton Kona Resort & Spa at Keauhou Bay  
Sheraton Maui Resort and Spa  
Sheraton Princess Kaiulani  
Sheraton Waikiki Resort

Shoreline Hotel Waikiki  
St. Regis Princeville Resort  
Stay Hotel Waikiki  
The Cliffs at Princeville  
The Club at Kukui`ula  
The Fairmont Kea Lani, Maui  
The Imperial Hawaii Resort At Waikiki  
The Kahala Hotel & Resort  
The Laylow, Autograph Collection  
The MODERN Honolulu  
The New Otani Kaimana Beach Hotel  
The Point at Poipu, Diamond Resorts International  
The Ritz-Carlton Residences, Waikiki Beach  
The Ritz-Carlton, Kapalua  
The Royal Hawaiian, A Luxury Collection Resort  
The Surfjack Hotel & Swim Club  
The Westin Maui Resort & Spa  
The Westin Princeville Ocean Resort Villas  
Travaasa Hana  
Trump International Hotel Waikiki  
Turtle Bay Resort  
Vive Hotel Waikiki  
Waikiki Beach Marriott Resort & Spa  
Waikiki Grand Hotel  
Waikiki Parc Hotel  
Waikiki Resort Hotel  
Waikiki Sand Villa Hotel  
Waikiki Shore  
Waikoloa Beach Marriott Resort & Spa  
Wailea Beach Marriott Resort & Spa  
Waipouli Beach Resort & Spa by Outrigger  
Westin Ka'anapali Ocean Resort Villas  
Wyndham at Waikiki Beach Walk  
Wyndham Vacation Resorts Royal Garden at Waikiki

RECEIVED  
Date & Time

Mar 19, 2018, 9:59 am



March 18, 2018

Representative Richard Onishi, Chairperson  
Representative Beth Fukumoto, Vice Chairperson  
House Tourism Committee  
Hawaii State Legislature

Dear Representative Onishi, Representative Fukumoto and Members of the House Tourism Committee,

**Testimony in Opposition to SB2699 SD2**

The Kohala Coast Resort Association (KCRA) opposes SB2699 SD2, applying the transient accommodations tax to resort fees. These fees cover a wide variety of services not included in the standard room rental rate (parking, wifi access, health club access, etc.) and vary by property, room type, and negotiated rate (group, preferred member club, etc.). Therefore they should not be included in the calculation of transient accommodations taxes.

KCRA is a collection of master-planned resorts and hotels situated north of the airport which represents more than 3,500 hotel accommodations and an equal number of resort residential units. This is approximately 35 percent of the accommodations available on the Island of Hawai'i. KCRA member properties annually pay more than \$20 million in TAT and \$20 million in GET.

We encourage your opposition to this measure.

Sincerely,

A handwritten signature in black ink that reads "Stephanie P. Donoho". The signature is written in a cursive, flowing style.

Stephanie Donoho  
Administrative Director



## **Testimony of Stephen Shur, President of the Travel Technology Association, in Strong Opposition to S.B. 2699:**

My name is Stephen Shur, and I am the President of the Travel Technology Association. My organization represents companies like Expedia, Priceline, Orbitz, Booking.com, TripAdvisor, and many others.

Our industry is responsible for booking hundreds of thousands of room nights in Hawaii annually including large chain hotels, independent hotels and short term rentals.

S.B. 2699 includes several provisions that will have far reaching and negative impacts on your tourism economy.

We are in strong opposition to S.B. 2699 which would impose a registration tax of \$15 per hotel listed and marketed by online travel agents. This provision will negatively impact Hawaii's independent hotels which benefit greatly from the exposure they get by being listed on online travel agent websites and apps. In the event that online travel agents choose to de-list properties, those properties will be the collateral damage of these discriminatory and unnecessary "registration taxes" on online travel agents.

Further, the bill changes the base of the transient accommodations tax to include the service fees that online travel agents charge their customers for providing the valuable travel agent service of assisting the traveler with searching, comparing and booking hotel rooms in Hawaii.

These new travel agent service fee taxes and registration taxes will be passed-on to the consumer in the form of higher room rates, thereby harming Hawaii's tourism economy. A recent study by TripAdvisor's TripIndex found that Hawaii was the 2<sup>nd</sup> most expensive destination in America. Leisure travelers are hyper sensitive to price and these increases will put Hawaii out of reach for many families.

No other state in America imposes registration taxes (ref: \$15 per hotel registration fee) on online travel agents and such a requirement is an unnecessary and harmful provision. If the state wants to ensure that the proper taxes are being collected and

remitted by travel agents, the state already has the ability to do so through audits and administrative proceedings. Such discriminatory registration fees (taxes) will only serve as a disincentive for travel agents to partner with Hawaii hotels to help them market their rooms to the world.

Regarding short term rental listings, the provision that defines transient accommodations intermediaries to include any entity that advertises for rent any transient accommodation is problematic. Many short term rental platforms are advertising platforms (much like classified ads) and are not party to any transaction to rent accommodations. Under the language in HB 2699, if a homeowner were to post photos of a condo on his or her Facebook page with a message of “Hey friends and family, my condo is available for rent this summer, contact me if you are interested,” Facebook would be the responsible party for tax collection and remittance on any taxes owed on the rental resulting from that post. The same would apply to posts on Craigslist or any other online forum where the properties are advertised but where no transaction takes place. This is simply unworkable. The reasonable solution is to make the tax obligation the responsibility of the homeowner and not the platform.

### **About our Industry.**

One of the biggest myths in our industry is that online travel agents buy rooms in bulk at wholesale rates and resell them at retail rates. This is simply not true.

When a traveler books a room via a travel agent, either online or in Hawaii, the total amount the traveler pays for the room includes:

1. the room rate set by the hotel,
2. all applicable taxes based on that room rate, and
3. a service fee charged by the travel agent (online or in the community)

Further, Hawaii hotels willingly and enthusiastically partner with my members to help market unsold rooms. And they benefit tremendously from their participation with online travel sites. Online travel agents market Hawaii hotels to the world.

- OTAs market Hawaii hotels to the world but are never responsible for unsold rooms.
- The hotel controls the inventory and sets the price.
- The terms wholesale and retail have no meaning in the travel agency arena.
- There is only one room rate and that is what the hotel requires to allow a guest in the room on a given night.

- Taxes on hotel rooms in Hawaii are based on the amount the hotel requires to allow someone to occupy a room on a given night. That is the basis for the calculation of the tax.
- Hotels have many rates on any given night. If a traveler has a AAA or AARP discount, for example, the tax is based on that discounted rate.
- OTAs do not operate hotels. Online travel agents are just that, travel agents. They connect travelers with hotels and charge the traveler a service fee for the service they provide (the ability to search for, compare and book a hotel room).
- The playing field between hotels and OTAs is not “uneven”. OTAs are a valued marketing channel for large hotel chains and independent hotels.
- Hilton CEO said this in an article April 7,2016: **“The OTAs are a good partner for us to be able to access customers that we might not otherwise be able to access.”**
- For independent hotels, the value of OTAs is even greater.
  - By partnering with OTAs, independent hotels get to compete for travelers with the major hotel chains when their property shows up on a comparison screen next to Marriott and Hilton.

Levying new fees (such as a \$15 per hotel registration fee) and taxes (such as applying the TAT to travel agent service fees) on online travel agents will have the opposite of the intended effect of raising revenue. Travel agents are the engine that help steer travelers to Hawaii. 30% of all hotel bookings in the US are via online travel agents and the number is even higher for international travelers. Taxing online and community travel agents will serve as a disincentive for them to steer travelers to the state.

Leisure travelers are hyper sensitive to price. These taxes will ultimately raise room rates in Hawaii. Priceline.com found that when the room rate is increased by 1%, there is a 2% reduction in bookings. Raising room rates in Hawaii through higher taxes will have a ripple effect through the state’s economy as leisure travelers choose to visit other states to save money, or not travel at all.

On average, 25% of rooms booked on OTAs are in-state bookings, which means Hawaii residents will be paying more for hotels. Small businesses who benefit from travel and tourism will be negatively impacted by these taxes as well as fewer travelers stay in Hawaii.

This is bad for Hawaii tourism. If even just a small percentage of travelers choose to stay in California, for example, for a lower cost room, any revenue gained by a tax on travel agents or registration fees will be small compared to the tax revenue lost when a traveler doesn’t visit Hawaii and spend their money on goods and services.



It has been said that when you tax something, you get less of it. In this case, we are talking about hotel bookings in Hawaii.

The opportunity cost of these taxes is high. It's not about raising revenue. It's not about closing a loophole that doesn't exist. It's not about leveling any playing field. It's simply a new tax on online travel agents and a disincentive for travel agents to steer people to Hawaii hotels.

These new taxes on travel agents are a job killer, a small business killer and a burden on Hawaii businesses and citizens. I urge you to reject this registration tax on online travel agents.

Thank you.

Stephen Shur  
President  
Travel Technology Association  
3033 Wilson Blvd, 7<sup>th</sup> Floor  
Arlington, VA 22201  
703-842-3754  
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[www.traveltech.org](http://www.traveltech.org)

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Mar 19, 2018, 10:00 am



*Maui Hotel & Lodging*  
ASSOCIATION

Testimony of

**Lisa H. Paulson**

Executive Director

Maui Hotel & Lodging Association

on

**SB 2699 SD2**

**RELATING TO THE TRANSIENT ACCOMMODATIONS TAX**

COMMITTEE ON TOURISM

**Tuesday, March 20, 2018, 9:15 am**

**Conference Room 429**

Dear Chair Onishi, Vice Chair Fukumoto and Members of the Committee,

The Maui Hotel & Lodging Association (MHLA) is the legislative arm of the visitor industry. Our membership includes 185 property and allied business members in Maui County – all of whom have an interest in the visitor industry. Collectively, MHLA’s membership employs over 25,000 residents and represents over 19,000 rooms. The visitor industry is the economic driver for Maui County. We are the largest employer of residents on the Island - directly employing approximately 40% of all residents (indirectly, the percentage increases to 75%).

MHLA **opposes SB 2699 SD 2** which imposes the transient accommodations tax on hotel resort fees that are calculated separately from the advertised transient accommodation's rate. Clarifies that the transient accommodations tax shall be calculated based on the gross rental. Specifies that the transient accommodations tax is to be collected from transient accommodations intermediaries who arrange transient accommodations at noncommissioned negotiated contract rates in the same manner as transient accommodations operators. Applies to taxable years beginning after 12/31/2018.

MHLA believes that changing the language in 237D-1 to add “resort fees” to “gross rental proceeds” is not appropriate as resort fees are for services or products provided to the guest sometimes through a third part vendor. Additionally, the resort fee typically includes a bundle of services that would cost more individually if they were not grouped. Hotel surveys have revealed that guests prefer an all-inclusive resort fee rather than being charged for each service used.

The visitor industry is a fragile and highly competitive industry and we are one of the highest taxed leisure and resort destinations in the country. Adding additional taxes on an already expensive destination only puts us at a disadvantage in the local and global markets.

Thank you for the opportunity to testify.

**The following is a list of hotels (members) represented by Maui Hotel & Lodging Association:**

Andaz Maui  
Aston at the Whaler on Kā'anapali Beach  
Aston Kā'anapali Shores  
Aston Mahana at Kā'anapali  
Best Western Pioneer Inn  
Destination Maui Vacation Rentals  
Destination Residences Hawai'i  
Fairmont Kea Lani, Maui  
Four Seasons Resort Lāna'i  
The Lodge at Koele, a Four Season Resort  
Four Seasons Resort Maui at Wailea  
Grand Wailea Resort  
Hana Kai Maui Resort  
Honua Kai Resort & Spa  
Hotel Molokai  
Hotel Wailea Maui  
Hyatt Regency Maui Resort & Spa  
Hyatt Residence Club, Kā'anapali Beach  
Kā'anapali Beach Club  
Kā'anapali Beach Hotel  
Kahana Falls  
Lāhaina Shores, Classic Resorts  
Mana Kai Maui  
Marriott's Maui Ocean Club  
Maui Beach Hotel  
Maui Coast Hotel  
Maui Condo & Home, LLC  
Maui Eldorado Kā'anapali by Outrigger  
Mauian Hotel, The  
Montage Kapalua Bay  
Napili Kai Beach Resort  
Napili Shores Resort by Outrigger  
Plantation Inn  
Residence Inn Maui Wailea  
Ritz-Carlton Kapalua  
Royal Lāhaina Resort  
Sheraton Maui Resort & Spa  
Travaasa Hana  
Wailea Beach Marriott Resort & Spa  
Wailea Point  
Westin Kā'anapali Ocean Resort Villas  
Westin Maui Resort & Spa  
Westin Nanea Ocean Villas  
Maui Beach Ocean View Rentals, LLC

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**Date & Time**  
Mar 19, 2018, 12:05 pm

**NetChoice** *Promoting Convenience, Choice, and Commerce on The Net*

Carl Szabo, Vice President and General Counsel  
1401 K St NW, Suite 502  
Washington, DC 20005  
202-420-7485  
[www.netchoice.org](http://www.netchoice.org)



March 19, 2018

Rep. Richard H.K. Onishi, Chair  
Committee on Tourism  
Hawaii House of Representatives  
Honolulu, HI

RE: **Opposition to SB 2699 – Creating a New Tax on Travel Agents and Websites**

Dear Chairs Onishi and members of the committee,

We encourage you to not advance SB 2699 as it imposes a new tax on services provided by travel agents and online travel companies. SB 2699 imposes a new tax on the fees these travel agents charge for researching, comparing, and booking rooms for travelers.

Cities and states favor hotel taxes since they fall mostly on visitors – not on resident voters. But under SB 2699, this approach would backfire since the new service tax would be paid *only* by Hawaiians– *not by travelers* from out-of-state.

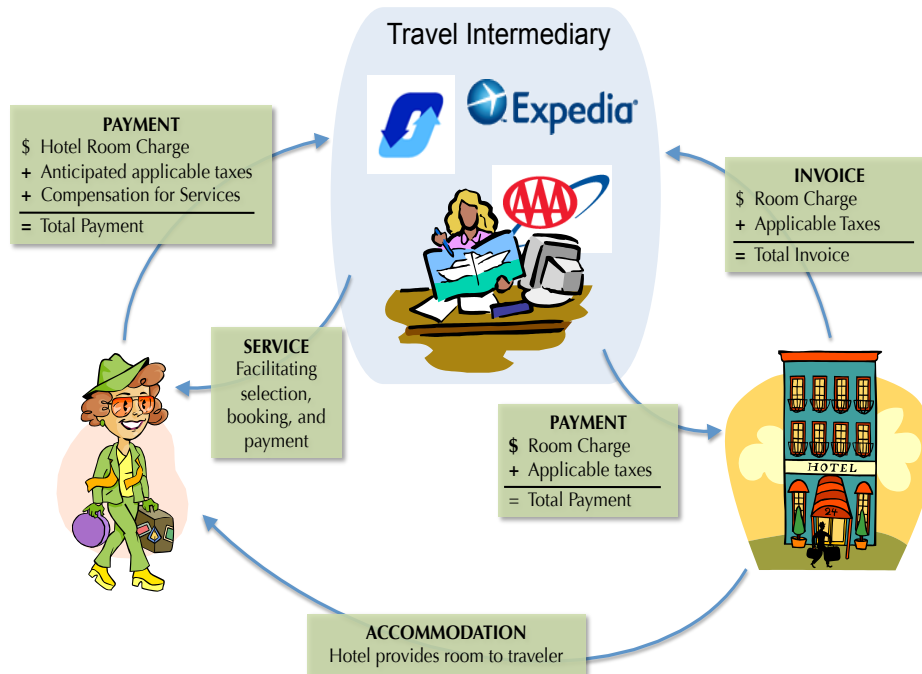
### **Imposes a new tax on Hawaiians**

Today, Hawaii does not impose sales tax or lodging tax on service fees charged by travel agents. These service fees compensate travel agents for researching and comparing available hotel options, booking the room, and handling payment to the hotel. But SB 2699 would impose a new tax on these service fees provided by travel agents and online travel companies, a tax that is passed on to your constituents.

### **Nearly all travel agents and travelers rely upon online services to research, compare, and book reservations**

From our work on this issue in states and at NCSL, it's clear there is some misunderstanding about travel reservation services and taxes. The chart below shows the flow of services, taxes, and payments in a typical transaction where a traveler uses a travel agent or online travel company to research and book a hotel reservation.

As shown in the chart, travel agents and online travel companies are providing a *service* to travelers. These services include comparisons of rates and amenities at multiple hotels, plus facilitation in making the reservation, processing the payment, and sending charges and applicable taxes to the hotel operator. Clearly, this facilitation service is distinct from the room provided by the hotel where the traveler eventually stays.



### Creates a new tax on travel service fees that would only apply when *Hawaiians* book their travel

The new tax imposed on booking service fees by SB 2699 would impact only Hawaii’s citizens and businesses. That’s because of the rules for determining the source jurisdiction for taxable services – when a tourist uses a travel service, the reservation service fee is sourced to the traveler’s home location – not to the traveler’s destination.

For example, say two tourists are booking a hotel room in Hawaii. One lives in San Francisco, the other in Hilo. The California tourist would *not* pay the tax created by SB 2699 when they booked through a travel agent since they received their online booking services outside of Hawaii.<sup>1</sup> But, the tourist living in Hilo who books through a travel agent *would* pay the tax created by SB 2699.

This new tax would therefore only apply to services provided to Hawaii-based travelers. The tax would *not* apply to service fees paid by out-of-state travelers booking Hawaiian hotels.

### Will cost Hawaii travel agents hundreds of dollars

SB 2699 would penalize Hawaii travel agents with a registration fee for every hotel with which they engage. Even a “small” tax of \$15 per hotel can add up quickly.

Take for example the Hawaiian travel agent working with 100 hotels. SB 2699 would impose a tax of \$1,500 on that Hawaiian travel agent. Now is not the time to impose these new taxes on your constituents.

<sup>1</sup> Note that the out-of-state tourist still pays the Hawaiian occupancy tax when they book the room.

## Allows tax collectors to levy their occupancy tax on more than just hotel rooms

Hawaii travel agents routinely create packages that bundle hotel rooms, food, travel, and events into one price. But SB 2699 allows Honolulu tax collectors to impose their occupancy taxes on all kinds of goods and services when included in travel packages:

- taxi from the airport to the hotel
- food served at a hotel restaurant
- tours of Pauhai Crater

## This new tax on service fees would only be collected by Hawaii-based travel websites

The requirement to collect this new tax on booking services could *only* be enforced against travel agents and websites that have a physical presence in Hawaii.

As noted above, out-of-state travel agents and websites already collect and remit lodging taxes when they make payment to the Hawaii hotel operator. But out-of-state travel agents would not be required to collect this new tax on service fees for providing reservation services at the time that travelers book their hotel.

## Creates new tax on resort fees

In addition to creating new taxes on service fees, SB 2699 applies new taxes on resort fees. This additional taxation further increases the prices charged by Hawaii's travel agents when selling complete travel packages. But, unlike hotels, who can hide this new tax until the traveler checks-in at the hotel, travel agents who book who trips cannot.

In essence, this new tax puts Hawaii's travel agents at a further disadvantage when competing with large hotels.

## Minimal revenue generated

For reasons explained above, every state, city, and county that has enacted a similar new tax has failed to gain the anticipated tax revenue.

First, as discussed above, the service taxes could not be imposed on any out-of-state traveler. Second, Hawaii tax collectors do not have authority to force out-of-state travel agents to collect these new service taxes since states can only impose collection obligations on businesses with a physical presence.

So, when you consider this tax, please consider whether the minimal tax revenue is worth the harm to Hawaii's travel agencies and travel websites.

## Avoid the conflation of travel services and lodging providers

By maintaining the true distinction between travel service providers and hotel operators, you can help Hawaii's travel and tourism industry focus on serving travelers and creating jobs – not on collecting nominal new taxes from the state's own citizens.

Instead of passing SB 2699 we suggest amending it to clarify when an occupancy tax applies. We suggest substituting the existing bill text with this language from Missouri law:

*“Any tax imposed or collected by any municipality, any county, or any local taxing entity on or related to any transient accommodations, whether imposed as a hotel tax, occupancy tax, or otherwise, shall apply solely to amounts actually received by the operator of a hotel, motel,*

tavern, inn, tourist cabin, tourist camp, or other place in which rooms are furnished to the public.

*Under no circumstances shall a travel agent or intermediary be deemed an operator of a hotel, motel, tavern, inn, tourist cabin, tourist camp, or other place in which rooms are furnished to the public unless such travel agent or intermediary actually operates such a facility. ...*

*This section is intended to clarify that taxes imposed as a hotel tax, occupancy tax, or otherwise, shall apply solely to amounts received by operators, as enacted in the statutes authorizing such taxes.”<sup>2</sup>*

We appreciate your consideration of our views, and please let us know if we can provide further information.

Sincerely,

Carl Szabo

Vice President and General Counsel, NetChoice

*NetChoice is a trade association of e-Commerce and online businesses. [www.netchoice.org](http://www.netchoice.org)*

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<sup>2</sup> Missouri HB 1442 (2010), signed into law July 2010 (emphasis added).

**LATE**

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Date & Time**

Mar 19, 2018, 4:02 pm

**SB-2699-SD-2**

Submitted on: 3/19/2018 3:52:06 PM

Testimony for TOU on 3/20/2018 9:15:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Matthew Kiessling	The Travel Technology Association	Oppose	No

Comments:

Dear Chairman Onishi and Members of the Committee

My name is Matthew Kiessling and I serve as the Vice President of Short-term Rental Policy for the Travel Technology Association, representing companies like Airbnb, Expedia, Booking.com, TripAdvisor, and many others.

Each year our short-term rental members help thousands of travelers connect with Hawaii homeowners as they look for and book private accommodations, an increasingly popular and essential component of a thriving travel and tourism economy. With that in mind, it is important to consider the wide-ranging consequences of pursuing some of the harmful provisions contained in S.B. 2699.

Travel Tech strongly opposes S.B. 2699, which would impose a registration tax of \$15 per accommodation on platforms. When considering the short-term rental landscape, this is a particularly regressive fee structure that unfairly penalizes private accommodations and smaller independent hotels. No other state in America imposes registration taxes, and to do so creates an unnecessary burden on platforms and inevitably leads to higher costs for consumers, many of which opt for short-term rentals because they can be more economical.

This legislation also defines transient accommodations intermediaries as any entity that advertises for rent any transient accommodation. This is a broad and ambiguous definition that would extend far beyond well known short-term rental platforms like Airbnb or HomeAway. The way HB 2699 is structured, a homeowner posting photos on Facebook inviting friends to rent their home, offering up their condo on Ebay, or advertising it in the Honolulu Star-Advertiser would result in each of the aforementioned online platforms taking on tax collection and remittance responsibility if they were the genesis of a short-term rental stay resulting from those online posts. This is simply not a feasible solution for anyone. The end result is likely to be a reduction in transient lodging tax revenue, as the many platforms now involved struggle to understand and fulfill tax collection and remittance obligations they are in no position to execute.

While Travel Tech recognizes that short-term rentals are a taxable activity, tax collection and remittance obligations should always be the primary responsibility of owners and



hosts. Platforms that are in a position to do so should certainly be given the option to collect and remit as a service to their customers, but platforms should never face mandated tax collection, especially in a situation where a relationship already exists between the property owner and county and state.

These new taxes and increased platform liability will only increase the cost and complexity of regulating and ensuring the proper taxes are being collected on short-term rentals. Travel Tech and our members stand ready and willing to work toward a viable solution on these issues, but S.B. 2699 is not the answer and I urge you to reject this legislation.

Sincerely,

Matthew Kiessling

Vice President, Short-term Rental Policy

The Travel Technology Association

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Date & Time**

Mar 20, 2018, 8:20 am



March 19, 2018

Committee on Tourism

On behalf of the Independent Lodging Industry Association and over 5,000 independent hotel members nationwide, including the beautiful state of Hawaii, respectfully urge you to **Oppose SB 2699. Do not place an occupancy tax on services that benefit local lodges, inns and service providers in Hawaii. SB 2699 would create a new tax in Hawaii.**

**SB 2699 would create a new tax on the service customers use to book rooms in Hawaii, increasing the cost of tourism in the state.**

Independent hotel owners rely on travel agents and online travel companies to help sell hotel rooms that would otherwise go unsold. Because they lack the marketing infrastructure of large hotel chains, independent hotel companies often find it helpful to partner with travel agents and online travel companies—particularly during slower travel seasons. In this way, owners of independent hotels can reach out-of-state visitors throughout the world who might never hear of these properties but for the marketing reach of their online partners.

The lodging industry has suffered in this weakened economy. Online Travel Companies (OTCs) such as Expedia, Booking.com, and others are playing a vital role in boosting room sales in these difficult times. The heads OTCs put in beds often is the difference between profitability or loss for many hotel operators

This, in turn, means that **proposals to raise taxes on travel agents and online travel companies threaten to cause disproportionate harm on the small business owners who operate independent hotels.**

Independents can't match large corporate hotel's marketing war chests, thus they rely heavily on OTCs to compete with branded hotels. Without a robust OTC channel, independent hoteliers will be put at a competitive disadvantage with chain hotels. It's critical that OTCs not be marginalized as it would diminish the ability of independent hotels to compete effectively.

Hotels, with the help of Online Travel Companies, boost the local economy by supporting jobs and increasing tourism. When people travel, many supporting businesses benefit. Every effort must be made to stimulate the economy and job growth.

For the sake of tourism and the small business owners who operate independent hotels in the state, I urge you to oppose any efforts to tax interactive travel services and SB 2699.

Thank you very much for your attention to this matter. If I can answer any questions about this bill or its impact on our membership, please do not hesitate to contact me.

Respectfully yours,

**Bobbie Singh-Allen**

Bobbie Singh-Allen, J.D.  
Executive Director

About Us:

The Independent Lodging Industry Association (ILIA) is a national association with over 5,000 members nationwide. It was founded in 2010 by the California Lodging Industry Association (CLIA). CLIA was established over 70 years ago by a group of independent hotel owners and operators. Over the past several decades, independent hotels, independently owned franchised hotels, and owners have been impacted by decisions being made out of the halls of State Capitols to Washington, D.C. Chain hotels have dominated the policy making process. ILIA will level the playing field and allow independent hotels a seat at the table. For more information, please contact me at: [bobbie@independentlodging.org](mailto:bobbie@independentlodging.org) or 916-826-2075.

# TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

**SUBJECT:** TRANSIENT ACCOMMODATIONS, Applies Tax to Resort Fees, Attaches Liability to Intermediary

**BILL NUMBER:** SB 2699, SD-2

**INTRODUCED BY:** Senate Floor Amendment

**EXECUTIVE SUMMARY:** Imposes the transient accommodations tax on additional hotel resort fees that are calculated separately from the advertised transient accommodation's rate. Because of additional language in the "gross rental" definition excluding fees unrelated to the transient accommodations, this appears to be a technical clarification.

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:** Adds a new definition of "resort fee" to section 237D-1, HRS. Resort fee is defined as any charge or surcharge imposed by an operator, owner, or representative thereof to a transient for the use of the transient accommodation's property, services, or amenities.

Amends the definition of "gross rental" in section 237D-1, HRS, to explicitly include resort fees.

Also 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, upon its approval, shall apply to taxable years beginning after December 31, 2018.

STAFF COMMENTS: The amendments relating to “resort fee” appear to be interpretive only. The Department has been administering the tax by focusing on whether the “resort fee” charges are mandatory. The bill dispenses with the mandatory element and focuses on whether the charges are in fact for something unrelated to transient accommodations.

The balance of the 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.

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 [page 10, line 11 of the bill], to "transient accommodations intermediary" to make the terminology consistent.

Digested 3/19/2018