



COMMONWEALTH of VIRGINIA

Department of Taxation

December 2, 2010

The Honorable Harry R. Purkey
General Assembly Building, Room 415
Capitol Square
Richmond, Virginia 23219

Dear Delegate Purkey:

Enclosed is the "Study on the Feasibility of Implementing Senate Bill 452" prepared by the Department of Taxation ("TAX") pursuant to your letter on March 2, 2010.

As requested, the Study analyzes the Retail Sales and Use Tax implications of enacting the bill and addresses the impact this bill would have on accommodations patrons, accommodation providers, and online travel companies. The Study does not reach a conclusion as to the viability of enacting such a bill. I hope that you find the information in this report useful in your legislative deliberations of this issue.

This report is being submitted to the Division of Legislative Automated Systems.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig M. Burns".

Craig M. Burns
Tax Commissioner

CMB/kdp
Enclosures

cc: The Honorable Mary Margaret Whipple
The Honorable Robert H. Brink
The Honorable William K. Barlow
The Honorable Richard D. Brown

Preface

Authority

During the 2010 Virginia legislative session, Senate Bill 452, and House Bills 791 and 893 were introduced to require online travel companies to compute the Retail Sales and Use Taxes and local transient occupancy taxes on charges for accommodations, such as hotel and motel rooms, based upon the total price paid for the use or possession of the accommodation, including any mark-up fees, tax recovery charges, or other named fees imposed by the online travel companies. These companies contract with hotels and other accommodations providers to allow guests to reserve accommodations online through the online travel companies' websites. While both House Bills were laid on the table in subcommittee, Senate Bill 452 passed the Senate unanimously, before being carried over by the House Finance Committee until next year's legislative session. The Chairman of the House Finance Committee directed the Department of Taxation to form a working group to study the implications of enacting the legislation.

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STUDY ON THE FEASIBILITY OF IMPLEMENTING SENATE BILL 452

EXECUTIVE SUMMARY

During the 2010 Virginia General Assembly session, several bills were introduced that sought to clarify the taxability of certain fees imposed by online travel companies (“OTC’s”). Generally, OTC’s contract with hotels and other accommodation providers for the right to broker or facilitate the reservation of hotel rooms online at a discount rate. Hotels and other accommodations providers make a number of rooms available at a discounted rate, which the OTC can make available to its customers for reservation online. While the OTC collects sales or occupancy taxes on the wholesale room rate that the accommodations provider charges the OTC, as well as any charges associated with the rental of the room and any taxes associated with those charges, the OTC does not charge or collect tax on the separate charge for providing the online reservation, despite that this charge is embedded in the total amount the guest is charged for the room. Because most state sales tax statutes and local occupancy tax ordinances were drafted prior to the advent of the Internet, they do not address the taxability of this wholesale to retail differential.

In 2006, the Tax Commissioner issued Public Document (“PD”) 06-139, which concluded that the differential is not subject to the Retail Sales and Use Tax, based upon the definition of “retail sale,” in *Va. Code* § 58.1-602, the language in the Retail Sales and Use Tax imposition statute, and the language interpreting these statutes, set forth in Title 23 of the Virginia Administrative Code, § 10-210-730. Because the statute defines retail sale as “the sale or charges for any room or rooms...**by** any hotel, motel...or any other place in which rooms, lodging, space or accommodations are regularly furnished to transients for a consideration,” the Tax Commissioner concluded that accommodations charges must be imposed by the entity that is providing the accommodations in order to be subject to the Retail Sales and Use tax. As OTC’s do not own or operate the facilities in which the accommodations are being provided, the Tax Commissioner determined that OTC’s are not required to collect and remit the applicable sales taxes.

In 2010, Senate Bill 452 and House Bills 791 and 893 were introduced in the Virginia General Assembly to change the policy established in PD 06-139. The bills would have mandated that OTC’s separately state and collect the Retail Sales and Use Tax and the applicable transient occupancy taxes on the differential retained by OTC’s. Senate Bill 452 passed the Senate unanimously before the full Finance Committee of the House voted to hold the bill over until the next year’s legislative session and directed the Virginia Department of Taxation to study the implications of enacting the legislation.

States and localities have differed in their approaches to determining whether the wholesale to retail differential retained by OTC’s are subject to state sales and local occupancy taxes. Many localities have sought clarification through litigation, and the decisions in the court cases have turned on a host of factors, including the language of the statute or ordinance, whether the locality complied with mandatory administrative

tax assessment procedures prior to bringing suit against the taxpayers, and the degree of control the OTC exercises with respect to the room rentals. As of the completion of this study, few of these cases have reached final adjudication. Generally, where the statute or ordinance's language requires that the charge be imposed by the operators or owners of the accommodations, the courts have often dismissed the local government's suit seeking to impose the local sales or occupancy tax on the mark-up fee, concluding that OTC's are not operators or owners of the accommodations.

Some states and localities have made determinations as to the taxability of these charges administratively. As with the courts, they have looked to the language in the statute or ordinance or the structure of the transactions to determine the taxability of the fees. Often, when state or local officials have interpreted the differential as being subject to sales and occupancy taxes, OTC's have appealed these decisions in court.

During the 2010 legislative session, several states sought to enact legislation to provide clarification as to whether the differential is subject to state or local tax. To date, New York and North Carolina are the only states that have enacted legislation taxing the OTC's mark-up fees. New York's legislation took effect on September 1, 2010, while OTC's will be required to begin collecting the tax in North Carolina beginning January 1, 2011. Bills introduced in 2010 in the state of Florida and Minnesota ultimately failed. A bill introduced and passed during Missouri's 2010 legislative session is one of the few bills that declares that these amounts are not subject to state sales or local transient occupancy taxes.

With only two states having enacted laws imposing the tax on the differential as of the release of this study, there is little guidance as to how to structure provisions to tax this amount, so as to properly address the possible issues that have been identified as potential impediments to the enactment of legislation, or that may decrease the potential revenue of imposing the Retail Sales and Use Tax and local transient occupancy taxes on the mark-up amount retained by OTC's.

Virginia stands to gain an additional \$4.61 million in Fiscal Year 2012, \$4.76 million in Fiscal Year 2013, and \$4.91 million in Fiscal Year 2014 in Retail Sales and Use Tax and local transient occupancy tax revenues from the passage of this bill. Critics of Senate Bill 452 have identified several factors that could potentially decrease this estimate. For example, some OTC's have raised the issue of nexus as a barrier to taxing these fees, arguing that out-of-state OTC's that do not have nexus with Virginia would be exempted from the requirement to charge or collect the tax, which, they argue, could decrease the likelihood of additional revenue in Virginia. In the few court cases in which OTC's have raised the issue of nexus, this argument has not prevailed. Further, OTC's are currently seeking federal legislation that would prevent states and localities from imposing their sales, use, or occupancy taxes on the OTCs' reservation fees. Any such legislation, if enacted, would preempt a Virginia statute authorizing the imposition of these taxes.

States and localities must give additional consideration to the impact legislation will have on their current taxing structures. Some OTC's contend that they are providing services; thus, they argue that taxing the fees for these services as a component part of the accommodations is a departure from Retail Sales and Use Tax conventions in those states in which services are not taxed. This study addresses Virginia's current treatment of unrelated services bundled with the provision of accommodations. As these transactions are included in the taxable base, and thus, subject to tax in Virginia, imposing the tax on the mark-up fee would not significantly depart from Virginia's Retail Sales and Use Tax conventions in this regard.

State and local governments must also give consideration to the impact such legislation would have on the taxing jurisdiction, travel intermediaries, and accommodations providers. The online travel industry contends that a bill of this nature would most heavily impact online travel intermediaries, as they would be subject to additional administrative burdens in filing taxes for each local jurisdiction. In addition, if the bill is drafted to require the OTC to separately state the tax for each individual charge, OTC's may be forced to reveal their confidential negotiated discount rates at which the accommodations providers make their rooms available. This could potentially discourage travelers from using OTC's and could prove detrimental to the merchant model under which many OTC's currently operate.

These considerations must be balanced against the local objectives for future legislation. Transparency in Virginia's taxing systems, equity among consumers renting accommodations, and predictability and stability of local revenues are among the chief goals localities have expressed for future legislation. Many of these goals are in direct conflict with the concerns that OTC's have expressed with Senate Bill 452 and similar legislation that would explicitly impose the tax on the differential amount that the OTC retains.

STUDY ON THE FEASIBILITY OF IMPLEMENTING SENATE BILL 452

SECTION I OVERVIEW OF THE ISSUE

Introduction

In the past two decades, the United States has experienced an overwhelming increase in electronic commerce. When the Internet was first opened to commercial use twenty years ago, few households were familiar with it. By 1999, e-commerce sales had grown to \$995.0 billion, and by 2006, that number had increased to 2,385 billion.¹

Like many other areas of commerce, travel purchases have migrated to the Internet. This has prompted the emergence of “online travel companies” (“OTC’s”). OTC’s contract with hotels and other accommodation providers to allow guests to reserve accommodations online through the OTC’s company websites. Under the OTC’s widely used “merchant model”, the accommodations providers negotiate with OTC’s for the amount that they are willing to accept for the booking of a hotel room via the OTC’s travel site. Generally, when an OTC collects payment from the customer securing the reservation online, the customer is charged the wholesale room rate (the discounted amount the hotel charges the OTC, plus any additional fees associated with the rental of the room), any taxes associated with the room charge, and a separate charge, which the OTC retains as compensation for securing the reservation. These charges are not separately itemized on the customer’s invoice. Rather, the invoice lists two separate charges: a charge for the room rate and a separate charge for tax recovery charges and service fees.

The OTC collects the state and local taxes on the room rate and associated room charges, and remits that amount to the accommodation provider, but does not charge or collect tax on the separate charge for the provision of the online reservation. The total retail price that the customer must pay the OTC is not disclosed to the hotels or the tax authorities.

Instead, the OTC’s contend that this differential or “mark-up” constitutes a charge for services rendered and is not subject to the Retail Sales and Use Tax or any local taxes collected on accommodations transactions. Because the charges and taxes are not separately itemized on the customer’s invoice, it is not clear to the online customer what taxes the OTC is collecting and to what amounts the tax is applied.

According to a report by the Center on Budget and Policy Priorities, issued in September, 2009, states’ and localities’ entire revenue stream from hotel taxes equals

¹ Bruce, Donald *et.al.* “State and Local Government Sales Tax Revenue Losses from Electronic Commerce,” University of Tennessee (2009).

some \$8.5 billion per year.² Some state and local governments contend that the OTC mark-up should be subject to state sales and local occupancy taxes. As the provision of accommodations is a multibillion dollar industry, states and localities maintain that they are losing millions in revenue. This has prompted many to initiate administrative proceedings or file suit against OTC's doing business in their respective state or localities, contending that their sales and hotel occupancy tax laws require the companies to charge their customers the applicable hotel taxes on the total retail price the OTC collects from the customer, rather than the wholesale rate the hotel charges the OTC. Others have sought to introduce legislation that would explicitly impose sales or local occupancy taxes upon these fees and mandate that the OTC's be responsible for collecting and remitting the applicable taxes. Courts have reached different conclusions as to the taxability of these charges.

OTC's

Historically, the travel intermediary industry has employed three business models or variations of these models to facilitate the reservation of accommodations: the traditional commission model, the tour operator model, and the merchant model.

Prior to September 11, 2001, the commission model was the traditional means employed by travel agents to facilitate accommodations reservations. Travel agencies would arrange reservations for accommodations providers, who would set the retail pricing and serve as the merchant of record for these transactions. Upon the guest's departure, the accommodations provider would charge the customer's credit card for the room charge and subsequently pay the travel agency a previously negotiated commission on the revenue received from the customer. Under this business model, the agent's commission is paid by the accommodations provider, not the customer, and the accommodations provider bears the entire risk of loss. The traditional agency model is used by some OTC's.³

Under the tour operator or reseller model, the travel intermediary contracts with the accommodations provider to purchase the room or rooms, then subsequently resells them to tourists. The customer pays the intermediary directly, both for his administrative services and for a hotel room, which the tour operator has previously rented from the hotel for a lower rate. Under this model, the intermediary has discretion to accept or reject the booking, as the intermediary owns the accommodations inventory being sold. As such, the intermediary bears the entire loss for any rooms that go unsold. Some OTC's operate under this model.⁴

² Mazerov, Michael: "Banning Taxation of Online Hotel Reservations is Unwarranted and Could Cost States and Localities Billions of Dollars." Center on Budget and Policy Priorities. September 18, 2009.

³ Testimony of Richard A. Leavy Before the Multistate Tax Commission on the Model Statute on the Tax Collection Responsibilities of Accommodations, Submitted on Behalf of Orbitz Worldwide, Inc. July 21, 2009.

⁴ *Id.*

The September 11 terrorists' attacks caused a dramatic decline in the number of people traveling and staying in hotels. In an effort to curb this decline, accommodations providers began negotiating the distribution of rooms through the Internet intermediaries' merchant model distribution format,⁵ named so because the intermediary is the merchant of record, and under its contract with the accommodations provider, is required to collect the proceeds from the consumers at the time the rooms are booked. Under the merchant model, accommodations providers contractually agree to set aside a portion of their rooms, which they make available to third party intermediaries at a discounted rate, so as to allow them to market to consumers the accommodation providers would normally be unable to reach. The intermediaries then compile a list of rooms on a central website that travelers can visit to search for available rooms at multiple hotels, compare rates and amenities, and ultimately book a reservation. The intermediary collects the sales and transient occupancy taxes on the discounted room charge from the customer, and remits the tax to the accommodations provider. The amount of tax is generally bundled with other fees and charges. The travel intermediary does not disclose the amount of the discounted rate to the ultimate consumer. The final price imposed upon the ultimate consumer is left to the discretion of the intermediary, which generally marks up the price to compensate itself for the online reservation service provided. The merchant model is the most widely used model among OTC's.⁶

Historical Tax Treatment of Online Reservation Fees in Virginia

The Retail Sales and Use taxation of accommodations in Virginia is governed by *Va. Code* § 58.1-603, which imposes the Retail Sales and Use Tax on the "gross proceeds derived from the sale or charges for rooms, lodgings, or accommodations furnished to transients as set out in the Code's definition of "retail sale.'" *Va. Code* § 58.1-602 defines "retail sale" to specifically include:

[T]he sale or charges for any room or rooms, lodgings, or accommodations furnished to transients for less than 90 continuous days by any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for a consideration.

In October, 2006, the Virginia Department of Taxation issued a ruling letter, Public Document ("PD") 06-139, in response to an out-of-state OTC's request for a determination as to whether the Virginia Retail Sales and Use Tax applies to the marked-up amount the OTC charges its customers for the services rendered in facilitating the reservation process.

⁵ Stanford, Beth Anne: "State and Local Efforts to Collect Additional Tax on Hotel Rooms Booked Online." STATE TAX NOTES, 319, (2005).

⁶ See Leavy, *supra*, note 3 at 1.

Via telephone or Internet, potential guests would contact the OTC to secure a reservation. The OTC would make the reservation for the potential guest and, once in receipt of a confirmation from the accommodations provider, would charge the guest's credit card a single aggregate amount, comprised of: 1) the discounted amount the accommodations provider charged for the occupancy of the room, plus related fees, and 2) an amount retained by the OTC, generally labeled a "tax recovery charge," which it imposed to cover expected applicable taxes the accommodations providers needed to charge and collect, plus any applicable service fees for services charged by the accommodation providers. The OTC would remit the discounted rental rate and the portion of the total recovery charge that was imposed to cover expected applicable taxes to the accommodations providers and would retain the remaining portion of the tax recovery charge.

In determining whether the Retail Sales and Use Tax applied to the amount retained by the OTC, the Tax Commissioner looked to the imposition statute in *Va. Code* § 58.1-603, as well as Title 23 of the Virginia Administrative Code 10-210-730, which provides,

The tax applies to the sale or charge for any room or rooms, lodgings or accommodations furnished to transients by any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or other similar place. The tax applies to all sales of tangible personal property by such businesses.

Based on these provisions, the Tax Commissioner concluded that charges must be imposed by the entity providing the accommodations in order for those charges to be subject to the tax. Because the accommodations provider was the entity providing the transient accommodations to the guest in this case, the Tax Commissioner concluded that the provider, and not the OTC, was required to collect and remit the applicable sales taxes.

While the Company is providing a service in connection with taxable transient accommodations and is charging a fee for such service, the Company is not providing the accommodations. Because the company is not providing the transient accommodations, the company is not liable to collect and remit tax on the services provided in connection with the rental of the transient accommodations. As an out-of-state entity, not in the business of providing transient accommodations in Virginia, the company is not required to register as a dealer for the collection of the tax.⁷

Thereafter, TAX confirmed that this same treatment would apply to the rental of private facilities when it issued PD 07-8, in which the Tax Commissioner ruled that a broker who facilitates rentals of private residences is not required to collect the tax on

⁷ Public Document 06-139 (October 24, 2006).

the rentals because the broker does not own or operate the private residences where the accommodations are being furnished.⁸

2010 Virginia Legislation

During the 2010 Virginia legislative session, several bills were introduced that would change the policy established in PD 06-139. Senate Bill 452 (introduced by Senator Mary Margaret Whipple)⁹, and House Bills 791 and 893 (introduced by Delegates Robert H. Brink and William H. Barlow, respectively) were drafted identically to explicitly require OTC's to compute the Retail Sales and Use Tax and local transient occupancy taxes on charges for accommodations based upon the total price paid for the use or possession of the accommodation, including any mark-up fees, tax recovery charges, or other named fees imposed by OTC's. Had they been enacted, these bills would have required accommodations providers and intermediaries to separately state the amount of the tax on the patron's bill, invoice, or similar documentation, and to collect and remit the tax to the Virginia Department of Taxation and/or the taxing locality. The bills separately addressed the Retail Sales and Use Tax and the local transient occupancy taxes. While both House bills were laid on the table in subcommittee, Senate Bill 452 passed the Senate unanimously.¹⁰ A House Finance subcommittee thereafter recommended it by a 10-0 vote, but the full Finance Committee voted 13 to 9 to hold the bill over until the next year's legislative session and directed the Tax Department to form a working group to study the implications of enacting the legislation.¹¹

Retail Sales and Use Tax Provisions

Each bill proposed to remove the statutory language that has been interpreted as limiting the application of the Retail Sales and Use Tax to charges for accommodations made by accommodation providers and explicitly authorized the imposition of the tax on accommodations charges imposed by OTC's. In addition, the bills outlined the procedures OTC's would need to follow in collecting and remitting taxes and fees on accommodations charges and mark-up fees.

The bills would not have changed the types of rentals that were subject to the Retail Sales and Use Tax, as the bills defined "accommodations," to include, "any room or rooms, lodgings, or accommodations in any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for a consideration." This is the same language that is used in the current statute.

⁸ Public Document 07-8 (March 9, 2007).

⁹ See Appendix I.

¹⁰ See Appendix II.

¹¹ See Appendices III and IV.

Under the terms of each bill, depending on how the transaction is structured, either accommodations providers and/or accommodations intermediaries could be required to collect the tax on the charges and fees for these accommodations. The bills defined “accommodations provider” as any person that furnishes accommodations to the general public for compensation.” An “accommodations intermediary” was defined as “any person, other than an accommodations provider, that facilitated the sale of an accommodation and charged a room charge to the customer.” The bills’ intent was to classify OTC’s as accommodations intermediaries.

The bills also identified several charges an accommodations provider or accommodations intermediary may impose upon its customers. The bills defined a “room charge” as the full retail price charged to the customer by the accommodations intermediary for the use of the accommodations, including any accommodations fee before taxes.” Thus, the “room charge” was intended to represent the total amount on the customer’s invoice, excluding taxes. The “discount room charge” was defined as the “full amount charged by the accommodations provider to the accommodations intermediary for furnishing the accommodation.” This amount represented the discounted prices at which hotels and other accommodations providers make rooms available to OTC’s to market their rooms. The “accommodations fee” was defined as the room charge less the discount room charge, if any, and required that the accommodations fee be no less than \$0.” This amount was intended to represent the amount the OTC retains after remitting the discount room charge, additional charges and fees imposed by the hotel, and applicable taxes to the accommodations provider.

The bills provided that, where an intermediary was not involved in the rental of the accommodations, the accommodations provider was required to collect and remit the Retail Sales and Use Taxes, and was held liable for these taxes. Alternatively, where an intermediary facilitated the sale, the bills required that the intermediary collect the room charge and the tax computed on the room charge from the guest. The intermediary was required to remit the discount room charge and the tax collected on the discount room charge to the accommodations provider, which, in turn, would remit such tax to the Tax Department. The bill also mandated that the intermediary remit the portion of the taxes relating to the accommodations fee and the difference between the room charge and the discount room charge directly to the Tax Department. For all retail sales of accommodations, both the accommodations provider and the intermediary would need to separately state the amount of the tax on the bill, invoice, or similar documentation and add the tax to whichever charge it was required to collect.

Transient Occupancy Tax Provisions

Virginia law authorizes counties to levy occupancy taxes on hotels, motels, boarding houses, travel campgrounds, and other guest room facilities rented out for continuous occupancy of less than 30 days.¹² Under current law, with some exceptions,

¹² Va. Code § 58.1-3819.

counties are authorized to levy the transient occupancy tax at a maximum rate of two percent “of the amount of charge for the occupancy of any room or space occupied.”¹³ Each bill would have changed the wording of the current county transient occupancy statutes¹⁴ by explicitly imposing the tax on the total price paid by the ultimate consumer for the use or possession of the room or space occupied in a retail sale.

Similarly, cities and towns are granted the authority to impose tax on the charges for transient accommodations. As with the statute for counties, each bill would have changed the wording of the current city and town transient occupancy tax statutes by explicitly imposing the tax on the total price paid by the ultimate consumer for the use or possession of the room or space.

Finally, each bill set forth the same requirements for collecting, remitting, and separately stating local transient occupancy taxes as the provisions for collecting the state sales taxes, except that the parties would be required to remit such taxes to the local taxing authority, rather than to the Virginia Department of Taxation.

¹³ *Id.*

¹⁴ The county transient occupancy tax statutes specifically enumerate the counties that are authorized to impose the transient occupancy tax at a rate that exceeds 2%, and in each case, impose the tax on occupancy charges. In order to ensure that the differential would be subject to the tax in each of these counties, the language had to be changed for every county transient occupancy tax provision. See *e.g.*, *Va. Code* § 58.1-3820 *et. seq.*

SECTION II OTHER STATES

State and Local Attempts to Determine the Taxability of Online Reservation Fees

Given that most local ordinances and state statutes were drafted long before the inception of the Internet, there is little clear guidance as to the taxability of the differential retained by OTC's. States and localities have recently sought to determine the taxability of this amount judicially, administratively, and by legislative enactments.

Litigation

Litigation has thus far been the most common method by which localities and taxpayers have sought to determine the taxability of fees imposed by online travel companies. In cities in 22 states, local officials have filed suit against OTC's, contending that the differential is subject to tax. Currently, more than forty court cases are pending across the country. Thus far, Florida is the only state that has filed such a suit. In addition to seeking a declaration that the total retail price is taxable, many of the suits seek back taxes for unpaid hotel taxes dating back several years. Several of the cases are at the trial court level, and in many cases, the OTC defendants have filed motions to dismiss the case. The determination as to whether these cases survive the OTC's motions to dismiss have varied, with the determination turning on the specific language of the taxing statute or ordinance.

Much like Virginia's Retail Sales and Use Tax and local occupancy tax statutes, many local ordinances in other states contain language that has been interpreted as requiring the local sales or occupancy tax to be charged by the operators or owners of the accommodations. Thus, courts have had to address the issue of whether online travel companies constitute operators for purposes of these ordinances. Often, when an ordinance contains this or similar language, the courts have dismissed the local government's suit seeking to impose the local sales or occupancy tax on the mark-up fee, concluding that OTC's are not operators or owners of the accommodations. For example, in *Louisville/Jefferson County v. Hotels.com*, the Sixth Circuit United States Court of Appeals granted Hotels.com's motion to dismiss on the basis that OTC's do not physically control or furnish the rooms they advertise, as required by the county ordinance.¹⁵ Similarly, in *City of Gallup v. Hotels.com*, the United States District Court determined that OTC's are not hotel operators under the city's Lodger's Tax Ordinance, and therefore, the tax is only imposed on the amount paid to the hotel operators, and not the full amount charged to the customer.¹⁶ In *City of Orange v. Hotels.com*, the U.S. District Court granted the OTC's motion to dismiss the case because the ordinance imposed the occupancy tax on the consideration paid to the hotel or motel, and OTC's were not included in this class.¹⁷

¹⁵ *Louisville/Jefferson County Metro Gov't v. Hotels.com*, 590 F.3d (381) (2009).

¹⁶ *City of Gallup v. Hotels.com*, (2:07-cv-00644-JEC-RLP) District of New Mexico (2007).

¹⁷ *City of Orange v. Hotels.com*, 2007 WL 2787985 (E.D. Tex.) (2007).

In some cases, however, courts have denied motions to dismiss filed by OTC's that have raised the argument that they do not own or operate the applicable accommodation. For example, in *Leon County v. Hotels.com*, the county's ordinance placed the duties of charging, collecting and remitting the tax on "the person receiving the consideration for the lease or rental." Despite the OTC's contention that the hotels were the only entities subject to the foregoing duties, the United States District Court ruled that the OTC's qualified as entities that "received the consideration for the lease or rental" because they purchased rooms at a discounted rate and subsequently rented, leased or let the rooms to their customers.¹⁸ Similarly, in *City of Antonio v. Hotels.com*, the United States District Court denied the OTC's motion to dismiss, despite language in the ordinance levying the tax on any person or entity owning, operating, managing, or controlling any hotel. Based on San Antonio's allegation that the OTC's had a right to control occupancy as a result of their contracts with the hotels, the Court concluded that San Antonio could recover given the right facts.¹⁹ In *City of Charleston v. Hotels.com*, in which Charleston's ordinance imposed the tax on entities engaged in furnishing accommodations to transients, the United States District Court denied Hotels.com's motion to dismiss because the court concluded they had received money in exchange for "supplying" hotel rooms.²⁰

Some ordinances that require owners or operators to charge the tax extend the same authority to "similar type businesses." Based on this language, localities have contended that online travel companies are required to charge the tax because they are businesses that are of a similar type to hotels, motels, or other accommodation providers. Thus far, the courts have not been persuaded by this argument.²¹

Alternatively, some court decisions have turned on whether the locality complied with mandatory administrative tax assessment procedures prior to bringing suit against the taxpayers. While courts have sometimes remanded or dismissed cases based on a city's failure to comply with these procedures, others have ruled that this does not bar a locality's ability to bring suit. In *City of Rome, Georgia v. Hotels.com*, Georgia law mandated that the city first estimate, assess, and attempt to collect the excise taxes at issue from the defendants before pursuing litigation against the defendants for violating Georgia's Excise Tax Act. The United States District Court stayed the case pending the city's exhaustion of administrative remedies.²² In *City of Atlanta v. Hotels.com*, a Fulton County judge granted the OTC's motion to dismiss, declaring that the city must first exhaust its administrative remedies before pursuing litigation, and the Georgia Court of Appeals affirmed the lower court's decision. The Georgia Supreme Court overturned

¹⁸ *Leon County v. Hotels.com, L.P.*, 2006 WL 3519102, (2006).

¹⁹ *City of San Antonio v. Hotels.com* 2007 WL 1541184 (2007).

²⁰ *City of Charleston v. Hotels.com*, 586 F.Supp.2d 538 (2008).

²¹ See *Pitt County v. Hotels.com, L.P.*, 553 F.3d 308 (2009), in which the U.S. Court of Appeals, 4th Circuit, ruled that hotels, motels, tourist homes, and tourist camps all provide lodging to patrons on site and are all physical establishments with rooms where guests can stay. Because OTC's do not physically provide the rooms, the court ruled that they are not a business that is of a similar type to a hotel, motel, or tourist home or camp.

²² *City of Rome, Georgia v. Hotels.com*, 2007 WL 6887932 (N.D.Ga.) (2007).

this decision, holding that the city's failure to exhaust administrative remedies did not preclude adjudication of the claim for declaratory judgment as to threshold legal issues regarding the applicability of hotel tax ordinances. The Supreme Court vacated the lower court's judgment and directed the trial court to adjudicate the city's claim for declaratory judgment as to the applicability of the hotel tax ordinance.²³

*Expedia Inc. v. City of Columbus*²⁴ is one of the few cases in which the court has reached the merits, and ruled in favor of the locality. In that case, the Georgia Supreme Court ruled that the retail, rather than the wholesale rate, is subject to Columbus' hotel occupancy taxes. The Columbus ordinance at issue imposed a 7% excise tax based on the 'charge to the public' for a hotel room. The Court interpreted this language to apply the tax to the price Expedia demands from the consumer, rather than the price Expedia agrees to pay the hotel for the room. As the Court pointed out, Expedia was not the end-consumer, a member of the public at large, or the occupant of the hotel room. The Court also rejected Expedia's contention that the undisclosed facilitation fee was not taxable, concluding:

Due to a lack of evidence regarding the amount of the facilitation fee, no one can discern which portion of the room rate is allegedly for Expedia's facilitation fee. Since Expedia has chosen to represent the room rate to the public as the price a customer must pay to secure his right to occupy the room, the City has no choice, under a clear and unambiguous reading of its ordinance, but to tax the customer for the published room rate demanded by Expedia. Expedia's disclaimer to the customer that the room rate is a combination of cost and fees is insufficient to inform the taxpayer of his true tax liability.²⁵

The Court did not determine whether Expedia is a hotel operator, concluding instead that, regardless of whether Expedia is a "hotel, motel, or innkeeper," it is an "entity" that collects taxes and therefore, "is required to remit tax payments belonging to the City."²⁶

Similarly, in *City of San Antonio, Texas v. Hotels.com*, a jury found that the OTC's control hotels under each of the 170 cities' occupancy tax ordinances, and are thus responsible for collecting and remitting hotel occupancy taxes in those localities. The jury awarded the cities \$20 million. The OTC's have appealed this decision to the U.S. Court of Appeals for the 5th Circuit.

The Superior Court of the State of California for the County of Los Angeles also reached the merits in the *Anaheim* cases, wherein the Court overturned a Hearing

²³ See also *Anaheim v. Super. Ct*, 179 Cal. App. 4th 825 (2009), affirming *Orange County Super. Ct trial judge's ruling that OTC's were entitled to challenge the tax, despite that they had not paid the totality of the assessment.*

²⁴ *Expedia Inc. v. City of Columbus*, 285 Ga. 684, 681 S.E. 2d 122(2009).

²⁵ *Id.* at 690.

²⁶ *Id.* at 689.

Officer for the City of Anaheim's \$21.3 million ruling in favor of the City of Anaheim.²⁷ The Court determined that, based on the language in the Anaheim ordinance, the total retail price was not subject to transient occupancy tax. The Anaheim ordinance imposed the tax on "fifteen percent of the rent" and defined rent as "the consideration charged by an operator for accommodations..." As the hotels controlled the production of the product sold, the quantity of production, the quality of production, the channels of distribution of the product, and the pricing of the product, the Court determined that the hotels, and not the OTC's, were actually engaged in controlling and running the hotel, and thus, the hotels were the operators.

The mixed decisions show that the outcomes of these cases depend largely on the wording of the individual statutes or ordinances imposing retail or occupancy taxes on transient accommodations. As of the completion of this study, no lawsuits have been filed in the state of Virginia against OTC's for collection of tax on the additional amount retained by the OTC's.

Administrative Responses

Some states have chosen to address the taxability of mark-up fees by issuing regulations, private letter rulings, tax bulletins, or similar guidance. As with the courts, states and localities generally look to the language in the statute or ordinance when providing administrative guidance as to the taxability of the fees.

In a January 1, 2009 Letter of Finding, the Indiana Department of State Revenue determined that the total charges imposed by the third party intermediary were subject to Indiana's sales tax.²⁸ Further, because these charges were paid to the third party intermediary, the intermediary was responsible for the collection and remittance of the sales tax to the Indiana Department of State Revenue. Language in Indiana's sales tax code provided that every rental or furnishing by a retail merchant is a separate unitary transaction, regardless of whether consideration is paid to an independent contractor or directly to the retail merchant. The statute defined unitary transaction to include all items of property and/or services for which a total combined charge or selling price is computed for payment, irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price. The applicable OTC has filed a petition in the Indiana Tax Court appealing this determination.²⁹

Other states have sought to establish policies based upon the structure of the transactions between the OTC and the accommodations provider. In 2002, the Comptroller of Public Accounts in Texas, for example, opined that a travel company is subject to tax if it contracts with hotels for a block of hotel rooms; is guaranteed access to the rooms; bears an inventory risk for the rooms; or is required to pay for every room

²⁷ *Priceline.com, Inc. v. City of Anaheim*, Superior Court, Los Angeles County (California), Case No. JCCP4472 (2010).

²⁸ *Indiana Letter of Finding* No. 08-0434 (February 1, 2009).

²⁹ See *Priceline.com 10-K 20100219 Legal Proceedings*.

in a block, even if some go unoccupied or are canceled.³⁰ The Comptroller also opined that the key factor in determining the tax responsibility of a hotel reservation service company is whether the company is acting as an agent for guests in obtaining hotel accommodations or is acting as a hotel that rents rooms to guests.³¹ These rulings may be superseded by the *City of San Antonio* case.

State and Local Government Legislative Enactments

Recently, many states and localities have sought to clarify or change their current statutes to provide that the additional amount imposed by the OTC's is subject to sales or occupancy tax. Currently, only two states have been successful in this endeavor. In 2010, the state of North Carolina incorporated language into its budget indicating that facilitation and similar types of fees are considered charges necessary to complete the rental of the accommodation, and are included in the sales price.³² The budget bill further provides that persons authorized to facilitate the rental of an accommodation are included under the definition of a retailer. The budget further requires the third party intermediary to report the sales price to the accommodations provider, who is liable for the tax. If the third party intermediary fails to report the sales price to the provider or understates the sales price reported, the intermediary becomes liable for tax due on the unreported or underreported sales price. The provisions of the budget bill require OTCs to comply beginning January 1, 2011. North Carolina anticipates that this change will increase revenues by \$1.7 million.³³

On August 11, 2010, the state of New York's 2010-2011 revenue budget was approved. The budget contains provisions requiring that room remarketers charge and collect sales tax on the mark-up fees. The budget defines "room remarketer" as a person who reserves, arranges for, conveys, or furnishes occupancy, whether directly or indirectly, to an occupant for rent in an amount determined by the room remarketer, directly or indirectly, whether pursuant to a written or other agreement."³⁴ The legislation also amends New York City's locally-administered hotel room occupancy tax so that it conforms to the methodology of the state tax with respect to room remarketers. The legislation will take effect on September 1, 2010, and is expected to increase revenue by \$20 million.³⁵

In 2010, several other state legislatures introduced bills that ultimately failed. Florida's House Bill 335 would have required online travel companies to collect tax on the full amount paid by customers. The bill died in the House Finance & Tax Council Committee.³⁶ An opposing bill, which would have clarified that sales tax is due only on

³⁰ *Texas Policy Letter Ruling* 200308379L (August 22, 2002).

³¹ *Texas Policy Letter Ruling* 200310132L (October 7, 2003).

³² Current Operations and Capital Improvements Appropriations Act of 2010, SB 897, S.L. 2010-31.

³³ The Joint Conference Committee Report on the Continuation, Expansion and Capital Budgets, Senate Bill 897, North Carolina General Assembly, June 28, 2010, p 5, Line 25.

³⁴ New York Budget Bill, A09710D (2010).

³⁵ New York State Division of Budget, 2010-2011 Enacted Budget Report, Executive Summary.

³⁶ H.B. 335, 2010 Leg. (FL. 2010) .

the wholesale accommodations price, passed the Florida House, but died in the Senate Messages Committee.³⁷ In Minnesota, H.F. 3687 would have clarified that the Minnesota sales tax applies to the full price that an online or similar travel service charges for Minnesota hotel rooms. The bill failed to make it out of the House policy committees.³⁸

Missouri is one of the few states that has enacted legislation declaring that the amount retained by intermediaries is not subject to state or local transient occupancy taxes. House Bill 1442, enacted during the 2010 legislative session, specifies that any state or local tax imposed on transient accommodations would apply only to amounts actually received by the operator of an accommodation, and precludes travel agents and intermediaries from being deemed operators of a hotel, motel, inn, tourist camp, or similar business, unless the travel agent or intermediary actually operates the facility.³⁹

As with states, some local governments have enacted ordinances to clarify the local sales and transient occupancy tax treatment of these facilitation fees. For example, on November 3, 2009, voters in the city of South San Francisco approved a measure that expressly made hotels responsible for payment of the transient occupancy tax applicable to the entire amount that a guest ultimately pays for the use of a room. In a subsequently issued Administrative Interpretation of this measure, the City Finance Director clarified that the City would apply the tax only to the net room rate, after some online entities removed South San Francisco hotels from their websites in response to the measure.⁴⁰

New York's budget provision took effect in September, 2010, and North Carolina's budget provision has yet to take effect. As these are the only states that have enacted laws imposing the tax on the differential as of the completion of this study, other states hoping to enact similar provisions have little guidance as to how to structure such provisions to ensure significant revenue gain for the state and its localities and to avoid litigation.

Multistate Tax Commission Efforts

In 2004, the Uniformity Committee of the Multistate Tax Commission ("MTC") commenced efforts to develop a Model Statute for collecting and remitting tax on the differential.⁴¹ Under the terms of the Model Statute, the intermediary would collect tax on the full retail price charged to its customers, remit the tax on the discounted rate to the accommodations provider, and remit the tax on the differential to the appropriate

³⁷ H.B. 1241, 2010 Leg. (FL. 2010).

³⁸ H.F. 3687, 2010 Leg., 86th Sess. (Mn. 2010).

³⁹ H.B. 1442, 95th Gen. Assem. Sess. (Mo. 2010).

⁴⁰ Henchman, Joseph. "Cities Pursue Discriminatory Taxation of Online Travel Services. STATE TAX NOTES, 632 (2010).

⁴¹ Hearing Officer's Report, Proposed Model Statute on the tax Collection Responsibilities of Accommodations Intermediaries. Multistate Tax Commission

taxing agency. The provisions of the Model statute differ from Senate Bill 452 in that the Model Statute contains additional safe harbor provisions as well as provisions addressing bundling.

Multistate Tax Commission proposals must undergo an extensive review process before they are recommended to the states. The uniformity committee reviews each proposal and subsequently solicits comments from the general public. Later, a public participation working group is created and a formal public hearing is conducted. Based on information presented at the public hearing, the hearing officer or hearing panel makes a recommendation on the draft, which the Executive Committee reviews and uses to determine whether it will pass the proposal on to the Commission. The Executive Committee must authorize a polling of the affected Commission Member States to ensure that a majority of the affected States would consider adoption of the draft proposal before the proposal is passed on to the Commission. The Multistate Tax Commission general counsel has reported that a majority of MTC states surveyed did not agree to consider adopting the proposed model statute.⁴²

⁴² 2010 Tax Newsletter, CCH, August 3, 2010. See also MTC Uniformity Committee Report to Executive Committee, Fiscal Year 2010 Through Third Quarter.

SECTION III POSSIBLE ISSUES WITH TAXING THE FULL RETAIL PRICE THE CUSTOMER PAYS THE OTC

Constitutional Nexus

Most OTC's do not have physical places of business in Virginia. This raises the issue as to whether it is constitutionally permissible for Virginia to require these nonresident entities to collect Virginia's Retail Sales and Use Tax on the mark-ups they impose.

The Commerce Clause of the United States Constitution reserves to Congress the power to regulate commerce among the states and with foreign nations. The U.S. Supreme Court has established a four-prong test to be used in determining whether a state tax on an out-of-state corporation's activities in interstate commerce violates the Commerce Clause. A state may require an entity engaged in interstate commerce to collect taxes on its behalf provided the tax is 1) applied to an activity with a substantial nexus with the taxing State; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The U.S. Supreme Court has also determined, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) that the Commerce Clause barred a state from requiring an out-of-state mail-order company to collect use tax on goods sold to customers located within the state when the company had no outlets, sales representatives, or significant property in the state. In this case, the Court determined that only Congress has the authority to require out-of-state vendors, without a physical presence in a state, to register and collect that state's tax.

Virginia law specifically sets out the standards for requiring out-of-state dealers to collect the Virginia Retail Sales and Use Tax on sales into the Commonwealth. The law provides that a dealer is deemed to have sufficient activity within the Commonwealth to require that dealer to register to collect the Virginia Retail Sales and Use Tax if the dealer:

- Maintains an office, warehouse, or place of business in the Commonwealth;
- Solicits business in the Commonwealth, by employees, independent contractors, agents, or other representatives;
- Advertises in Commonwealth publications, on billboards or posters located in the Commonwealth, or through materials distributed in the Commonwealth;
- Regularly makes deliveries into the Commonwealth by means other than common carrier;

- Continuously, regularly, seasonally, or systematically solicits business in the Commonwealth through broadcast advertising;
- Solicits business in the Commonwealth by mail, provided the solicitations are continuous, regular, seasonal, or systematic and the dealer benefits from any banking, financing, debt collection, or marketing activities occurring in the Commonwealth;
- Is owned or controlled by the same interests which own or control a business located within this Commonwealth;
- Has a franchisee or licensee operating under the same trade name in the Commonwealth, if the franchisee or licensee is required to obtain a certificate of registration; or
- Owns tangible personal property that is rented or leased to a consumer in the Commonwealth, or offers tangible personal property, on approval, to consumers in the Commonwealth.⁴³

Because OTC's rarely maintain physical places of business in the states in which the sales and occupancy taxes are collected, some OTC's contend that the imposition of taxes on these nonresident OTC's violates the Commerce Clause. Where an OTC has challenged a statute or ordinance based upon constitutional nexus, most courts have rejected this argument. In *City of Charleston v. Hotels.com*, the United States District Court of South Carolina indicated that "proactively market[ing], book[ing], and leas[ing] hotel rooms and other accommodations" is sufficient to provide both a substantial nexus and a physical presence between the taxing jurisdictions and the out-of-state travel companies.⁴⁴ Similarly, in *Expedia Inc. v. City of Columbus*, the Georgia Supreme Court ruled that, because Expedia had voluntarily contracted with accommodations providers in Georgia to collect taxes, it rendered itself accountable to the City's tax authorities for remission of taxes collected.⁴⁵ The Court distinguished the facts in the *Quill* case, noting that in *Quill*,

[T]he state was seeking to force the out-of-state retailer, which had never collected the state's taxes, to collect and remit state use taxes as a matter of law. In the case sub judice, but for the fact that Expedia has willingly inserted itself as a matter of contract into the local taxation scheme designed for hotels and their guests, there would be no dispute."⁴⁶

⁴³ Va. Code § 58.1-612.

⁴⁴ *City of Charleston v. Hotels.com*, 586 F. Supp. 2d 538 (April, 2008)

⁴⁵ *Expedia, Inc. v. City of Columbus*, 285 Ga. 684, 681 S.E.2d 122 (June, 2009).

⁴⁶ *Id.*

The United States District Court in Texas reached a similar conclusion in *City of San Antonio v. Hotels.com*, in response to the nexus argument:

This argument is a red herring because the occupant of the room is already being taxed, and the defendants have already been collecting and remitting taxes on the rooms they sell. If the defendants believed that they had no obligation whatsoever to collect and remit occupancy taxes, they would not have been doing so.⁴⁷

Because some OTC's hire independent inspectors or other representatives to visit hotels in their databases and verify the amenities and quality of the applicable properties, it has also been argued that these OTCs have nexus in those states⁴⁸.

Virginia's nexus statute provides that if an independent contractor, employee, or other representative of an OTC travels to Virginia to solicit sales or business in the Commonwealth, this would provide sufficient nexus to require the out-of-state OTC to collect Virginia's sales and use taxes. However, it is not likely that an OTC inspector's activities would rise to the level of soliciting business, as contemplated by the statute. In an administrative ruling issued by TAX in 1998,⁴⁹ an interior decorator located outside of Virginia periodically visited Virginia customers as a part of its consulting service. The Tax Commissioner determined that "the fact that the taxpayer makes periodic visits to its customers as a part of its consulting services does not, by itself, create nexus with Virginia. However, if the taxpayer's employees, agents or other representatives solicit sales while in Virginia, nexus is created."⁵⁰ Thus, the statute requires that the Virginia visits have a solicitation component involving more than simply meeting and consulting with clients.

Some commentators have also argued that OTC's operating under the "reseller" model are essentially granted property rights in these rooms, which, they argue, gives the OTC physical presence in the state where the room is located.

Inclusion of Separate Services in the Accommodations Tax Base

In Virginia, charges for services are generally exempted from the Retail Sales and Use Tax. Services provided in connection with sales of tangible personal property, however, are taxable. The determination as to whether the amount retained by the OTC constitutes a charge for a service is thus relevant to this discussion.

⁴⁷ *City of San Antonio v. Hotels.com*, 2008 WL 2486043 (W.D.Tex.) (2008).

⁴⁸ Stanford, *supra* note 5, at 322.

⁴⁹ Public Document 98-147 (October 10, 1998).

⁵⁰ *Id.*

OTC's provide their customers a means of reserving hotel rooms in remote locations without having to use the long process that was often undertaken prior to the advent of OTC's, of researching and determining which hotels are located in an area, individually contacting hotels in the area to determine the availability and room rates, analyzing the information to judge which facility is most appropriate, and then calling the selected hotel and making a room reservation.⁵¹ Using an OTC, a customer can locate available hotel accommodations based on specified search criteria, use web-based tools to review, sort, and compare offerings from the identified travel accommodations providers, and have access to the lowest available prices that accommodations providers are willing to accept for the sale of their accommodations. The OTC's also process and transmit payments to hotels on behalf of the customers. OTC's thus argue that they are providing a service to their customers, in that the customers can now obtain this information and make a reservation via the OTC's website. They argue that because these fees are services, taxing them as a component part of the accommodations constitutes a departure from Retail Sales and Use Tax conventions.

While services in Virginia are generally not taxable, there are certain exceptions, particularly the provision of accommodations to transients for less than 90 days. Virginia also authorizes the taxation of additional charges that are bundled together with the rental of accommodations,⁵² and sometimes, the charges are for services that are not directly related to the provision of accommodations and are imposed by unrelated third-parties. For example, in PD 06-1 (January 4, 2006), a rental car that was bundled into the price of a hotel room was subject to Virginia's Retail Sales and Use Tax, despite that the rental car charge was imposed by a separate third party entity.⁵³ Thus, even if these fees are imposed on services that are not directly related to the provision of accommodations, including these services in the tax base would not be a departure from the current policy in Virginia.

Resellers or Intermediaries

There is also little authority in Virginia as to whether OTC's that are operating under the merchant model are serving in the capacity of resellers or intermediaries. OTC's assert that they are not resellers, but rather independent service providers acting for their own accounts, selling services to customers in connection with the customers' purchase of accommodations. For example, Travelocity uses a global distribution system, through which it transmits a customer's information to the hotel in which the customer makes the reservation. The hotel does not give Travelocity the authority to

⁵¹ Memorandum from Jonathan E. Perkel, Senior Vice President of Travelocity, to Roxanne Bland, Multistate Tax Commission (August 20, 2009).

⁵² 23 VAC § 10-210-730(C).

⁵³ Also see *e.g.*, Public Document 95-17 (February 2, 1995), *entire charge for hotel room, breakfast, a round of golf and a complimentary tee gift was subject to the tax.*

assign customers to particular rooms, nor can Travelocity perform any other activities that would indicate ownership or control of the rooms at issue.⁵⁴

Virginia provides neither a statutory nor regulatory definition of “resale.” The law defines a “retail sale” or “sale at retail” as “any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means, whatsoever, of tangible personal property, and any rendition of a taxable service for a consideration.”⁵⁵ The definition further provides that “all sales for resale must be made in strict compliance with regulations applicable to this chapter.”⁵⁶

Nor has the Virginia Supreme Court had occasion to address the issue of whether a third party intermediary marketing rooms online for travelers is a reseller of rooms. Because Virginia’s law is silent as to the definition of resale, absent some interpretation by the Virginia courts, it will be left to the legislature to clarify whether OTC’s are acting in the capacity of resellers.

Possibility of Federal Legislation

In response to the influx of litigation and legislation seeking to declare the amount retained by OTCs as taxable, OTC’s are currently seeking federal legislation to prevent this action. Language for a federal bill, referred to as the “Internet Travel Tax Fairness Act, that would prevent states and localities from imposing their sales, use, or occupancy taxes on the online travel companies’ reservation fees has been circulating on Capitol Hill. Under the proposal, taxes on hotel accommodations would be computed based on the amount that the hotel receives in payment from the hotel occupant, rather than the total amount that the online travel company receives. The proposal is drafted to preclude hotels and other accommodation providers from creating a joint venture or affiliate to shelter amounts paid by consumers from occupancy tax. Under the proposal, states have discretion to tax online travel booking services, provided the state generally taxes services.

In the past, OTC’s have made similar attempts to shield the differential from state and local taxes through federal legislation. During Senate Finance Committee proceedings, several OTC’s proposed an amendment to the American Recovery and Reinvestment Act of 2009, to eliminate hotel room rental taxes and sales taxes associated with room rentals, whenever the rentals were facilitated through a travel agent or OTC, but the amendment was ultimately not offered. Prior to that, during the 2007 and 2008 sessions of Congress, similar amendments were withdrawn from consideration. As of the completion of this study, the Internet Travel Tax Fairness Act is still being drafted, and has yet to be introduced in Congress.

⁵⁴ Perkel, *supra* note 53 at 1.

⁵⁵ Va. Code § 58.1-602.

⁵⁶ *Id.*

Clearly, if federal legislation prohibits states from imposing the tax on these fees, a Virginia statute authorizing the imposition of these taxes would be pre-empted.

Right of Localities to Impose the Transient Occupancy Tax Directly on Consumers

Virginia law authorizes counties, cities, and towns to impose transient occupancy taxes through their local ordinances. The language used in the enabling statutes to grant counties the authority to impose these taxes differs from the language of the enabling statutes granting cities these powers. *Va. Code* § 58.1-3819, subsection (A) provides that any county, by duly adopted ordinance, may levy a transient occupancy tax on hotels, motels. . .and other facilities offering guest rooms.” (*Emphasis added*). Subsection (D) of the statute provides:

[A]ny county, city or town which requires local hotel and motel businesses, or any class thereof, to collect, account for and remit to such locality a local tax imposed on the **consumer**, may allow such businesses a commission for such service in the form of a deduction from the tax remitted.” (*Emphasis added*)

Because there are specific references to hotels and consumers in subsections A and D respectively, the Virginia Supreme Court has interpreted these provisions to authorize counties to enact transient occupancy tax ordinances holding either the consumer, the hotel, or both liable for the payment of the taxes.⁵⁷ Thus, an Arlington County ordinance that allowed a hotel to collect the tax from the consumer, but required the tax to be accounted for and paid by the hotel, regardless of whether the hotel collected the tax from the consumer of the services was deemed permissible by the Court.⁵⁸

By contrast, *Va. Code*, § 58.1-3840 provides in part: “[A]ny city or town having general taxing powers...may impose excise taxes on ...**transient room rentals.**” (*Emphasis added*). Because the language imposes the tax on transient room rentals, it is unclear whether this gives cities the authority to impose the tax on hotels only, on the consumer only, or, as with counties, on both entities. The language does not specifically preclude any of these scenarios. Rather, the fact that the tax may be imposed on “transient room rentals” seems to grant cities and towns broader authority to tax either the hotel or the consumer.

Va. Code § 15.2-1104 appears to grant municipal corporations broad discretion to tax property, persons, and other subjects of taxation in order to raise money to pay the municipality's debts, defray the expenses, and accomplish the purposes and

⁵⁷ *Delta Air Lines, Inc. v. County Board of Arlington County*, 242 Va. 209, 409 S.E. 2d 130 (1991).

⁵⁸ *Id.*

perform the functions of the municipality. The statute authorizes municipalities to tax these entities “in such manner as the municipal corporation deems necessary or expedient.”

Read together, these provisions could be interpreted to authorize cities and towns to enact transient occupancy tax ordinances holding the consumer, the hotel, or both liable for the payment of the taxes. The fact that subsection (D) of the counties’ enabling statute makes reference to cities and towns, in addition to counties, lends support to this interpretation.

Nevertheless, the Virginia Supreme Court has not ruled on the issue of whether cities and towns may impose excise taxes on transient room rentals upon either hotels or the consumer. If the Virginia Supreme Court were to interpret *Va. Code* § 58.1-3840’s reference to “transient room rentals” to allow a direct tax only on hotels, then city and town ordinances authorizing the tax directly on consumers could be declared invalid. Because there is little guidance as to how “transient room rentals” should be interpreted, the Virginia General Assembly should exercise caution in conforming the language in the county enabling statute to mirror the language of the enabling statute for cities and towns.

Several local ordinances impose the tax directly on the transient and mandate that the accommodation provider collect the tax. In most of these ordinances, the tax is deemed “held in trust” until the accommodations provider remits the tax to the local taxing jurisdiction.⁵⁹ Because the vast majority of ordinances tend to address whether these taxes are to be held in trust, this does not need to be clarified in the enabling statutes.

⁵⁹ See e.g., ALEXANDRIA, VA., CODE §§ 3-2-142 and 3-2-144; ALTA VISTA, VA., CODE §§ 70-82 and 70-85; CHARLOTTESVILLE, VA., CODE §§ 30-253 and 30-255; NORFOLK, VA., CODE §§ 24-234 and 24-235; VIRGINIA BEACH, VA., CODE §§ 35-159 and 35-161; *But see* ARLINGTON, VA., CODE § 40-2; FAIRFAX, VA., CODE § 4-13-2 (*imposing the tax on ‘every transient,’ but not specifying that the tax is to be collected by the accommodation provider and held in trust*).

SECTION IV IMPACT OF TAXING THE FULL RETAIL PRICE

Fiscal Impact on States and Localities

Breakdown of State and Local Impact

	FY 2012	FY 2013	FY 2014
Sales and Use Tax Breakdown			
<i>General Fund-Unrestricted</i>	\$1.08	\$1.12	\$1.15
<i>General Fund-Restricted</i>	\$0.43	\$0.44	\$0.46
<i>Transportation Trust Fund</i>	\$0.22	\$0.23	\$0.24
<i>Local Option</i>	\$0.44	\$0.46	\$0.47
Total Sales and Use Tax	\$2.17	\$2.24	\$2.31
Local Transient Occupancy Tax	\$2.43	\$2.51	\$2.59
Total Sales and Transient Occupancy Taxes	\$4.61	\$4.76	\$4.91

Total State and Local Impact of Sales and Transient Occupancy Taxes

	FY 2012	FY 2013	FY 2014
State Impact	\$1.73	\$1.79	\$1.84
Local Impact (Transient Occupancy and Local Option)	\$2.88	\$2.97	\$3.06
Total Sales and Transient Occupancy Taxes	\$4.61	\$4.76	\$4.91

*Estimates were rounded to the nearest \$10,000.

Total State and Local Impact

There are approximately 233 online travel agencies doing business in the United States. Sales transacted through OTC's make up approximately 10.3% of all hotel transactions in Virginia.⁶⁰ The difference between the prices the accommodations providers charge the OTC's and the final price the OTC's charge consumers has been estimated to fall between 25 and 40%.⁶¹ As shown in the table above, assuming a retail mark-up of 32.5 %, if the amount retained by OTC's were subject to tax effective July 1, 2011, Virginia's state and local governments would experience an increase in revenue totaling \$4.61 million in Fiscal Year 2012, \$4.76 million in Fiscal Year 2013, and \$4.91 million in Fiscal Year 2014. This total estimate includes revenue from the state and

⁶⁰ TNS TravelsAmerica, via the Virginia Tourism Corporation ("VTC"). In a similarly conducted analysis, Florida estimated in Fiscal Year 2009 that approximately 11.7% of hotel bookings were made through OTC's and that this amount would rise to 13.5% in Fiscal Year 2010. See SB 156 and HB 335, Florida Revenue Estimating Conference, March 19, 2010. Additionally, the market research group PhocusWright estimates that in 2007, about 11.1% of hotel bookings were transacted through OTC's. See Mazerov, *supra*, note 2 at 11.

⁶¹ Stanford, *supra* note 5 at 320.

local Retail Sales and Use Tax and the local transient occupancy taxes. The Virginia Department of Taxation has not factored in any potential revenue loss resulting from OTC's that are not subject to the tax because they lack nexus or OTC's that boycott a state or locality as a result of legislation imposing the tax on the mark-up fees.

Total Retail Sales and Use Tax Impact

Using the same assumptions as set forth above, if the amount retained by OTC's were subject to tax in Virginia, there would be an increase in Retail Sales and Use Tax revenue of \$2.17 million in Fiscal Year 2012, \$2.24 million in Fiscal Year 2013, and \$2.31 million in Fiscal Year 2014. This estimate includes revenue from the 1% local Retail Sales and Use Tax.

Local Tax Revenues

Using the same assumptions as set forth above, if the amount retained by OTC's were subject to tax in Virginia's localities, there would be an increase in 1% local sales taxes and occupancy taxes totaling \$2.88 million in Fiscal Year 2012, \$2.97 million in Fiscal Year 2013, and \$3.06 million in 2014. This total includes an increase in transient occupancy tax revenues of \$2.43 million in Fiscal Year 2012, \$2.51 million in Fiscal Year 2013, and \$2.59 million in Fiscal Year 2014.

Impact on OTC's

Not surprisingly, online travel companies oppose the imposition of state and local taxes on their mark-ups, primarily because they believe that filing local tax returns in 7,000 local jurisdictions across the country, each with varying tax rates and compliance requirements, would create an unmanageable and costly administrative burden.⁶² Some OTC's have indicated that they would need to change their software in order for the tax to be properly calculated, collected, reported, and remitted on the fees for booking services.⁶³ For example, while fees for hotel rooms are generally refunded if the booking for the accommodation is canceled prior to the provision of accommodations, generally, the fees OTC's impose for booking services are non-refundable.⁶⁴ Some OTC's also argue that local occupancy tax ordinances are designed to apply to hotel owners and operators that have physical premises in the various taxing jurisdictions, and therefore may reasonably be expected to know the tax rates and requirements for the jurisdiction, and are better equipped to comply with the tax collection and filing requirements in each jurisdiction.

In Virginia, the local sales and use tax rates are uniform across the state. Local transient occupancy tax rates, however, vary across the state. If Senate Bill 452 were

⁶² See Perkel, *supra*, note 53 at 2.

⁶³ Leavy, *supra* note 3 at 7.

⁶⁴ *Id.*

enacted, uniform local sales tax rates would likely ease the difficulty in tracing and complying with the tax filing and collection requirements in Virginia localities, but due to the varying transient occupancy tax rates, some difficulty would remain.

OTC's are also concerned that this type of legislation may force them to reveal the negotiated discount rate at which the accommodation providers make their rooms available. OTC's argue that if this information is disclosed to their customers, it may discourage the use of OTC's and could be detrimental to their business model. This is not an issue under Senate Bill 452 as drafted because the bill only requires that the accommodations intermediary separately state the amount of the tax on the bill and add the tax to the room charge. There is no requirement that the tax be separately itemized for each individual charge.

Potential to Reach Traditional Travel Agents

Senate Bill 452 defines "accommodations intermediary" as any person, other than an accommodations provider, that facilitates the sale of an accommodation and charges a room charge to the customer." "Facilitating the sale" is intended to include brokering, coordinating, or in any other way arranging for the purchase of, or the right to use accommodations by a customer. The legislation, as currently written, makes no distinction between intermediaries using the traditional travel agent model and those operating under the merchant model.

The primary difference between an intermediary operating under the traditional travel agent model and the merchant model is that the travel agent is paid a commission from an accommodations provider for booking a room for a customer, while the merchant charges the customer, rather than the accommodations provider, a service fee.⁶⁵ While some travel agents may deviate from this model and charge customers an upfront fee, these agents most likely do not have a contract with the provider.

The Virginia Department of Taxation understands that the intent of Senate Bill 452 was to reach intermediaries that use the merchant model. The bill was not intended to reach intermediaries operating under the travel agent model. Nevertheless, the bill's language arguably encompasses traditional travel agents, consolidators, and other brokers, and would exceed the intended scope of the bill. If the legislature does not intend to reach intermediaries operating under the travel agent model, consolidators, and other brokers, the definition for "accommodations intermediary" provided in Senate Bill 452 must be revised. The Department recommends that the following revisions be made for any proposal introduced during the 2011 or subsequent legislative sessions:

Accommodations intermediary means any person or entity, other than an accommodations provider, that facilitates the sale of an accommodation, acts as

⁶⁵ Hearing Officer Report, *supra* note 42.

the merchant of record, and imposes an accommodations fee on the customer, which it retains as compensation for facilitating the sale. For purposes of this definition, 'facilitates the sale' includes brokering, coordinating, or in any other way arranging for the purchase of, or the right to use accommodations by a customer.

Impact on Time Shares and other Vacation Rentals

Generally, Virginia law treats the rental of vacation homes the same as the rental of hotel rooms and other accommodations for state sales tax purposes. Under *Va. Code* § 58.1-602, the Retail Sales and Use Tax is imposed on the rental of any room or rooms, lodgings, or accommodations furnished to transients for less than 90 continuous days, which includes charges imposed by any "hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, **or any other place in which rooms, lodging, space or accommodations are regularly furnished to transients for a consideration.**" (*Emphasis added*). Provided the rental accommodations are furnished to the transient for less than 90 continuous days, and the transient has not obtained an interest in the property,⁶⁶ the rental of vacation properties will generally be subject to the Retail Sales and Use Tax in Virginia.

County transient occupancy taxes apply to a more limited category of accommodations. *Va. Code* § 58.1-3819 authorizes localities to impose a transient occupancy tax on hotels, motels, boarding houses, travel campgrounds, and other facilities offering guest rooms rented out for continuous occupancy. Vacation rentals are not included in the list, and are not subject to county occupancy taxes. This conclusion is supported by the fact that a bill was introduced during the 2010 General Assembly Session that would have added single-family residences to the list of accommodations rentals that are subject to the county occupancy tax.⁶⁷ The bill was defeated in the House.

The enabling statute authorizing the imposition of transient occupancy taxes in cities and towns does not provide an enumerated list of accommodations that are subject to transient occupancy tax. *Va. Code* § 58.1-3840 authorizes the imposition of transient occupancy taxes on "transient room rentals," but the statute does not provide a definition for this term. Thus, there is no statutory provision prohibiting localities from imposing the tax on the rental of vacation homes.

If Virginia's legislature changed the law to render the mark-up subject to the transient occupancy tax, vacation home rentals would not be impacted. As counties are not currently authorized to impose the transient occupancy tax on vacation rentals,

⁶⁶ *Va. Code* § 58.1-602 excludes from the definition of "transient" "a purchaser of camping memberships, time-shares, condominiums, or other similar contracts or interests that permit the use of, or constitute an interest in, real estate. See also PD 06-145 (December 8, 2006).

⁶⁷ See S.B. 342, 2010 Gen. Assem. Reg. Sess. (Va. 2010).

rental properties located in counties would not be subject to the tax. Nor would vacation rental properties located in cities and towns be impacted by this legislation. Transactions for the rental of vacation properties are generally structured so that the brokerage fee is built into the total cost of the rental. For example, in Virginia Beach, if an owner of a vacation rental hopes to net \$1,000 and the broker hopes to net \$100 for the rental, the broker will set the rental price at \$1,100, and the family renting will be subject to Virginia Beach's transient occupancy tax on the full \$1,100 price. Because the mark-up fee is already included in the taxable base, legislation taxing the mark-up fee would have no visible impact in these cities.

Further, under their current business models, OTC's do not market vacation rental homes. Unless OTC's changed their business models to advertise for the rental of vacation homes, these properties would not be impacted by legislation imposing sales and occupancy taxes on the amount retained by OTC's.

Impact on the Hotel Industry

Senate Bill 452 outlined the process by which accommodation providers and intermediaries would be required to collect and remit the sales and occupancy taxes, as well as the liability imposed upon each party. The bill required the accommodation provider to collect from the intermediary the discount room charge, any additional charges imposed for use of the room, and any taxes associated with these charges, and to remit those taxes to the Department of Taxation or the local taxing authority. The bill specified that the accommodations provider would not be relieved of liability for additional charges imposed in connection with the use of the room. The bill also required that the accommodations provider separately state the amount of the tax on the bill or invoice and add the tax to the discount room charge, if applicable. The bill imposed the same requirements on the OTC with respect to the marked-up charge and the applicable taxes. Because the statute made each party independently liable for the charges they imposed and the taxes associated with those charges, the bill should not place any additional administrative burdens or liability on hotels.

Potential Unintended Consequences

OTC Boycott

The enactment of a bill that imposes the Retail Sales and Use Tax or local occupancy taxes on the OTC's mark-up may have unintended consequences that impact states, localities, and individual consumers. Opponents of the various proposals to tax these charges have contended that subjecting these fees to taxation could compel OTCs to stop doing business in low volume cities where the fees are subject to tax. There have been at least two instances in which OTC's have pulled out of localities in the midst of litigation or as a result of rulings that are favorable to the localities. For example, in response to the Georgia Supreme Court holding that the OTC's facilitation fees were subject to Columbus' occupancy tax, several leading intermediaries removed

Columbus from their websites, prompting the city to file a court motion seeking damages for lost tax revenue from the delisting.⁶⁸ A study conducted by two professors at the D. Abbott Turner School of Business at Columbus State University estimated that the Columbus economy lost \$9.3 million in revenue and \$1.4 million in taxes for the 12 months ending June 2009 as a result of this delisting.⁶⁹ Similarly, following South San Francisco's enactment of an ordinance taxing these fees, several OTC's removed hotels in the city from their websites.

Although OTC's are less likely to boycott counties and cities with high volumes of hotel traffic, smaller localities may be susceptible to removal from the OTC's websites, which could result in a decrease in local occupancy tax revenues in those localities.

Potential for Increased Costs

Enactment of this or a similar bill could also potentially affect accommodation pricing, and may ultimately drive down the number of hotel rooms and similar accommodations booked via OTC's. OTC's currently retain a portion of the total retail price imposed upon the consumer, and do not collect tax on this amount. If the law is changed in Virginia to require that this amount be taxed, and the cost is passed on to the consumer, this may trigger an increase in the total retail price the consumer is required to pay. An increase in costs could result in a decrease in accommodations booked online.

Ameliorating any Negative Results

Ideally, any proposals that are introduced in the future would seek to ameliorate the concerns that have been raised by OTC's and other opponents of the legislation, as well as to further the goals that have been identified by local governments and other advocates of legislation imposing the tax on the mark-up fee. Many of the opponents' concerns are in direct conflict with the proponents' goals for future legislation.

Transparency

Advocates of the proposals introduced in the 2010 session of the General Assembly reportedly desire transparency in Virginia's taxing system, and believe that in order for this to be accomplished, the actual charge for the room and the amount collected for taxes from the consumer must be clearly stated on bills and statements issued to consumers. Under the current system, consumers, hotels, and state and local taxing officials are not informed of the actual amount retained by OTC's after the discounted room charge and applicable taxes and fees are remitted to the hotel. Taxes and fees are bundled together as one line item. Thus, consumers cannot determine how much they are paying in tax on these transactions, and states and localities are

⁶⁸ Henchman, *supra* note 41 at 632.

⁶⁹ Cole, Robert K. "Bathing in the Hotel Merchant Tax Quagmire.

unable to determine with accuracy whether they are receiving the full amount of tax to which they are entitled.

This was the rationale behind the class action lawsuit filed in King County, Washington, and several other lawsuits that have been filed on behalf of consumers, rather than localities. The Washington suit was brought against OTC's seeking compensation on behalf of consumers, alleging that OTC's collect taxes on the retail sales price paid by the customer, but only remit taxes on the wholesale rate paid to the hotel. The complaint alleged violation of the Washington Consumer Protection Act, breach of contract, and common law conversion. Both parties filed motions for summary judgment, and the court granted summary judgment for the consumers on the breach of contract claim on May 28, 2009, finding that Expedia committed breach of contract for not stating that its "service fee" did not cover costs, but rather constituted the company's profit.⁷⁰ On July 8, 2009 the parties reached a proposed settlement on all other issues, so the court did not rule as to the Consumer Protection violation claims.⁷¹

The issue becomes whether online intermediaries are violating some federal or state law in bundling the service charges and taxes together, so as not to disclose the actual amount of taxes the consumer is paying. The Federal Trade Commission Act prohibits unfair or deceptive acts or practices, and requires that advertising be truthful and non-deceptive, that advertisers have evidence to support claims made in their advertisements, and that advertisements be fair.⁷² An FTC Policy Statement on Deception, issued in 1983, outlines the elements of a valid deception case. In order to violate the Federal Trade Commission Act, first, there must be a representation, omission or practice that is likely to mislead the consumer. The Federal Trade Commission examines the practice from the perspective of a consumer acting reasonably in the circumstances. Second, the representation, omission, or practice must be material, meaning that it is likely to affect the consumer's conduct or decision with regard to a product or service. Thus far, none of the lawsuits that have been filed, asserting that the additional amounts the OTC's collect are subject to tax, have alleged violation of the Federal Trade Commission Act.

Instead, frequently localities have alleged that the OTC's are violating the state's consumer protection or unfair trade statutes.⁷³ The courts have yet to rule on this question. As the prohibited acts differ from state to state, the determination as to whether an OTC's bundling of service charges and taxes is in violation of a state's consumer protection or unfair trade practice act will turn on the specific prohibitions and

⁷⁰ *In re Expedia Hotel Taxes and Fees*, Superior Court of Washington & King Co., File #05-2-02060-1SEA (Dec. 1, 2009).

⁷¹ Priceline, Com *supra* note 73.

⁷² 15. U.S.C.A. § 45.

⁷³ See e.g., *City of Charleston v. Hotels.com*, 586 F. Supp.2d. 538(2008), *alleging violation of the South Carolina Unfair Trade Practices Act*; *City of Fairview Heights v. Orbitz, Inc.* WL 6319817 (S.D. Ill. July 2006), *alleging violation of the Illinois Consumer Fraud and Deceptive Practices Act*; *Wake County v. Hotels.com* LP 2007 NCBC 35, *asserting claim for unfair and deceptive trade practices*.

language of the individual statute. Virginia's Consumer Protection Act prohibits a list of over fifty specified practices, including misrepresenting goods or services as those of another; misrepresenting that goods or services are of a particular standard, quality, grade, style or model; or using any deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction.⁷⁴ The statute does not specifically prohibit the bundling of service charges and taxes.

Even if this practice does not run afoul of any federal or state consumer protection laws, advocates contend that the exact amount collected from the consumer and remitted for sales and local transient occupancy taxes should be stated separately. They argue that separately itemizing these amounts is beneficial to states and localities for purposes of auditing, and allows consumers to be fully informed as to the amount of tax they are paying on these transactions. By contrast, OTC's have an interest in ensuring that the amount of the mark-up fee is not disclosed to protect the confidentiality of their price structure.⁷⁵

Senate Bill 452 required that for the retail sale of any accommodations, the accommodations provider and accommodations intermediary were both required to separately state the amount of the tax on the bill, invoice, or similar documentation. The bill did not mandate that every individual charge be separately itemized.

If the legislature wants to ensure that the exact amount collected from the consumer is stated separately, Senate Bill 452 should be revised to require that the accommodations intermediary separately itemize the discount room charge, any additional charges, and the accommodations fee, and separately itemize the tax for each individual charge.

Equity

Advocates of the 2010 proposal are equally concerned with ensuring that consumers paying the same price for rooms in any given jurisdiction are charged the same transient occupancy and sales taxes. Further, equity dictates that resident accommodations providers not be placed at a competitive disadvantage from online travel companies.

Opponents of this bill would contend that, rather than accomplishing the goals of equity, Senate Bill 452 would upset what is currently a level playing field. They would argue that OTC's are engaged in the provision of the service of facilitating room reservations, which is separate from the services associated with the room rental. Further, under the merchant model, OTC customers are charged a reduced rate for the occupancy of a room (the discounted room rate). Opponents would argue that

⁷⁴ Va. Code, § 59.1-196 *et seq.*

⁷⁵ See e.g., www.travelocity.com. *Information about Taxes, Governmental Fees, Tax Recovery Charges and Service Fees* ("Combining the Tax Recovery Charge with our Processing Service Fee enables us to maintain the opaque nature of the 'prepaid' rate").

legislation taxing an OTC customer on the full amount charged on the invoice, including the separate facilitation fee would effectively impose a tax on a separate service that would not otherwise be taxable, and thus, produce inequitable results for the OTC customer.

Predictability and Stability of Local Revenues:

States and localities are also concerned with the need to predict the revenue stream arising from room sales, as these predictions are necessary in determining how much local tax revenue to invest in local and regional tourism initiatives and preparing a balanced budget. Localities believe that published room rates are almost meaningless when taxes are computed on wholesale rates that are not disclosed to the consumer and that bear no relation to the room rate quoted to the ultimate consumer. Further, governments are concerned with a perceived erosion of state and local revenues.

As drafted, Senate Bill 452 lacks provisions requiring the separate itemization of every charge and every tax imposed upon the hotel patron. Nevertheless, because the statute, as drafted, would require the accommodations intermediary to remit tax on the entire wholesale amount, published hotel rates would provide a more reliable indicator of local and state taxes arising from the sale of accommodations.

Although the imposition of the tax on mark-up fees imposed by OTC's would place localities in a better position to predict the revenue streams from hotel accommodations, the legislature should balance this potential benefit with the OTC's concerns of keeping confidential their room discount amounts and protecting their business models. The legislature should also balance the increased revenue that would result from this bill with the potential for a decrease in state and local revenues in those states or localities where mark-up fees are subject to tax.

SECTION V CONCLUSION

The taxability of mark-up fees imposed by online travel companies continues to be a controversial issue. Any consideration as to this proposal must be concerned with how the constitutional nexus requirements would impact the potential revenue for the state and localities, whether the tax is consistent with Virginia's tax policies, whether the bill would bring in additional revenue to states and localities, and how the bill would impact businesses and citizens of the Commonwealth. As indicated in this study, there are no definitive answers to these issues.

Appendix I
Senate Bill 452 Text

2010 SESSION

SENATE SUBSTITUTE

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SENATE BILL NO. 452
AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Finance
on January 27, 2010)

(Patron Prior to Substitute—Senator Whipple)

A BILL to amend and reenact §§ 58.1-602, 58.1-3819, 58.1-3822, 58.1-3823, 58.1-3824, 58.1-3825, 58.1-3825.2, 58.1-3826, 58.1-3842, and 58.1-3843 of the Code of Virginia, Chapter 265 of the Acts of Assembly of 1977, as amended, carried by reference in the Code of Virginia as § 58.1-3820, and Chapter 436 of the Acts of Assembly of 1990, as amended, carried by reference in the Code of Virginia as § 58.1-3821, and to amend the Code of Virginia by adding in Article 6 of Chapter 38 of Title 58.1 a section numbered 58.1-3818.8, relating to taxes on the rental of rooms, lodgings, accommodations, or similar spaces.

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-602, 58.1-3819, 58.1-3822, 58.1-3823, 58.1-3824, 58.1-3825, 58.1-3825.2, 58.1-3826, 58.1-3842, and 58.1-3843 of the Code of Virginia, Chapter 265 of the Acts of Assembly of 1977, as amended, carried by reference in the Code of Virginia as § 58.1-3820, and Chapter 436 of the Acts of Assembly of 1990, as amended, carried by reference in the Code of Virginia as § 58.1-3821, are amended and reenacted, and that the Code of Virginia is amended by adding in Article 6 of Chapter 38 of Title 58.1 a section numbered 58.1-3818.8 as follows:

§ 58.1-602. Definitions.

As used in this chapter, unless the context clearly shows otherwise, the term or phrase:

"Accommodations" means any room or rooms, lodgings, or accommodations in any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for a consideration.

"Accommodations fee" means the room charge less the discount room charge, if any, provided that the accommodations fee shall not be less than \$0.

"Accommodations intermediary" means any person, other than an accommodations provider, that facilitates the sale of an accommodation and charges a room charge to the customer. For purposes of this definition, "facilitates the sale" includes brokering, coordinating, or in any other way arranging for the purchase of, or the right to use accommodations by a customer.

"Accommodations provider" means any person that furnishes accommodations to the general public for compensation. The term "furnishes" includes the sale of use or possession, or the sale of the right to use or possess.

"Advertising" means the planning, creating, or placing of advertising in newspapers, magazines, billboards, broadcasting and other media, including, without limitation, the providing of concept, writing, graphic design, mechanical art, photography and production supervision. Any person providing advertising as defined herein shall be deemed to be the user or consumer of all tangible personal property purchased for use in such advertising.

"Amplification, transmission and distribution equipment" means, but is not limited to, production, distribution, and other equipment used to provide Internet-access services, such as computer and communications equipment and software used for storing, processing and retrieving end-user subscribers' requests.

"Business" includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either directly or indirectly.

"Cost price" means the actual cost of an item or article of tangible personal property computed in the same manner as the sales price as defined in this section without any deductions therefrom on account of the cost of materials used, labor, or service costs, transportation charges, or any expenses whatsoever.

"Custom program" means a computer program which is specifically designed and developed only for one customer. The combining of two or more prewritten programs does not constitute a custom computer program. A prewritten program that is modified to any degree remains a prewritten program and does not become custom.

"Discount room charge" means the full amount charged by the accommodations provider to the accommodations intermediary for furnishing the accommodation.

"Distribution" means the transfer or delivery of tangible personal property for use, consumption, or storage by the distributee, and the use, consumption, or storage of tangible personal property by a person who has processed, manufactured, refined, or converted such property, but does not include the transfer or delivery of tangible personal property for resale or any use, consumption, or storage otherwise exempt under this chapter.

"Gross proceeds" means the charges made or voluntary contributions received for the lease or rental

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60 of tangible personal property or for furnishing services, computed with the same deductions, where
61 applicable, as for sales price as defined in this section over the term of the lease, rental, service, or use,
62 but not less frequently than monthly.

63 "Gross sales" means the sum total of all retail sales of tangible personal property or services as
64 defined in this chapter, without any deduction, except as provided in this chapter. "Gross sales" shall not
65 include the federal retailers' excise tax or the federal diesel fuel excise tax imposed in § 4091 of the
66 Internal Revenue Code if the excise tax is billed to the purchaser separately from the selling price of the
67 article, or the Virginia retail sales or use tax, or any sales or use tax imposed by any county or city
68 under § 58.1-605 or 58.1-606.

69 "Import" and "imported" are words applicable to tangible personal property imported into the
70 Commonwealth from other states as well as from foreign countries, and "export" and "exported" are
71 words applicable to tangible personal property exported from the Commonwealth to other states as well
72 as to foreign countries.

73 "In this Commonwealth" or "in the Commonwealth" means within the limits of the Commonwealth
74 of Virginia and includes all territory within these limits owned by or ceded to the United States of
75 America.

76 "Integrated process," when used in relation to semiconductor manufacturing, means a process that
77 begins with the research or development of semiconductor products, equipment, or processes, includes
78 the handling and storage of raw materials at a plant site, and continues to the point that the product is
79 packaged for final sale and either shipped or conveyed to a warehouse. Without limiting the foregoing,
80 any semiconductor equipment, fuel, power, energy, supplies, or other tangible personal property shall be
81 deemed used as part of the integrated process if its use contributes, before, during, or after production,
82 to higher product quality, production yields, or process efficiencies. Except as otherwise provided by
83 law, such term shall not mean general maintenance or administration.

84 "Internet" means collectively, the myriad of computer and telecommunications facilities, which
85 comprise the interconnected world-wide network of computer networks.

86 "Internet service" means a service that enables users to access proprietary and other content,
87 information electronic mail, and the Internet as part of a package of services sold to end-user
88 subscribers.

89 "Lease or rental" means the leasing or renting of tangible personal property and the possession or use
90 thereof by the lessee or renter for a consideration, without transfer of the title to such property.

91 "Manufacturing, processing, refining, or conversion" includes the production line of the plant starting
92 with the handling and storage of raw materials at the plant site and continuing through the last step of
93 production where the product is finished or completed for sale and conveyed to a warehouse at the
94 production site, and also includes equipment and supplies used for production line testing and quality
95 control. The term "manufacturing" shall also include the necessary ancillary activities of newspaper and
96 magazine printing when such activities are performed by the publisher of any newspaper or magazine
97 for sale daily or regularly at average intervals not exceeding three months.

98 The determination whether any manufacturing, mining, processing, refining or conversion activity is
99 industrial in nature shall be made without regard to plant size, existence or size of finished product
100 inventory, degree of mechanization, amount of capital investment, number of employees or other factors
101 relating principally to the size of the business. Further, "industrial in nature" shall include, but not be
102 limited to, those businesses classified in codes 10 through 14 and 20 through 39 published in the
103 Standard Industrial Classification Manual for 1972 and any supplements issued thereafter.

104 "Modular building" means, but shall not be limited to, single and multifamily houses, apartment
105 units, commercial buildings, and permanent additions thereof, comprised of one or more sections that are
106 intended to become real property, primarily constructed at a location other than the permanent site, built
107 to comply with the Virginia Industrialized Building Safety Law (§ 36-70 et seq.) as regulated by the
108 Virginia Department of Housing and Community Development, and shipped with most permanent
109 components in place to the site of final assembly. For purposes of this chapter, a modular building shall
110 not include a mobile office as defined in § 58.1-2401 or any manufactured building subject to and
111 certified under the provisions of the National Manufactured Housing Construction and Safety Standards
112 Act of 1974 (42 U.S.C. § 5401 et seq.).

113 "Modular building manufacturer" means a person or corporation who owns or operates a
114 manufacturing facility and is engaged in the fabrication, construction and assembling of building
115 supplies and materials into modular buildings, as defined in this section, at a location other than at the
116 site where the modular building will be assembled on the permanent foundation and may or may not be
117 engaged in the process of affixing the modules to the foundation at the permanent site.

118 "Modular building retailer" means any person who purchases or acquires a modular building from a
119 modular building manufacturer, or from another person, for subsequent sale to a customer residing
120 within or outside of the Commonwealth, with or without installation of the modular building to the
121 foundation at the permanent site.

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122 "Motor vehicle" means a "motor vehicle" as defined in § 58.1-2401, taxable under the provisions of
123 the Virginia Motor Vehicles Sales and Use Tax Act (§ 58.1-2400 et seq.) and upon the sale of which all
124 applicable motor vehicle sales and use taxes have been paid.

125 "Occasional sale" means a sale of tangible personal property not held or used by a seller in the
126 course of an activity for which he is required to hold a certificate of registration, including the sale or
127 exchange of all or substantially all the assets of any business and the reorganization or liquidation of
128 any business, provided such sale or exchange is not one of a series of sales and exchanges sufficient in
129 number, scope and character to constitute an activity requiring the holding of a certificate of registration.

130 "Open video system" means an open video system authorized pursuant to 47 U.S.C. § 573 and, for
131 purposes of this chapter only, shall also include Internet service regardless of whether the provider of
132 such service is also a telephone common carrier.

133 "Person" includes any individual, firm, copartnership, cooperative, nonprofit membership corporation,
134 joint venture, association, corporation, estate, trust, business trust, trustee in bankruptcy, receiver,
135 auctioneer, syndicate, assignee, club, society, or other group or combination acting as a unit, body
136 politic or political subdivision, whether public or private, or quasi-public, and the plural of such term
137 shall mean the same as the singular.

138 "Prewritten program" means a computer program that is prepared, held or existing for general or
139 repeated sale or lease, including a computer program developed for in-house use and subsequently sold
140 or leased to unrelated third parties.

141 "Railroad rolling stock" means locomotives, of whatever motive power, autocars, railroad cars of
142 every kind and description, and all other equipment determined by the Tax Commissioner to constitute
143 railroad rolling stock.

144 "Retail sale" or a "sale at retail" means a sale to any person for any purpose other than for resale in
145 the form of tangible personal property or services taxable under this chapter, and shall include any such
146 transaction as the Tax Commissioner upon investigation finds to be in lieu of a sale. All sales for resale
147 must be made in strict compliance with regulations applicable to this chapter. Any dealer making a sale
148 for resale which is not in strict compliance with such regulations shall be personally liable for payment
149 of the tax.

150 The terms "retail sale" and a "sale at retail" shall specifically include the following: (i) the sale or
151 charges for any ~~room or rooms, lodgings, or accommodations~~ furnished to transients for less than 90
152 continuous days ~~by any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any~~
153 ~~other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for~~
154 ~~a consideration;~~ (ii) sales of tangible personal property to persons for resale when because of the
155 operation of the business, or its very nature, or the lack of a place of business in which to display a
156 certificate of registration, or the lack of a place of business in which to keep records, or the lack of
157 adequate records, or because such persons are minors or transients, or because such persons are engaged
158 in essentially service businesses, or for any other reason there is likelihood that the Commonwealth will
159 lose tax funds due to the difficulty of policing such business operations; and (iii) the separately stated
160 charge made for automotive refinish repair materials that are permanently applied to or affixed to a
161 motor vehicle during its repair. The Tax Commissioner is authorized to promulgate regulations requiring
162 vendors of or sellers to such persons to collect the tax imposed by this chapter on the cost price of such
163 tangible personal property to such persons and may refuse to issue certificates of registration to such
164 persons.

165 *In the case of the "retail sale" of any accommodations made by an accommodations provider in*
166 *which an accommodations intermediary does not facilitate the sale of the accommodations, the*
167 *accommodations provider shall collect the retail sales and use taxes imposed in accordance with this*
168 *chapter, computed on the total charges for the accommodations, and shall remit the same to the*
169 *Department and shall be liable for the same.*

170 *In the case of the "retail sale" of any accommodations in which an accommodations intermediary*
171 *facilitates the sale, (i) the accommodations provider shall collect from the accommodations intermediary*
172 *the retail sales and use taxes imposed in accordance with this chapter, computed on the discount room*
173 *charge, and shall remit the same to the Department and shall be liable for the same, and (ii) the*
174 *accommodations intermediary shall collect the retail sales and use taxes imposed in accordance with*
175 *this chapter, computed on the room charge, and shall (a) remit the portion of such taxes that relate to*
176 *the accommodations fee to the Department and shall be liable for the same, and (b) remit the portion of*
177 *such taxes that relate to the discount room charge to the accommodations provider for purposes of*
178 *payment of the tax under clause (i) and shall be liable for the same.*

179 *In the case of the "retail sale" of any accommodations in which an accommodations intermediary*
180 *facilitates the sale, nothing herein shall relieve the accommodations provider from liability for retail*
181 *sales and use taxes on any charges made by the accommodations provider for the accommodations,*
182 *which charges are in addition to the discount room charge.*

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183 *In any "retail sale" of any accommodations, the accommodations provider shall separately state the*
184 *amount of the tax on the bill, invoice, or similar documentation and shall add the tax to (i) the total*
185 *charges charged to the transient by the accommodations provider, or (ii) the discount room charge*
186 *billed to the accommodations intermediary, as applicable. In any "retail sale" of any accommodations,*
187 *the accommodations intermediary shall separately state the amount of the tax on the bill, invoice, or*
188 *similar documentation and shall add the tax to the room charge; thereafter such tax shall be a debt*
189 *from the person renting the accommodations to the accommodations intermediary, recoverable at law in*
190 *the same manner as other debts.*

191 The term "transient" shall not include a purchaser of camping memberships, time-shares,
192 condominiums, or other similar contracts or interests that permit the use of, or constitute an interest in,
193 real estate, however created or sold and whether registered with the Commonwealth or not. Further, a
194 purchaser of a right or license which entitles the purchaser to use the amenities and facilities of a
195 specific real estate project on an ongoing basis throughout its term shall not be deemed a transient;
196 provided, however, that the term or time period involved is for seven years or more.

197 The terms "retail sale" and "sale at retail" shall not include a transfer of title to tangible personal
198 property after its use as tools, tooling, machinery or equipment, including dies, molds, and patterns, if (i)
199 at the time of purchase, the purchaser is obligated, under the terms of a written contract, to make the
200 transfer and (ii) the transfer is made for the same or a greater consideration to the person for whom the
201 purchaser manufactures goods.

202 "Retailer" means every person engaged in the business of making sales at retail, or for distribution,
203 use, consumption, or storage to be used or consumed in the Commonwealth.

204 "Room charge" means the full retail price charged to the customer by the accommodations
205 intermediary for the use of the accommodations, including any accommodations fee before taxes.

206 "Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional
207 or otherwise, in any manner or by any means whatsoever, of tangible personal property and any
208 rendition of a taxable service for a consideration, and includes the fabrication of tangible personal
209 property for consumers who furnish, either directly or indirectly, the materials used in fabrication, and
210 the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on
211 the premises of the person furnishing, preparing, or serving such tangible personal property. A
212 transaction whereby the possession of property is transferred but the seller retains title as security for the
213 payment of the price shall be deemed a sale.

214 "Sales price" means the total amount for which tangible personal property or services are sold,
215 including any services that are a part of the sale, valued in money, whether paid in money or otherwise,
216 and includes any amount for which credit is given to the purchaser, consumer, or lessee by the dealer,
217 without any deduction therefrom on account of the cost of the property sold, the cost of materials used,
218 labor or service costs, losses or any other expenses whatsoever. "Sales price" shall not include (i) any
219 cash discount allowed and taken; (ii) finance charges, carrying charges, service charges or interest from
220 credit extended on sales of tangible personal property under conditional sale contracts or other
221 conditional contracts providing for deferred payments of the purchase price; (iii) separately stated local
222 property taxes collected; (iv) that portion of the amount paid by the purchaser as a discretionary gratuity
223 added to the price of a meal; or (v) that portion of the amount paid by the purchaser as a mandatory
224 gratuity or service charge added by a restaurant to the price of a meal, but only to the extent that such
225 mandatory gratuity or service charge does not exceed 20% of the price of the meal. Where used articles
226 are taken in trade, or in a series of trades as a credit or part payment on the sale of new or used
227 articles, the tax levied by this chapter shall be paid on the net difference between the sales price of the
228 new or used articles and the credit for the used articles.

229 "Semiconductor cleanrooms" means the integrated systems, fixtures, piping, partitions, flooring,
230 lighting, equipment, and all other property used to reduce contamination or to control airflow,
231 temperature, humidity, vibration, or other environmental conditions required for the integrated process of
232 semiconductor manufacturing.

233 "Semiconductor equipment" means (i) machinery or tools or repair parts or replacements thereof; (ii)
234 the related accessories, components, pedestals, bases, or foundations used in connection with the
235 operation of the equipment, without regard to the proximity to the equipment, the method of attachment,
236 or whether the equipment or accessories are affixed to the realty; (iii) semiconductor wafers and other
237 property or supplies used to install, test, calibrate or recalibrate, characterize, condition, measure, or
238 maintain the equipment and settings thereof; and (iv) equipment and supplies used for quality control
239 testing of product, materials, equipment, or processes; or the measurement of equipment performance or
240 production parameters regardless of where or when the quality control, testing, or measuring activity
241 takes place, how the activity affects the operation of equipment, or whether the equipment and supplies
242 come into contact with the product.

243 "Storage" means any keeping or retention of tangible personal property for use, consumption or
244 distribution in the Commonwealth, or for any purpose other than sale at retail in the regular course of

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245 business.

246 "Tangible personal property" means personal property which may be seen, weighed, measured, felt,
247 or touched, or is in any other manner perceptible to the senses. The term "tangible personal property"
248 shall not include stocks, bonds, notes, insurance or other obligations or securities. The term "tangible
249 personal property" shall include (i) telephone calling cards upon their initial sale, which shall be exempt
250 from all other state and local utility taxes, and (ii) manufactured signs.

251 "Use" means the exercise of any right or power over tangible personal property incident to the
252 ownership thereof, except that it does not include the sale at retail of that property in the regular course
253 of business. The term does not include the exercise of any right or power, including use, distribution, or
254 storage, over any tangible personal property sold to a nonresident donor for delivery outside of the
255 Commonwealth to a nonresident recipient pursuant to an order placed by the donor from outside the
256 Commonwealth via mail or telephone. The term does not include any sale determined to be a gift
257 transaction, subject to tax under § 58.1-604.6.

258 "Use tax" refers to the tax imposed upon the use, consumption, distribution, and storage as herein
259 defined.

260 "Used directly," when used in relation to manufacturing, processing, refining, or conversion, refers to
261 those activities which are an integral part of the production of a product, including all steps of an
262 integrated manufacturing or mining process, but not including ancillary activities such as general
263 maintenance or administration. When used in relation to mining, it shall refer to the activities specified
264 above, and in addition, any reclamation activity of the land previously mined by the mining company
265 required by state or federal law.

266 "Video programmer" means a person or entity that provides video programming to end-user
267 subscribers.

268 "Video programming" means video and/or information programming provided by or generally
269 considered comparable to programming provided by a cable operator including, but not limited to,
270 Internet service.

271 § 58.1-3818.8. Definitions.

272 *As used in this article, unless the context requires a different meaning:*

273 "Accommodations" means any room, space, or unit for which tax is imposed on the retail sale of the
274 same pursuant to this article.

275 "Accommodations fee" means the accommodations intermediary room or space charge less the
276 discount charge, if any, provided that the accommodations fee shall not be less than \$0.

277 "Accommodations intermediary" means any person, other than an accommodations provider, that
278 facilitates the sale of an accommodation and charges an accommodations intermediary room or space
279 charge to the customer. For purposes of this definition, "facilitates the sale" includes brokering,
280 coordinating, or in any other way arranging for the purchase of, or the right to use accommodations by
281 a customer.

282 "Accommodations intermediary room or space charge" means the full retail price charged to the
283 customer by the accommodations intermediary for the use of the accommodations, including any
284 accommodations fee before taxes.

285 "Accommodations provider" means any person that furnishes accommodations to the general public
286 for compensation. The term "furnishes" includes the sale of use or possession, or the sale of the right to
287 use or possess.

288 "Discount charge" means the full amount charged by the accommodations provider to the
289 accommodations intermediary for furnishing the accommodation.

290 "Retail sale" means a sale to any person for any purpose other than for resale.

291 § 58.1-3819. Transient occupancy tax.

292 A. Any county, by duly adopted ordinance, may levy a transient occupancy tax on hotels, motels,
293 boarding houses, travel campgrounds, and other facilities offering guest rooms rented out for continuous
294 occupancy for fewer than 30 consecutive days. The tax shall be imposed on the total price paid by the
295 ultimate consumer for the use or possession of the room or space occupied in a retail sale. Such tax
296 shall be in such amount and on such terms as the governing body may, by ordinance, prescribe. Such
297 tax shall not exceed two percent of the amount of charge for the occupancy of any room or space
298 occupied total price paid by the ultimate consumer for the use or possession of the room or space
299 occupied in a retail sale; however, York County, Albemarle County, Nelson County, Mecklenburg
300 County, Gloucester County, Spotsylvania County, Stafford County, Loudoun County, Bedford County,
301 Cumberland County, Floyd County, King George County, Wise County, Botetourt County, Prince
302 Edward County, Rockbridge County, Caroline County, Dinwiddie County, Page County, Wythe County,
303 James City County, Franklin County, Tazewell County, Augusta County, Prince William County, Craig
304 County, Prince George County, Patrick County, Pulaski County, Halifax County, Montgomery County,
305 Carroll County, Northampton County, Amherst County, Giles County, Smyth County, and Greene

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306 County may levy a transient occupancy tax not to exceed five percent, and any excess over two percent
307 shall be designated and spent solely for tourism and travel, marketing of tourism or initiatives that, as
308 determined after consultation with the local tourism industry organizations, including representatives of
309 lodging properties located in the county, attract travelers to the locality, increase occupancy at lodging
310 properties, and generate tourism revenues in the locality. If any locality has enacted an additional
311 transient occupancy tax pursuant to subsection C of § 58.1-3823, then the governing body of the locality
312 shall be deemed to have complied with the requirement that it consult with local tourism industry
313 organizations, including lodging properties. If there are no local tourism industry organizations in the
314 locality, the governing body shall hold a public hearing prior to making any determination relating to
315 how to attract travelers to the locality and generate tourism revenues in the locality.

316 B. The tax imposed hereunder shall not apply to rooms or spaces rented and continuously occupied
317 by the same individual or same group of individuals for 30 or more days in hotels, motels, boarding
318 houses, travel campgrounds, and other facilities offering guest rooms. In addition, that portion of any tax
319 imposed hereunder in excess of two percent shall not apply to travel campgrounds in Stafford County.

320 C. Nothing herein contained shall affect any authority heretofore granted to any county, city or town
321 to levy such a transient occupancy tax. The county tax limitations imposed pursuant to § 58.1-3711 shall
322 apply to any tax levied under this section, *mutatis mutandis*.

323 D. Any county, city or town which requires local hotel and motel businesses, or any class thereof, to
324 collect, account for and remit to such locality a ~~local tax imposed on the consumer~~ *the transient*
325 *occupancy tax*, may allow such businesses a commission for such service in the form of a deduction
326 from the tax remitted. Such commission shall be provided for by ordinance, which shall set the rate
327 thereof, no less than three percent, not to exceed five percent of the amount of tax due and accounted
328 for. No commission shall be allowed if the amount due was delinquent.

329 E. All transient occupancy tax collections shall be deemed to be held in trust for the county, city or
330 town imposing the tax.

331 § 58.1-3820. Arlington County transient occupancy tax.

332 Notwithstanding the provisions of Chapter 443, as amended, of the Acts of Assembly of 1970 carried
333 by reference in the Code of Virginia as § 58.1-3819, beginning on and after July 1, 1977, Arlington
334 County is authorized to levy the transient occupancy tax permitted in § 58.1-3819 in an amount not to
335 exceed five percent of the ~~amount of the charge for the occupancy of any room or space occupied total~~
336 *price paid by the ultimate consumer for the use or possession of any room or space occupied in a retail*
337 *sale*, provided that the county's local license tax as permitted in § 58.1-3703, as amended, on hotels,
338 motels, boarding houses, travel campgrounds, and other facilities offering guest rooms rented out for
339 continuous occupancy for fewer than thirty consecutive days, on and after January 1, 1978, shall not
340 exceed one percent of the gross receipts of such hotels, motels, boarding houses, travel campgrounds,
341 and other facilities offering guest rooms rented out for continuous occupancy for fewer than thirty
342 consecutive days. For purposes of this section, a corporation or partnership shall be deemed an
343 individual or group unless provided otherwise by local ordinance. For purposes of exercising the
344 authority granted by this section, those ordinances enacted by Arlington County on October 26, 1991,
345 and December 7, 1991, are validated as to their application, prospectively only, from the date of their
346 enactment. The remaining provisions of § 58.1-3819 shall apply *mutatis mutandis* to the provisions of
347 this section.

348 § 58.1-3821. Transient occupancy tax on certain rentals.

349 The County of Franklin and the County of Nelson may, by ordinance, levy a transient occupancy tax
350 on condominiums, apartments, townhouses, or like buildings when rooms or units in such buildings are
351 rented for occupancy for fewer than thirty days at a time. The tax imposed hereunder shall not apply to
352 rooms or units rented for continuous occupancy by the same individual or group for thirty or more days
353 in condominiums, apartments, townhouses, or like buildings.

354 Such tax shall be in an amount and on such terms as the governing body, by ordinance, may
355 prescribe; however, in the County of Franklin such tax shall not exceed two percent of the ~~amount of~~
356 *charge for the occupancy of any room or space occupied total price paid by the ultimate consumer for*
357 *the use or possession of the room or unit occupied in a retail sale* and in the County of Nelson such tax
358 shall not exceed ~~5%~~ *percent of the amount of charge for the occupancy of any room or space occupied*
359 *total price paid by the ultimate consumer for the use or possession of the room or unit occupied in a*
360 *retail sale*. Any revenue collected in Nelson County from that portion of the tax which exceeds ~~2%~~
361 *percent*, shall be designated and spent for promoting tourism, travel, or business that generates tourism
362 or travel in the county. Any county which imposes the tax authorized in this section may allow the
363 businesses collecting, accounting for, and remitting such ~~consumer~~ *transient occupancy* tax a
364 commission for such service in the form of a deduction from the tax remitted. The commission amount
365 shall be established by ordinance; however, the maximum commission payable shall not exceed five
366 percent of the amount of tax due and accounted for nor be less than a minimum of three percent of the
367 amount of tax due. No commission shall be allowed if the amount due was delinquent.

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368 § 58.1-3822. Additional transient occupancy tax.

369 In addition to such transient occupancy taxes as are authorized by §§ 58.1-3819 and 58.1-3820,
370 beginning January 1, 1991, and ending January 1, 2012, Arlington County may impose an additional
371 transient occupancy tax not to exceed one-fourth of one percent of the amount of the charge for the
372 occupancy of any room or space occupied total price paid by the ultimate consumer for the use or
373 possession of any room or space occupied in a retail sale. The revenues collected from the additional
374 tax shall be designated and spent for the purpose of promoting tourism and business travel in the
375 county. Such designated funds shall be in addition to the county's previous budgeted amount for the
376 promotion of tourism and business travel.

377 § 58.1-3823. Additional transient occupancy tax for certain counties.

378 A. In addition to such transient occupancy taxes as are authorized by §§ 58.1-3819 through
379 58.1-3822, Hanover County, Chesterfield County and Henrico County may impose:

380 1. An additional transient occupancy tax not to exceed four percent of the amount of the charge for
381 the occupancy of any room or space occupied total price paid by the ultimate consumer for the use or
382 possession of any room or space occupied in a retail sale. The tax imposed hereunder shall not apply to
383 rooms or spaces rented and continuously occupied by the same individual or same group of individuals
384 for 30 or more days. The revenues collected from the additional tax shall be designated and spent for
385 promoting tourism, travel or business that generates tourism or travel in the Richmond metropolitan
386 area; and

387 2. An additional transient occupancy tax not to exceed two percent of the amount of the charge for
388 the occupancy of any room or space occupied total price paid by the ultimate consumer for the use or
389 possession of any room or space occupied in a retail sale. The tax imposed hereunder shall not apply to
390 rooms or spaces rented and continuously occupied by the same individual or same group of individuals
391 for 30 or more days. The revenues collected from the additional tax shall be designated and spent for
392 expanding the Richmond Centre, a convention and exhibition facility in the City of Richmond.

393 3. An additional transient occupancy tax not to exceed one percent of the amount of the charge for
394 the occupancy of any room or space occupied total price paid by the ultimate consumer for the use or
395 possession of any room or space occupied in a retail sale. The tax imposed hereunder shall not apply to
396 rooms or spaces rented and continuously occupied by the same individual or group of individuals for 30
397 or more days. The revenues collected from the additional tax shall be designated and spent for the
398 development and improvement of the Virginia Performing Arts Foundation's facilities in Richmond, for
399 promoting the use of the Richmond Centre and for promoting tourism, travel or business that generates
400 tourism and travel in the Richmond metropolitan area.

401 B. In addition to such transient occupancy taxes as are authorized by §§ 58.1-3819 through
402 58.1-3822, any county with the county manager plan of government may impose an additional transient
403 occupancy tax not to exceed two percent of the amount of the charge for the occupancy of any room or
404 space occupied total price paid by the ultimate consumer for the use or possession of any room or
405 space occupied in a retail sale, provided the county's governing body approves the construction of a
406 county conference center. The tax imposed hereunder shall not apply to rooms or spaces rented and
407 continuously occupied by the same individual or same group of individuals for 30 or more days. The
408 revenues collected from the additional tax shall be designated and spent for the design, construction,
409 debt payment, and operation of such conference center.

410 C. 1. In addition to such transient occupancy taxes as are authorized by §§ 58.1-3819 through
411 58.1-3822, the Counties of James City and York may impose an additional transient occupancy tax for
412 the use or possession of any overnight guest room in an amount not to exceed \$2 per room per night
413 for the occupancy of any overnight guest room. The revenues collected from the additional tax shall be
414 designated and expended solely for advertising the Historic Triangle area, which includes all of the City
415 of Williamsburg and the Counties of James City and York, as an overnight tourism destination by the
416 members of the Williamsburg Area Destination Marketing Committee of the Greater Williamsburg
417 Chamber and Tourism Alliance. The tax imposed by this subsection shall not apply to travel
418 campground sites or to rooms or spaces rented and continuously occupied by the same individual or
419 same group of individuals for 30 or more days.

420 2. The Williamsburg Area Destination Marketing Committee shall consist of the members as
421 provided in this subdivision. The governing bodies of the City of Williamsburg, the County of James
422 City, and the County of York shall each designate one of their members to serve as members of the
423 Williamsburg Area Destination Marketing Committee. These three members of the Committee shall have
424 two votes apiece.

425 Further, one member of the Committee shall be selected by the Board of Directors of the
426 Williamsburg Hotel and Motel Association; one member of the Committee shall be from The Colonial
427 Williamsburg Foundation and shall be selected by the Foundation; one member of the Committee shall
428 be an employee of Busch Gardens Europe/Water Country USA and shall be selected by Busch Gardens

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429 Europe/Water Country USA; one member of the Committee shall be from the Jamestown-Yorktown
430 Foundation and shall be selected by the Foundation; one member of the Committee shall be selected by
431 the Executive Committee of the Greater Williamsburg Chamber and Tourism Alliance; and one member
432 of the Committee shall be the President and Chief Executive Officer of the Virginia Tourism Authority
433 who shall serve ex officio. Each of these six members of the Committee shall have one vote apiece. The
434 President of the Greater Williamsburg Chamber and Tourism Alliance shall serve ex officio with
435 nonvoting privileges unless chosen by the Executive Committee of the Greater Williamsburg Chamber
436 and Tourism Alliance to serve as its voting representative. The Executive Director of the Williamsburg
437 Hotel and Motel Association shall serve ex officio with nonvoting privileges unless chosen by the Board
438 of Directors of the Williamsburg Hotel and Motel Association to serve as its voting representative.

439 3. The Williamsburg Area Destination Marketing Committee shall maintain all authorities granted by
440 this section. The Greater Williamsburg Chamber and Tourism Alliance shall serve as the fiscal agent for
441 the Williamsburg Area Destination Marketing Committee with specific responsibilities to be defined in a
442 contract between such two entities. The contract shall include provisions to reimburse the Greater
443 Williamsburg Chamber and Tourism Alliance for annual audits and any other agreed-upon expenditures.
444 The Williamsburg Area Destination Marketing Committee shall also contract with the Greater
445 Williamsburg Chamber and Tourism Alliance to provide administrative support services as the entities
446 shall mutually agree.

447 4. The provisions in subdivision 2 relating to the composition and voting powers of the Williamsburg
448 Area Destination Marketing Committee shall be a condition of the authority to impose the tax provided
449 herein.

450 For purposes of this subsection, "advertising the Historic Triangle area" as an overnight tourism
451 destination means advertising that is intended to attract visitors from a sufficient distance so as to
452 require an overnight stay of at least one night.

453 D. The county tax limitations imposed pursuant to § 58.1-3711 shall apply to any tax levied under
454 this section, *mutatis mutandis*.

455 § 58.1-3824. Additional transient occupancy tax in Fairfax County.

456 In addition to such transient occupancy taxes as are authorized by this chapter, beginning July 1,
457 2004, Fairfax County may impose an additional transient occupancy tax not to exceed two percent of
458 the ~~amount of charge for the occupancy of any room or space occupied~~ *total price paid by the ultimate*
459 *consumer for the use or possession of any room or space occupied in a retail sale*; provided that the
460 board of supervisors of the County appropriates the revenues collected from such tax as follows:

461 1. No more than 75 percent of such revenues shall be designated for and appropriated to Fairfax
462 County to be spent for tourism promotion in the County after consultation with local tourism industry
463 organizations and in support of the local tourism industry; and

464 2. The remaining portion of such revenues shall be designated for and appropriated to a nonprofit
465 convention and visitor's bureau located in Fairfax County.

466 The tax imposed hereunder shall not apply to rooms or spaces rented and continuously occupied by
467 the same individual or same group of individuals for 30 or more days.

468 For purposes of this section, "tourism promotion" means direct funding designated and spent solely
469 for tourism, marketing of tourism or initiatives that, as determined in consultation with the local tourism
470 industry organizations, attract travelers to the locality and generate tourism revenues in the locality.

471 § 58.1-3825. Additional transient occupancy tax in Rockbridge County and the Cities of Lexington
472 and Buena Vista.

473 In addition to such transient occupancy taxes as are authorized by this chapter, Rockbridge County
474 and the Cities of Lexington and Buena Vista may impose an additional transient occupancy tax not to
475 exceed two percent of the ~~amount of charge for the occupancy of any room or space occupied~~ *total*
476 *price paid by the ultimate consumer for the use or possession of any room or space occupied in a retail*
477 *sale*. The authority to impose such tax is hereby individually granted to the local governing bodies of
478 such county and cities. However, if such tax is adopted, the local governing body of such county or
479 cities adopting the tax shall appropriate the revenues collected therefrom to the Virginia Horse Center
480 Foundation to be used by the Foundation for the sole purpose of making principal and interest payments
481 on a promissory note or notes signed or executed by the Virginia Horse Center Foundation or the
482 Virginia Equine Center Foundation prior to January 1, 2004, with the Rockbridge Industrial
483 Development Authority as the obligee or payee, as part of an agreement for the Authority to issue bonds
484 on behalf of or for improvements at the Virginia Horse Center Foundation, Virginia Equine Center
485 Foundation, or Virginia Equine Center.

486 For purposes of this section, such note or notes signed or executed prior to January 1, 2004, shall
487 include any notes or other indebtedness incurred to refinance such note or notes, regardless of the date
488 of refinancing, provided that such refinancing shall not include any debt or the payment of any debt for
489 any activity relating to the Virginia Horse Center Foundation, Virginia Equine Center Foundation, or
490 Virginia Equine Center that occurs on or after January 1, 2004.

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491 The tax imposed hereunder shall not apply to rooms or spaces rented and continuously occupied by
492 the same individual or same group of individuals for 30 or more days. Such tax may no longer be
493 imposed in such county or such cities after final payment of the note or notes described herein.

494 § 58.1-3825.2. Additional transient occupancy tax in Bath County.

495 A. In addition to such transient occupancy tax as is authorized by § 58.1-3819, Bath County may
496 impose an additional transient occupancy tax not to exceed two percent of the amount of the charge for
497 ~~the occupancy of any room or space occupied~~ total price paid by the ultimate consumer for the use or
498 possession of any room or space occupied in a retail sale.

499 B. The revenues collected from the additional tax shall be designated and spent as follows:

500 1. One-half of such revenue shall be designated and spent solely for tourism and travel, marketing of
501 tourism, or initiatives that, as determined after consultation with the local tourism industry organizations,
502 attract travelers to the locality and generate tourism revenues in the locality. If there are no local tourism
503 industry organizations in the locality, the governing body shall hold a public hearing prior to making
504 any determination relating to how to attract travelers to the locality and generate tourism revenues in the
505 locality.

506 2. One-half of such revenue shall be designated and spent solely for the design, operation,
507 construction, improvement, acquisition, and debt service for such expenses on debt incurred after June
508 30, 2009, of tourism facilities, historic sites, beautification projects, promotion of the arts, regional
509 tourism marketing efforts, capital costs related to travel and transportation including air service, public
510 parks and recreation, and information centers that attract travelers to the locality and generate tourism
511 revenues in the locality.

512 C. The tax imposed hereunder shall not apply to rooms or spaces rented and continuously occupied
513 by the same individual or same group of individuals for 30 or more days in hotels, motels, boarding
514 houses, travel campgrounds, and other facilities offering guest rooms.

515 D. If Bath County requires local hotel and motel businesses, or any class thereof, to collect, account
516 for, and remit the tax imposed pursuant to this section, the County may allow such businesses a
517 commission for such service in the form of a deduction from the tax remitted. Such commission shall be
518 provided for by ordinance, which shall set the rate thereof, no less than three percent and not to exceed
519 five percent of the amount of tax due and accounted for. No commission shall be allowed if the amount
520 due is delinquent.

521 E. All tax collections pursuant to this section shall be deemed to be held in trust for Bath County.

522 § 58.1-3826. Scope of transient occupancy tax.

523 A. The transient occupancy tax imposed pursuant to the authority of this article shall be imposed
524 only for the ~~occupancy~~ use or possession of any room or space that is suitable or intended for
525 occupancy by transients for dwelling, lodging, or sleeping purposes.

526 B. In the case of the retail sale of any accommodations made by an accommodations provider and in
527 which an accommodations intermediary does not facilitate the sale of the accommodations, the
528 accommodations provider shall collect the tax imposed pursuant to this article, computed on the total
529 price paid for the use or possession of the accommodations, and shall remit the same to the locality and
530 shall be liable for the same.

531 In the case of the retail sale of any accommodations in which an accommodations intermediary
532 facilitates the sale, (i) the accommodations provider shall collect from the accommodations intermediary
533 the tax imposed pursuant to this article, computed on the discount charge, and shall remit the same to
534 the locality and shall be liable for the same, and (ii) the accommodations intermediary shall collect the
535 tax imposed pursuant to this article, computed on the accommodations intermediary room or space
536 charge, and shall (a) remit the portion of such tax that relates to the accommodations fee to the locality
537 and shall be liable for the same, and (b) remit the portion of such tax that relates to the discount
538 charge to the accommodations provider for purposes of payment of the tax under clause (i) and shall be
539 liable for the same.

540 In any retail sale of any accommodations, the accommodations provider shall separately state the
541 amount of the tax on the bill, invoice, or similar documentation and shall add the tax to (i) the total
542 price paid for the use or possession of the accommodations in cases in which an accommodations
543 intermediary does not facilitate the sale of the accommodations, or (ii) the discount charge billed to the
544 accommodations intermediary, as applicable. In any retail sale of any accommodations, the
545 accommodations intermediary shall separately state the amount of the tax on the bill, invoice, or similar
546 documentation and shall add the tax to the accommodations intermediary room or space charge;
547 thereafter such tax shall be a debt from the person renting the accommodations to the accommodations
548 intermediary, recoverable at law in the same manner as other debts.

549 § 58.1-3842. Combined transient occupancy and food and beverage tax.

550 A. Rappahannock County, by duly adopted ordinance, is hereby authorized to levy a tax on
551 ~~occupancy~~ for the use or possession of any room or space occupied in a bed and breakfast establishment

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552 on which the county is authorized to levy a transient occupancy tax under § 58.1-3819 and on food and
553 beverages sold for human consumption within such establishment on which the county is authorized to
554 levy a food and beverage tax under § 58.1-3833, when the charges for the ~~occupancy use or possession~~
555 of the room or space and for the sale of food and beverages are assessed in the aggregate and not
556 separately stated. Such tax shall not exceed four percent of the total ~~amount charged for the occupancy~~
557 ~~of the room or space occupied price paid by the ultimate consumer for the use or possession of the~~
558 ~~room or space occupied~~ and for the food and beverages in a retail sale. Such tax shall be in such
559 amount and on such terms as the governing body may, by ordinance, prescribe. The tax shall be in
560 addition to the sales tax currently imposed by the county pursuant to the authority of Chapter 6
561 (§ 58.1-600 et seq.) of this title. Collection of such tax shall be in a manner prescribed by the governing
562 body. All taxes collected under the authority of this article shall be deemed to be held in trust for the
563 county imposing the tax.

564 B. If a bed and breakfast establishment separately states charges for the ~~occupancy use or possession~~
565 of the room or space and for the sale of food and beverages, a transient occupancy tax levied under
566 § 58.1-3819 and a food and beverage tax levied under § 58.1-3833 shall apply to such separately stated
567 charges, as applicable.

568 C. Any tax imposed pursuant to this article shall not apply within the limits of any town located in
569 such county, where such town now, or hereafter, imposes a town meals tax or a town transient
570 occupancy tax on the same subject. If the governing body of any town within a county, however,
571 provides that a county tax authorized by this article shall apply within the limits of such town, then such
572 tax may be imposed within such towns.

573 D. This tax shall be levied only if a food and beverage tax has been approved in a referendum
574 within the county as provided by the second paragraph of subsection A of § 58.1-3833. No county in
575 which the levy of a food and beverage tax has been approved in a referendum pursuant to subsection A
576 of § 58.1-3833 shall be required to submit an amendment to its meals tax ordinance or a further
577 question to the voters in a referendum prior to adopting an ordinance adopting or amending the tax
578 authorized by this article.

579 E. Nothing herein contained shall affect any authority heretofore granted to any county to levy a
580 food and beverage tax or a transient occupancy tax.

581 § 58.1-3843. Scope of transient occupancy tax.

582 A. As used in this section, unless the context requires a different meaning:

583 "Accommodations" means any room or space for which tax is imposed on the retail sale of the same
584 pursuant to this article.

585 "Accommodations fee" means the same as such term is defined in § 58.1-3818.8.

586 "Accommodations intermediary" means the same as such term is defined in § 58.1-3818.8.

587 "Accommodations intermediary room or space charge" means the same as such term is defined in
588 § 58.1-3818.8.

589 "Accommodations provider" means the same as such term is defined in § 58.1-3818.8.

590 "Discount charge" means the same as such term is defined in § 58.1-3818.8.

591 "Retail sale" means the same as such term is defined in § 58.1-3818.8.

592 B. Notwithstanding any other provision of law, general or special, the tax imposed on transient room
593 rentals pursuant to the authority of this article shall be imposed only for the ~~occupancy use or~~
594 ~~possession~~ of any room or space that is suitable or intended for occupancy by transients for dwelling,
595 lodging, or sleeping purposes.

596 C. In the case of the retail sale of any accommodations made by an accommodations provider and in
597 which an accommodations intermediary does not facilitate the sale of the accommodations, the
598 accommodations provider shall collect the tax imposed pursuant to this article, computed on the total
599 price paid for the use or possession of the accommodations, and shall remit the same to the locality and
600 shall be liable for the same.

601 In the case of the retail sale of any accommodations in which an accommodations intermediary
602 facilitates the sale, (i) the accommodations provider shall collect from the accommodations intermediary
603 the tax imposed pursuant to this article, computed on the discount charge, and shall remit the same to
604 the locality and shall be liable for the same, and (ii) the accommodations intermediary shall collect the
605 tax imposed pursuant to this article, computed on the accommodations intermediary room or space
606 charge, and shall (a) remit the portion of such tax that relates to the accommodations fee to the locality
607 and shall be liable for the same, and (b) remit the portion of such tax that relates to the discount
608 charge to the accommodations provider for purposes of payment of the tax under clause (i) and shall be
609 liable for the same.

610 In any retail sale of any accommodations, the accommodations provider shall separately state the
611 amount of the tax on the bill, invoice, or similar documentation and shall add the tax to (i) the total
612 price paid for the use or possession of the accommodations in cases in which an accommodations
613 intermediary does not facilitate the sale of the accommodations, or (ii) the discount charge billed to the

Appendix I
Senate Bill 452 Text

11 of 11

614 accommodations intermediary, as applicable. In any retail sale of any accommodations, the
615 accommodations intermediary shall separately state the amount of the tax on the bill, invoice, or similar
616 documentation and shall add the tax to the accommodations intermediary room or space charge;
617 thereafter such tax shall be a debt from the person renting the accommodations to the accommodations
618 intermediary, recoverable at law in the same manner as other debts.

S E N A T E S U B S T I T U T E

SB452S1

Appendix II
Senate Bill 452 Tracking

SB 452 Retail Sales and Use Tax; taxes on room rentals.

another bill?

go

[Mary Margaret Whipple](#) | [all patrons](#) ... [notes](#) | [add to my profiles](#)

Summary as introduced:

Taxes on room rentals. Provides that retail sales and hotel taxes on transient room rentals are computed based upon the total charges or the total price paid for the use or possession of the room. For those cases in which a hotel or similar establishment contracts with an agent or other party to collect the retail sales and hotel taxes, the bill would require the agent or other party to separately state the taxes on the bill or invoice and to collect the taxes based upon the total charges or the total price paid for the use or possession of the room.

Full text:

[01/13/10 Senate: Prefiled and ordered printed; offered 01/13/10 10103839D](#) [pdf](#) | [impact statement](#)

[01/27/10 Senate: Committee substitute printed 10104559D-S1](#) [pdf](#) | [impact statement](#)

Status:

01/13/10 Senate: Prefiled and ordered printed; offered 01/13/10 10103839D

[01/13/10 Senate: Referred to Committee on Finance](#)

[01/27/10 Senate: Reported from Finance with substitute \(15-Y 0-N\)](#)

01/27/10 Senate: Committee substitute printed 10104559D-S1

[01/28/10 Senate: Constitutional reading dispensed \(40-Y 0-N\)](#)

01/29/10 Senate: Read second time

01/29/10 Senate: Reading of substitute waived

01/29/10 Senate: Committee substitute agreed to 10104559D-S1

01/29/10 Senate: Engrossed by Senate - committee substitute SB452S1

[02/01/10 Senate: Read third time and passed Senate \(40-Y 0-N\)](#)

02/08/10 House: Placed on Calendar

02/08/10 House: Read first time

[02/08/10 House: Referred to Committee on Finance](#)

[02/16/10 House: Assigned Finance sub: #1](#)

[02/24/10 House: Subcommittee recommends reporting \(10-Y 0-N\)](#)

[03/02/10 House: Continued to 2011 in Finance \(13-Y 9-N\)](#)

DEPARTMENT OF TAXATION
2010 Fiscal Impact Statement

- | | |
|---|---|
| <p>1. Patron Mary Margaret Whipple</p> <p>3. Committee House Finance</p> <p>4. Title Retail Sales and Use Tax; Transient
Occupancy Tax; Room Rentals</p> | <p>2. Bill Number <u>SB 452</u></p> <p>House of Origin:
<input type="checkbox"/> Introduced
<input type="checkbox"/> Substitute
<input type="checkbox"/> Engrossed</p> <p>Second House:
<input checked="" type="checkbox"/> In Committee
<input type="checkbox"/> Substitute
<input type="checkbox"/> Enrolled</p> |
|---|---|

5. Summary/Purpose:

This bill would expand the application of the Retail Sales and Use Tax regarding hotels, motels, and other accommodations to authorize the imposition of the tax on the price mark-up and other charges and fees imposed by a third party intermediary. The bill would also outline the procedures for payment of the applicable taxes on these charges.

Under current law, the Retail Sales and Use Tax is imposed on the gross proceeds derived from the charge for transient accommodations made by the entity providing the accommodations. Third parties who facilitate these transactions are not liable to collect the tax on any price mark-up and other charges and fees they may charge in connection with the provision of these services.

The effective date of this bill is not specified.

6. Fiscal Impact Estimates are: Not available. (See Line 8.)

7. Budget amendment necessary: No.

8. Fiscal implications:

Administrative Costs

TAX considers implementation of this bill as "routine," and does not require additional funding.

Revenue Impact

This bill would result in a gain in state and local revenues, the amount of which is unknown.

9. Specific agency or political subdivisions affected:

TAX
All localities

10. Technical amendment necessary: No.

11. Other comments:

Retail Sales and Use Tax

Under current law, the Retail Sales and Use Tax applies to the sale or charge for any room or rooms, lodgings, or accommodations furnished to transients by any hotel, motel, inn, tourist cabin, camping grounds, club or other similar place. Any additional charges made in connection with the rental of a room or other lodging or accommodations are deemed to be a part of the charge for the room and are also subject to the tax. This includes additional charges for pay-per view movies, television, and video games, local telephone calls and similar services. Internet Access Services and toll charges for long-distance telephone calls furnished in connection with the accommodation are not subject to the tax; however, any mark-up made by the accommodations provider over the cost of the long-distance phone charge is taxable.

Third party intermediaries often enter into contracts with accommodation providers to allow guests to reserve accommodations online through the intermediary. These intermediaries often have no physical presence in the state of Virginia. Under agreements with the accommodations providers, the third party intermediaries generally collect the total amount that the accommodations provider charges for the use and possession of the room plus any related fees from the customer, as well as a separate service charge for services provided by the intermediary.

In October of 2006, TAX issued a ruling addressing whether the service charges imposed upon the customer by these third party intermediaries, were subject to the Retail Sales and Use Tax. The Tax Commissioner determined that the imposition language in the statute specifically enumerated the entities whose fees and charges would be subject to the Retail Sales and Use Tax. The statute defines "retail sale" to specifically include

[T]he sale or charges for any room or rooms, lodgings, or accommodations furnished to transients for less than 90 continuous days by any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space or accommodations are regularly furnished to transients for a consideration (Emphasis added).

Because the third party intermediaries were not among the list of entities specifically enumerated in the statute whose charges were subject to tax, the Tax Commissioner

ruled that the service charges imposed by these intermediaries were exempt of the Retail Sales and Use Tax. Thus, the Retail Sales and Use Tax and the local Transient Occupancy Taxes do not apply to the service charges imposed by third party intermediaries.

Local Transient Occupancy Taxes

Under current law, any county may impose a transient occupancy tax at a maximum rate of two percent, upon the adoption of an ordinance, on hotels, motels, boarding houses, travel campgrounds, and other facilities offering guest rooms. The tax, however, does not apply to rooms rented on a continuous basis by the same individual or group for 30 or more continuous days. The tax applies to rooms intended or suitable for dwelling and sleeping. Therefore, the tax does not apply to such rooms used for alternative purposes, such as banquet rooms and meeting rooms.

Proposal

This bill would remove the statutory language that limits the application of the Retail Sales and Use Tax to charges imposed by hotels, motels, inns, tourist camps, tourist cabins, camping grounds, clubs, and other accommodation providers, thereby authorizing the imposition of the tax on charges and fees related to the provision of accommodations and imposed by a third party intermediary. The bill would also outline the procedures for payment of the applicable taxes on these charges.

Under the terms of this bill, there are two parties that could potentially be required to collect the Retail Sales and Use Tax on the charges associated with the purchase of an accommodation. An “accommodations provider” would be defined as any person that furnishes accommodations to the general public for compensation. An “accommodations intermediary” would be defined as any person, other than an accommodations provider, that facilitates the sale of an accommodation and charges a room charge to the customer.” “Facilitating the sale” would include brokering, coordinating, or in any other way arranging for the purchase of, or the right to use accommodations by a customer.

Under the terms of this bill, “room charge” would be defined as the full retail price charged to the customer by the accommodations intermediary for the use of the accommodations, including any accommodations fee before taxes. A “discount room charge” would be defined as the full amount charged by the accommodations provider to the accommodations intermediary for furnishing the accommodation. The total price paid by the purchaser of accommodations would be broken down into several different fees. An “accommodations fee” would be defined as the room charge less the discount room charge, if any, provided that the accommodations fee is not less than \$0. The accommodations fee would generally constitute a separate fee imposed by the intermediary, as compensation for the services provided in booking the accommodation.

This bill would provide that when a taxable sale of accommodations is made by an accommodations provider to a customer, and no third party intermediary facilitates the transaction, the accommodations provider would be liable for and required to collect the

Retail Sales and Use Tax and remit it to the Department of Taxation ("TAX"). When a third party intermediary facilitates the transaction, the intermediary would be required to collect the room charge, and the Retail Sales and Use Tax computed on the room charge, and remit the portion of the taxes relating to the accommodations fee to TAX and the portion of the taxes relating to the discount room charge directly to the accommodations provider, and would be liable for both amounts. The accommodations provider would, in turn, be required to remit these taxes to TAX. The accommodations provider would only be liable for the tax computed on the discount room charge and any tax computed on additional charges that are imposed by the accommodations provider.

For all retail sales of accommodations, both the accommodations provider and the intermediary would be required to separately state the amount of the tax on the bill, invoice, or similar documentation and to add the tax to whichever charge it is required to collect.

These provisions would also apply to any local transient occupancy taxes imposed, except that the parties would be required to remit such taxes to the local taxing authority, rather than to TAX.

The effective date of this bill is not specified.

Similar Legislation

House Bill 370 would add Alleghany County to the list of localities that are currently authorized to impose a transient occupancy tax at a maximum rate of five percent.

House Bill 972 would provide that any additional transient occupancy tax or any increase in the rate of an existing transient occupancy tax in Fairfax County does not apply within the limits of any town located in Fairfax County, unless the governing body of the town consents.

Senate Bill 218 would provide that any additional transient occupancy tax or any increase in the rate of an existing transient occupancy tax imposed on or after July 1, 2010 in Fairfax County, does not apply within the limits of any town located in Fairfax County, unless the governing body of the town consents.

Senate Bill 342 would authorize any county, by ordinance, to levy a transient occupancy tax on single-family residences, including time shares and other guest rooms rented out for continuous occupancy for fewer than 30 consecutive days.

cc : Secretary of Finance

Date: 12/6/2010 KP
DLAS File Name: SB452FE161.doc

Appendix IV
House Chairman's Request for Study



HARRY R. (BOB) PURKEY
2352 LEEWARD SHORE DRIVE
VIRGINIA BEACH, VIRGINIA 23451
EIGHTY-SECOND DISTRICT

COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
RICHMOND

March 2, 2010

COMMITTEE ASSIGNMENTS:
FINANCE (CHAIRMAN)
COMMERCE AND LABOR
SCIENCE AND TECHNOLOGY

Mr. Mark Haskins
Department of Taxation
Main Street Center, 23rd Floor
600 E. Main Street
Richmond, VA 23218

Dear Mark:

Please have the Tax Department provide an in-depth analysis of Senator Whipple's bill SB452.

The purpose of your study is to provide complete tax analysis of SB452 ascertaining all tax aspects of this bill. Further, please also ascertain all businesses in Virginia which would be impacted by SB452. Please also provide Senator Whipple and our full Finance Committee your analysis, what needs to be accomplished to assist Senator Whipple in constructing her bill and to be prepared to fully address the multitude of concerns debated in our Finance Committee.

Further, please determine the viability of Senator Whipple's effort on this bill, and the potential new legislation's impact on all potential individuals and businesses.

Thank you for your valuable assistance.

Respectfully,

A handwritten signature in black ink that reads "Bob Purkey".

Harry R. Purkey, Chairman
House Finance Committee

CC: Senator Mary Margaret Whipple
Members, House Finance Committee

DISTRICT: (757) 481-1493 • RICHMOND: (804) 698-1082 • E-MAIL: DELBPURKEY@HOUSE.VIRGINIA.GOV

Appendix VI
Senate Comment to Draft Study

SENATE OF VIRGINIA

MARY MARGARET WHIPPLE
315th SENATORIAL DISTRICT
ALL OF THE CITY OF FALLS CHURCH, AND
PART OF ARLINGTON AND FAIRFAX COUNTIES
3596 NORTH VALLEY STREET
ARLINGTON, VIRGINIA 22207



COMMITTEE ASSIGNMENTS
RULES, CHAIR
AGRICULTURE, CONSERVATION AND
NATURAL RESOURCES
EDUCATION AND HEALTH
FINANCE
PRIVILEGES AND ELECTIONS

October 1, 2010

Mr. Mark Haskins
Director of Policy Development
Virginia Department of Taxation
600 East Main Street
Richmond, Virginia 23219

Dear Mark,

Thank you for the opportunity to comment on the study of SB 452. I appreciate all the work that has gone into the report, but do have some additional comments. Please acknowledge and include the following points in the final draft.

1. As you may recall, I have been concerned about the consumer receiving adequate information. However, the Department's draft lacks any discussion of truth-in-selling or truth-in-advertising laws. On-line travel intermediaries generally bundle together their mark-up fees and government taxes on customer statements. The customer purchasing a room on-line is not provided a separate line item stating the amount taxes imposed on his purchase. Thus, the customer cannot determine the amount of taxes actually paid on the transaction. In addition to depriving consumers of information, the lack of this tax information makes a tax audit or verification effort impossible. The report should analyze the applicability of truth-in-selling and truth-in-advertising laws to the bundling of service charges and taxes. (See attached OTC computer receipts for Virginia hotel bookings.)
2. The nexus issue is particularly important and should take prior litigation and court decisions into account. On page 21 of the draft, the Department notes that "[w]hile the nexus argument has yet to reach the courts, the issue has surfaced as part of the debate as to the taxability of online intermediary fees." In fact, the nexus issue has been ruled on in several cases. In Expedia, Inc. v. City of Columbus, 285 Ga. 684 (2009), the Supreme Court of Georgia did undertake a constitutional nexus analysis. The court noted that Expedia provided in its contracts with hotels that Expedia would collect all applicable taxes from its customers. The court held that the City of Columbus was not imposing a tax on Expedia. Rather, Expedia by its contracts with Columbus hotels to collect all applicable taxes made itself accountable to the City for the collection and remission of taxes.

The City has not imposed and does not purport to impose any tax on Expedia. Expedia, of its own accord, has contracted with hotels to collect taxes belonging to the City and, having done so, it has rendered itself accountable to the City's tax authorities for remission of taxes it has actually collected. Thus, Quill Corp. v.

North Dakota, 504 U. S. 298 (112 SC 1904, 119 LE2d 91) (1992) is distinguishable because, in that case, the state was seeking to force the out-of-state retailer, which had never collected the state's taxes, to collect and remit state use taxes as a matter of law. In the case sub judice, but for the fact that Expedia has willingly inserted itself as a matter of contract into the local taxation scheme designed for hotels and their guests, there would be no dispute. Accordingly, the trial court did not err when it rejected Expedia's constitutional claims.

It would appear that the holding in this case is particularly relevant to any discussion of constitutional nexus and should be included in detail in the final report.

There is also an extensive legal discussion of the nexus issue in the holding in the case of Travelscope LLC v. S. Carolina Dept. of Revenue. The nexus issue was also ruled on in City of San Antonio v. Hotels.com (2007). I would appreciate your review of these decisions.

3. On page 23 of the draft there is a discussion of whether on-line travel intermediaries are performing a service that is independent of the sale of the hotel room. The Department notes on page 24 that including services in the sales tax base would not be a departure from current Virginia sales tax policy. More emphasis might be given to the fact that any good purchased by a consumer has some service element built into the price of the good. For example, a person purchasing a pre-assembled lawn mower is also paying for the cost of assembly in the final purchase price. It is a slippery slope to argue that Virginia does not impose a sales tax on accompanying services. If this were true, in the lawn mower example the consumer would be allowed a deduction for the cost of assembly of the lawn mower. No such deduction is currently allowed under Virginia's sales tax laws.
4. Arguments have been made that SB 452 imposes a "new tax" on online travel intermediaries. On October 24, 2006, the Department of Taxation issued a ruling (Public Document 06-139) concluding that Virginia's sales tax laws only apply to the sale or charge for rooms or accommodation made by hotels, motels, inns, tourist camps, tourist cabins, camping grounds, clubs, or other similar places. In other words, Virginia's sales tax laws do not reach sales or charges for rooms or accommodations made by on-line travel companies. The Department relied upon the following language in Code of Virginia § 58.1-602:

The terms "retail sale" and a "sale at retail" shall specifically include the . . . sale or charges for any room or rooms, lodgings, or accommodations **furnished** to transients for less than 90 continuous days by any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for a consideration . . . (emphasis added).

However, it seems to me that this language does no more than set forth a laundry list of rooms or places the rental of which will trigger the imposition of sales tax. Thus, rooms, lodgings, or accommodations that are **furnished** by hotels, motels, etc. will be subject to

Mr. Mark Haskins
October 1, 2010
Page 3

sales tax upon the rental of the same. The language does not distinguish between sales made by a hotel directly or made by an on-line travel intermediary for purposes of sales tax liability. Sales of lodging made by a hotel business directly or made by an on-line travel company both trigger sales tax liability, the only requirement being that the room, lodging, or accommodation be **furnished** by a hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients.

Virginia's sales tax has always reached on-line intermediaries selling lodging on behalf of hotel businesses. Unfortunately, what appears to be an incorrect analysis in Public Document 06-139 can be used by some to argue that SB 452 for the first time is attempting to make on-line intermediaries subject to Virginia's sales tax.

Although the Department's 2006 Opinion regarding OTCs liability for sales tax is cited on page 5 of the Study, it is not adequately described. The Opinion is based on a TAX Administrative Regulation, not on the statutory language of the Virginia Code. The Opinion did not examine the actual wording of Va. Code §58.1-612 defining "dealer" for sales and use tax purposes.

5. As to the fiscal impact analysis (page 30), it would be useful to know the source and year for the claim that only 10.3% of hotel room bookings in Virginia are via OTCs. The footnote for the OTC mark up of 25-40% is to a 2005 State Tax Notes article which means the figure is from an even earlier period. It should be updated or confirmed. If the 10.3% figure is also from 2005 or earlier, it too needs to be updated. It would be useful to list tax recoveries in recent litigation detailing the number of years and tax rates applicable. At least the basis for the New York and North Carolina fiscal impact statements should be examined and compared to Virginia tax rates and revenues.
6. It does seem to me that the litigation discussion on pages 10-14 should include the cases that have been decided or settled in favor of localities, states and consumers. For example, the San Antonio case resulted in a federal jury verdict of \$20.4 million to Texas cities; the Travelscope case resulted in a \$6.4 million recovery for the state; and City of San Diego v. Hotel.com ended in a judgment of \$21.1 million to the city.

Again, I want to thank the Department of Taxation for all the hard work and attention given to this topic. I ask that my letter be included as an appendix to the final report.

Sincerely,



Mary Margaret Whipple
District 31
Senate of Virginia

Attachment

4/12/2010

Print

From: donotreply@hotels.com (donotreply@hotels.com)

To: [REDACTED]

Date: Fri, February 15, 2008 12:39:50 PM

Cc:

Subject: Hotel booking confirmation

Hotels.com
Receipt

YOUR RESERVATION HAS BEEN BOOKED!

Tazewell Hotel & Suites

1-757-623-6200
245 Granby St
Norfolk, VA 23510

Guest Rating

3.8

39 Reviews

Check-In: **Mon, Feb 25, 2008** | Check-Out: **Wed, Feb 27, 2008**

Guest: [REDACTED]

Hotels.com Booking Number: **052959559**

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Quality					
Condition					
Comfort					
Cleanliness					
Convenience					
Neighborhood					
Price					
Value					
Overall Satisfaction					

Would you recommend? Yes No

Save Up to \$30!

YOUR RECEIPT

Tazewell Hotel & Suites

245 Granby St
Norfolk, VA 23510
[View Map](#) | [Driving Directions](#)

us.mg2.mail.yahoo.com/dc/blank.html?...

1/2

4/12/2010

Priceline.com - hotel, hotel reservation,...

Total Charges*: **\$64.29**

*Prices are in US dollars.

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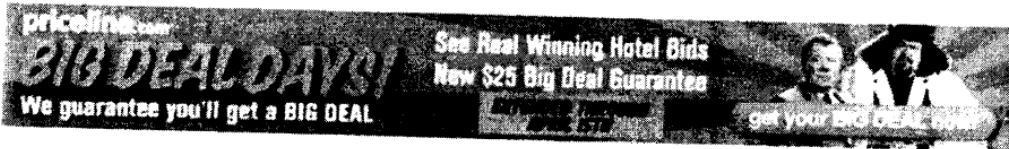
Important Hotel Check-In Details

Remember, your Priceline hotel reservation is non-refundable, non-transferable and non-changeable. If you have any questions or require further assistance, please visit our [Customer Service](#) area. You may also contact our Customer Service Department toll-free at 1-800-657-9168. Please have your priceline Request Number (683-199-881-01) and the phone number you used when you placed your request (703-915-7212) ready when you call.

All rooms will **accommodate 2 adults**. Bed type requests (King, Queen, 2 Doubles, etc.) or other special needs such as a non-smoking or smoking room should be requested through your confirmed hotel, can not be guaranteed and are based on availability.

Reservation is guaranteed for arrival on the confirmed check-in date only. If you do not check-in on the first day of your reservation and you do not alert the hotel in advance, the remaining portion of your reservation will be canceled and you will not be entitled to a refund.

When you check-in, please present the confirmation number(s) printed above (one for each room) and your photo ID at the Front Desk. In addition, the hotel will require a major credit card to guarantee incidental charges (phone calls, room service, parking, resort fees, energy charges, etc.) that you may incur while staying at the hotel. Should you have a special request, please contact your hotel directly at the number listed above to coordinate your arrangements.



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4/12/2010

Check-In: **Mon, Feb 25, 2008**

(check-in time: 3:00 PM)

Check-Out: **Wed, Feb 27, 2008**

(check-out time: 12:00 PM)

Print

1 Adults, 0 Children
Standard King

Rates per Room

(excluding tax recovery charges and our service fees)

Mon, Feb 25, 2008 — ~~\$ 92.00~~ \$ 82.80

Tue, Feb 26, 2008 — ~~\$ 92.00~~ \$ 82.80

Extra Person Fees

\$ 0.00



**Tax Recovery Charges
& Service Fees**

\$ 28.24

Total Charges

\$ 193.84

(includes tax recovery charges and our service fees)

Payment Information

Payment Method:

Credit Card

Card Number:

*****~~1234~~*****

Amount Charged:

\$ 193.84

Balance Due:

\$ 0.00

All Prices in USD.

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We understand that sometimes plans fall through. We do not charge a change or cancel fee. However, this property (Tazewell Hotel & Suites) imposes the following penalty to its customers that we are required to pass on: Cancellations or changes made after 12:00 AM (Eastern Standard Time (US & Canada)) on 02/24/2008 are subject to a 1 Night Room & Tax penalty. The property makes no refunds for no shows or early checkouts.

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4/12/2010

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Doubletree Hotel Richmond Downtown ★ ★ ★ ½

Downtown Richmond
301 West Franklin Street
Richmond, Virginia 23220
804-644-9871
[See Hotel Website](#)
[View Map and Directions](#)

Check-In Date:
Sun, Feb 28, 2010 / After 03:00 PM

Check-Out Date:
Mon, Mar 1, 2010 / 12:00 PM

Amenities:

Reservation and Billing Information

Reservation Information

Reservation Name: [REDACTED]
Hotel Confirmation Number: 87332205
Hotel Request Number: 683-199-881-01

Payment Information

Billing Name: [REDACTED]
Payment Method: MasterCard ending in [REDACTED]

Your Offer Price Per Room, Per Night: \$50.00
Subtotal: \$50.00
Taxes & Fees: \$14.29



priceline.com/hotels/.../accepted.asp?s...

1/2