



MULTISTATE TAX COMMISSION

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Hearing Officer's Report

Proposed Model Statute on the Tax Collection Responsibilities of Accommodations Intermediaries

Introduction

In 2004, the Uniformity Committee began a project in response to the then-emerging issue regarding lodging tax collection responsibilities of Internet accommodations intermediaries who book accommodations on a non-exclusive basis for their customers.¹ There are several business models in use. Under most, if not all of them, the intermediary collects and remits tax on the discount price that the intermediary pays to the accommodations provider and not on the retail price that the intermediary charges to the intermediary's customer.

Some intermediaries take the position that tax is not due on the margin between the discount price and the retail price. But some states and localities have determined tax is due on the entire retail price charged by the intermediary to the customer, including the margin.² The proposed model statute provides a mechanism for the collection and remittance tax on the entire retail price, including the margin.

The model employs the "dual track" method of collecting and remitting tax. The intermediary collects tax on 100% of the retail price it charges to its customer. It then remits the tax due on the discount rate portion of the price to the provider (which in turn remits it to the appropriate taxing agency) and remits the tax due on the margin between the discount rate and the retail price to the appropriate taxing agency. The intermediary is not required to state the margin, the discount rate, or the total amount of tax collected to the customer.

The proposed model also contains safe harbors for intermediaries and providers. Intermediaries are protected from liability on the basis of collecting tax on the room charge at an incorrect rate if the rate is identical to the rate on the discount room charge.

¹ Taxes imposed on or measured by the price of the accommodations go by many different names in the states and localities. Therefore this report will refer to such taxes as "lodging" taxes.

² E.g., *Expedia, Inc. v. City of Columbus*, No. S09A0567 (Ga. June 15 2009); *City of Atlanta v. Hotels.com*, No. S08G0568 (Ga. March 23, 2009); *City of Charleston, S.C. v. Hotels.com, et. al*, C. A. No. 2:06-ev-1646-PMD (D. SC November 5, 2007).

Providers are protected from liability on the basis of an incorrect amount remitted by the intermediary on the margin.

The model does not address travel packages, where accommodations may be bundled with air transportation, car rentals, or similar travel components.

Public Comments

At the July 21, 2009 public hearing, the Hearing Officer heard testimony from several representatives of the accommodations intermediaries industry and representatives from the Ad Hoc Coalition for Fair Hotel Tax Collection. In the industry's view, the model statute:

Accommodations Intermediaries:

- Imposes new taxes on accommodations intermediaries
- Creates burdensome compliance costs and carries the potential of filing returns in 7,000 local jurisdictions
- Creates burdensome 'trust tax accounting' dynamic between providers and intermediaries
- Raises issues regarding the right of return of accommodations taxes payable or paid if and when customers don't show. This will require more communication between providers and intermediaries, thereby increasing costs.
- The definition of "accommodations intermediary" is too broad. It would pull "traditional" travel agents and consolidators within its scope, as well as credit card companies acting as payment processors for payments made to providers, who could be charged accommodations taxes for the transaction fees charged to merchants.
- Is vague with respect to bundled travel packages.
- Intermediaries are not in the practice of allocating revenues to specific elements of bundled packages for financial reporting purposes.
- May cause intermediaries to drop low-volume destinations
- May open the door for double taxation in states with gross receipts tax
- Could be a barrier to entry for small businesses (i.e. "mom and pop" travel agencies)

Ad Hoc Coalition for Fair Hotel Tax Collections:

- The intermediaries' markup should not be taxed as a service fee. Instead, the accommodations tax ought to be based on the retail price paid by the consumer
- The entire amount of tax collected should go to the tax jurisdiction where the accommodations provider is located
- In the spirit of consumer protection laws, intermediaries should provide a line by line accounting on the basis of each element of the travel package, the intermediaries' service charge, and the accommodations and sales tax charged to the consumer
- Bundled travel packages can be unbundled; there are a number of accounting procedures available to isolate costs of accommodations in a bundled package
- Are also opposed to section 2(a), because it does not require intermediaries to disclose the amount of taxes collected from the customer. Several local jurisdictions require the intermediary to provide transparent information to the customer regarding the taxes they are being charged

The Hearing Office also received extensive written testimony, much of which reiterates the points made above. Below are additional concerns that were not made during the hearing.

- Risk of inconsistent tax treatment of similar transactions
- Complexity of dual-track remittance
- Compliance and audit issues
- Nexus
- Sourcing Principles of the Streamlined Sales and Use Tax Agreement (SSUTA)

Ad Hoc Coalition for Fair Hotel Tax Collections

- Replace "accommodations intermediary" with "travel company"
- Description of responsibilities should include a registration requirement in those jurisdictions where rooms are rented
- Model should require separate line entries for taxes and fees
- No safe harbors

The Hearing Officer will address each of these areas of concern.

Does the Model Statute Impose New Taxes on Accommodations Intermediaries?

Accommodations intermediaries believe that because intermediaries are not accommodations providers, the proper characterization of the mark up between the discounted room charge and the room charge is that of a “service fee.” In their view, the model statute therefore imposes a new tax on intermediaries that does not recognize the fundamental difference between accommodations charges and service fees.

The Hearing Officer disagrees. The proposed model does not impose new lodging taxes on the intermediaries’ margin. Section 2(a) reads, in part, “an accommodations intermediary shall be responsible for the collection of tax **imposed by [cite to applicable code section(s)]** on the room charge...” (emphasis added). Thus, the model assumes that the state or locality has already taken the position that the margin is subject to lodging taxes. Rather than impose taxes on the margin, the model only describes the mechanism by which lodging taxes that have been determined to be due on the margin are to be collected and remitted.

Does the Model Statute Impose Burdensome Compliance Costs on Intermediaries?

The Hearing Officer notes the model is concerned only with the collection and remittance process for lodging tax already imposed on the retail price of accommodations sold to customers. Imposition of any tax necessitates compliance and administrative costs for the taxpayer. If the collection and remittance requirements create excessive administrative costs, or could be structured more efficiently, then consideration must be given to revising the structure. But the intermediaries have provided no clear evidence of excessive tax administration costs.

Does the Model Statute Create a Burdensome “Trust Tax Accounting” Dynamic?

The Hearing Officer fails to understand how the proposal impacts the manner in which intermediaries and providers currently operate. If the Hearing Officer understands correctly, under the current system, the intermediary is often not billed for months after the customer has used the room purchased. During that time, the intermediary holds the “tax recovery fee” charged to the customer, presumably so it may remit the appropriate amount of tax to the hotel when invoiced. It appears that the intermediary and provider already have a “trust tax accounting” system. The model statute would not alter that arrangement.

Does the Model Raise Issues Regarding the Return of Lodging Taxes When Customers Do Not Show?

The Hearing Officer notes, first, that the model is concerned only with the collection and remittance process for lodging tax already imposed on the retail price of accommodations sold to customers. Second, presumably intermediaries are currently collection and remitting tax on at least the discount rate. If a return of tax is required under certain circumstances, then presumably there is already a system in place to accomplish such

return. The determination of the base on which the tax must be collected (discount rate or retail) and the method for remitting such tax to the taxing jurisdiction (whether through the provider to the taxing jurisdiction or directly to the taxing jurisdiction), should have no impact on the system for the return of tax to the ultimate customer where such return is necessary. Thus, the question of how the return of lodging taxes are accomplished for customer no-shows should not be affected by this model.

Is the Model Statute's Definition of "Accommodations Intermediaries" Too Broad?

Intermediary representatives believe that the definition of "accommodations intermediaries" is overly broad. As written, the definition could bring "traditional" travel agents, consolidators and even credit card and other financial service companies within its scope.

The Hearing Officer disagrees. The model is intended to reach all service providers in the travel industry whose billing practices are similar to those currently in use by accommodations intermediaries. The model could reach travel consolidators, but it would not apply to the "traditional" travel agent or credit issuers or financial service companies.

"Traditional" Travel Agent

The Hearing Officer assumes that a "traditional" travel agent is one who is paid a commission from an accommodations provider for booking a room for a customer. The agent may collect payment from the customer on behalf of the provider, but does not charge the customer a service fee. The agent's commission is paid by the provider, not the customer. Some agents charge customers an upfront fee but unlike intermediaries, these agents most likely do not have a contract with the provider, leaving them to charge and collect lodging tax on the retail price of accommodations as quoted by the provider.

Credit Issuers and Financial Service Companies

The Hearing Officer disagrees with the assertion that credit issuers and other finance companies would fall within the definition. The operative phrase in the definition is "and charges a room charge to the customer." The credit issuer might "facilitate the sale" by extending a short-term unsecured loan to the borrower, but it is not the entity charging a room charge to the customer, nor is it charging a room charge to the customer when it charges the merchant for its services.

Is the Model Statute Unclear on the Treatment of Bundled Travel Packages?

The Hearing Officer agrees that the model statute is unclear with respect to travel packages. The Uniformity Committee decided not to address travel packages because of the perceived difficulty in separating the costs for accommodations and other components of the bundle. Therefore, the model, as drafted, applies to charges for accommodations

only, and does not address collection and remittance for accommodations bundled with other travel components.

However, the Hearing Officer believes that bundled travel packages should be addressed in the model for purposes of collection and remittance of lodging tax on accommodations. Therefore, the Hearing Officer recommends the following language be inserted as a new §1(h), Definitions:

“A travel package consists of accommodations bundled with two or more separate components such as air transportation, car rental or similar items and charged to the customer for a single retail price.”

The Hearing Officer received comments that with respect to travel packages, intermediaries do not separate out the value of each travel component. The Hearing Officer also received comments that some localities currently require intermediaries to separate out the value of the accommodations and tax due when bundled with other travel components.³

The Hearing Officer is not in a position to evaluate these conflicting comments. The Hearing Officer recommends that the following language be inserted as a new §2(e):

“The value of the accommodations bundled as part of a travel package may be determined by reasonable and verifiable standards from the accommodation intermediaries’ books and records that are kept in the regular course of business including, but not limited to, non-tax purposes.”

One commentator noted that “[b]ecause there is no per-component mark-up, there is no amount that would fall within the current Draft Proposal definition of ‘accommodations fee’.”⁴

The Hearing Officer believes that the above new §2(e) addresses this issue.

One commentator noted that for some intermediaries, agreements and contracts with providers may restrict or prohibit their separately stating the cost of each component of the bundled package for marketing purposes. Sometimes the price of the accommodations may change depending on the number of items in a package.

The Hearing Officer notes that the model requires the intermediary to separately show the price of the accommodations component of a bundled travel package for tax collection, remittance and auditing purposes, not for marketing purposes. If the price for accommodations changes, so does the tax due.

³ Martin Morris, Comments on Model Statute on the Tax Collection Responsibilities of Accommodations Intermediaries, August 6, 2009

⁴ Jonathan E. Perkel, Comments on MTC Proposal to Tax Accommodations Intermediaries, August, 20, 2009

Will Intermediaries Cease to Serve Low-Volume Destinations?

The Hearing Officer expresses no opinion. The model is concerned only with the collection and remittance process for lodging tax already imposed on the retail price of accommodations sold to customers. Whether to tax the margin is a policy position on the part of state and local governments; whether continue serving low-volume destinations is a business decision on the part of the accommodations intermediary; and these decisions fall outside the model's scope.

Will the Model Statute Open the Door for Double Taxation in States with Gross Receipts Taxes

The Hearing Officer expresses no opinion. The model is concerned only with the collection and remittance process for lodging tax already imposed on the retail price of accommodations sold to customers. The potential for double taxation is an issue that falls outside the model's scope.

Could the Model Statute Could Be a Barrier to Entry for Small Businesses?

The Hearing Officer expresses no opinion. The model statute is concerned only with the collection and remittance process for lodging tax already imposed on the retail price of accommodations sold to customers. The question of whether the model could pose a barrier to small businesses' entry into the market falls outside the model's scope. However, the Hearing Officer acknowledges that the model could act as a barrier to entry if it imposes high administrative costs but no clear evidence of such costs was provided.

Does the Model Statute Carry the Risk of Inconsistent Tax Treatment of Similar Transactions?

The Hearing Officer disagrees. The model is intended to reach all providers in the travel industry who are subject to the lodging tax on a discount price and a margin. Under the model, whenever tax is due on the margin, it is collected and remitted in the prescribed manner whether the taxpayer calls itself an intermediary or a travel agent, online or offline.

Is The Model Statute's Dual-Track Remittance Process is Too Complex?

The Hearing Officer notes that the dual-track remittance mechanism was adopted, in part, to minimize the risk of liability to the intermediary for lodging taxes owed by the provider, and vice-versa. See Safe Harbor.

Would the Model Statute Would Increase the Complexity of Tax Audits?

If the model proves to result in excessively complex audits, then consideration must be given to simplifying its structure. However, there is no evidence that use of the model would result in excessively complex audits.

Does the Model Statute Raise Nexus Concerns?

The Hearing Officer expresses no opinion. The Hearing Officer's charge is to gather and evaluate public comments on the proposed model statute's collection and remittance process. Nexus concerns clearly fall outside this mandate and will not be considered.

Does the Model Statute Contravene the Sourcing Principles of the Streamlined Sales and Use Tax Agreement?

The Hearing Officer disagrees. The sourcing principles of the SSUTA concern sales taxes, not lodging taxes. Unlike sales taxes, lodging taxes are not transaction-based. Lodging taxes are based on room occupancy which occurs in the jurisdiction where the provider is located. Therefore, lodging taxes should be sourced to the location of the provider.

Should the Intermediaries' Markup Should Not Be Taxed as a Service Fee?

The model assumes that the state or locality has already taken the position that the margin is subject to lodging taxes.

Should the Entire Amount of Tax Collected Should Go to the Tax Jurisdiction Where the Accommodations Provider is Located?

The Hearing Officer agrees. The model assumes that the state or locality has already taken the position that the margin is subject to the jurisdiction's lodging taxes.

Should the Model Statute Replace "Accommodations Intermediary" with "Travel Company"?

The Hearing Officer disagrees. The Uniformity Committee developed the proposed model to apply only to customer purchases of accommodations. The Hearing Officer believes that the term "Travel Company" is connotes other aspects of the travel industry that the model was not intended to address. The term "accommodations intermediary" is a more accurate illustration of the model's intent.

Should the Model Statute Should Include a Description of Responsibilities of the Accommodations Provider and Accommodation Intermediaries, Including the Requirement for Intermediaries to Register in the Jurisdictions Where Rooms Are Rented?

The Hearing Officer disagrees. The model is concerned only with the collection and remittance process for the tax already imposed on the retail price of accommodations sold to customers. Whether intermediaries should be required to register falls outside the model's scope.

Can Bundled Travel Packages Can Be Unbundled?

See Is the Model Statute is Unclear on the Treatment of Bundled Travel Packages?

Should the Model Statute Should Require a Line by Line Accounting on the Basis of Each Element of the Travel package, the Intermediaries' Service charge, and the Accommodations and Sales Tax Charged to the Consumer?

The Hearing Officer agrees, to the extent that accommodations intermediaries' invoices should contain a line entry for the amount of lodging tax collected. In the interest of transparency, most, if not all states require lodging taxes to be separately stated from the retail price of accommodations purchased by the customer. The Hearing Officer recommends that the language of §2(a) be amended:

2. Collection and Remittance.—

- (a) An accommodations intermediary shall be responsible for the collection of tax imposed by [cite to applicable code section(s)] on the room charge and ~~but~~ shall ~~not~~ be required to separately state on the invoice the specific amount of taxes collected.

The Hearing Officer expresses no opinion on the appropriateness of line entries for each component of the travel package and sales tax as these issues fall outside the model's scope.

The Model Statute Should Not Include Safe Harbors

The Hearing Officer disagrees. Safe harbors are reasonable in a dual-track tax collection and remittance procedure to minimize the risk of liability of each for errors of the other.

Recommendation

The Hearing Officer recommends authorization of the Model Statute on the Tax Collection Responsibilities of Accommodations Intermediaries, as amended, for a By-law 7 survey of the States for consideration in adopting the proposed model statute as a uniformity measure.

Respectfully submitted,

Roxanne Bland
Hearing Officer

Exhibit A

**MODEL STATUTE ON THE TAX COLLECTION RESPONSIBILITIES OF
ACCOMMODATIONS INTERMEDIARIES**

(REDLINED)

Draft 7/21/09—Public Hearing

1. Definitions.—

(a) “Accommodations” means one or more individual sleeping rooms or suites for transient overnight lodging.

(b) “Accommodations provider” means any person or entity that furnishes accommodations for periods of [less than thirty days ^{***alternative language***} thirty days or less] 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.

(c) “Accommodations intermediary” means any person or entity, 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, the term “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.

- (d) “Accommodations fee” means the room charge less the discount room charge, if any, provided that for purposes of this Act the accommodations fee shall not be less than zero.
- (e) “Room charge” means the full retail price charged to the customer for the use of the accommodations, including any accommodations fee before taxes.
- (f) “Discount room charge” means the amount charged by the accommodations provider to the accommodations intermediary for furnishing accommodation.
- (g) “Unrelated accommodations intermediary” means an accommodations intermediary that is not part of a controlled group of corporations, as defined in I.R.C. Section 1563(a), that includes the accommodations provider.
- (h) A travel package consists of accommodations bundled with two or more separate components such as air transportation, car rental or similar items and charged to the customer for a single retail price.

2. Collection and Remittance.—

(a) An accommodations intermediary shall be responsible for the collection of tax imposed by [cite to applicable code section(s)] on the room charge and shall be required to separately state on the invoice the specific amount of taxes collected.

Deleted: but

Deleted: not

(b) An accommodations intermediary shall remit to the accommodations provider the tax collected on the discount room charge.

(c) An accommodations intermediary shall remit to the [state or local tax agency] the tax(es) collected on the accommodations fee.

(d) An accommodations provider shall collect and remit to the [state or local tax agency] the tax(es) imposed on the discount room charge.

(e) The value of the accommodations bundled as part of a travel package may be determined by reasonable and verifiable standards from the accommodation intermediaries' books and records that are kept in the regular course of business including, but not limited to, non-tax purposes.

3. Safe Harbor.—

- (a) No assessment shall be made against an accommodations intermediary on the basis of an incorrect remittance of tax on the room charge if the tax rate applied to the room charge by an accommodations intermediary in collecting and remitting such tax is identical to the rate applied to the discount room charge by the accommodations provider.

- (b) No assessment shall be made against an accommodations provider on the basis of an incorrect remittance of tax on the accommodations fee by an unrelated accommodations intermediary.

Optional:

Example:

Accommodations Provider (Provider) furnishes a one night accommodation to a guest who booked the accommodations through Accommodations Intermediary (Intermediary). The Provider bills the Intermediary for a discount room charge of \$80.00. The price at which the Intermediary facilitates the sale of a one-night accommodations to the customer is \$100.00, which includes a \$20.00 accommodations fee. The 5% tax applied to the discount room charge is \$4.00 and applied to the accommodation fee is \$1.00. The total price charged to the customer, including tax, is \$105.00, which is the sum of the discount room charge, the accommodations fee and the \$5.00 tax (\$100 room charge + [5% tax rate x \$100.00 room charge] = \$105.00 price to customer).

Intermediary remits \$4.00 tax (5% tax rate x \$80.00 discount room charge) to the Provider and a \$1.00 tax (5% tax rate x \$20.00 accommodations fee) to [the state or local tax agency]. Provider remits the \$4.00 tax to the [state or local tax agency].

\$80.00		Discount room charge
\$20.00		Accommodations fee
	\$100.00	Room charge
\$4.00		Tax on discount room charge remitted by intermediary to provider, and by provider to [state or local government] = (5% x \$80.00)
\$1.00		Tax on accommodations fee remitted by intermediary to [state or local government] = (5% x \$20.00)
	\$5.00	Total tax on room charge
\$105.00		Price to customer including tax charged by Provider and Intermediary

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(c) “Accommodations intermediary” means any person or entity, 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, the term “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.

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- (e) “Room charge” means the full retail price charged to the customer for the use of the accommodations, including any accommodations fee before taxes.

- (f) “Discount room charge” means the amount charged by the accommodations provider to the accommodations intermediary for furnishing accommodation.

- (g) “Unrelated accommodations intermediary” means an accommodations intermediary that is not part of a controlled group of corporations, as defined in I.R.C. Section 1563(a), that includes the accommodations provider.

- (h) A travel package consists of accommodations bundled with two or more separate components such as air transportation, car rental or similar items and charged to the customer for a single retail price.

4. Collection and Remittance.—

- (a) An accommodations intermediary shall be responsible for the collection of tax imposed by [cite to applicable code section(s)] on the room charge and shall be required to separately state on the invoice the specific amount of taxes collected.
- (b) An accommodations intermediary shall remit to the accommodations provider the tax collected on the discount room charge.
- (c) An accommodations intermediary shall remit to the [state or local tax agency] the tax(es) collected on the accommodations fee.
- (d) An accommodations provider shall collect and remit to the [state or local tax agency] the tax(es) imposed on the discount room charge.
- (e) The value of the accommodations bundled as part of a travel package may be determined by reasonable and verifiable standards from the accommodation intermediaries' books and records that are kept in the regular course of business including, but not limited to, non-tax purposes.

5. Safe Harbor.—

- (a) No assessment shall be made against an accommodations intermediary on the basis of an incorrect remittance of tax on the room charge if the tax rate applied to the room charge by an accommodations intermediary in collecting and remitting such tax is identical to the rate applied to the discount room charge by the accommodations provider.

- (b) No assessment shall be made against an accommodations provider on the basis of an incorrect remittance of tax on the accommodations fee by an unrelated accommodations intermediary.

Optional:

Example:

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Intermediary remits \$4.00 tax (5% tax rate x \$80.00 discount room charge) to the Provider and a \$1.00 tax (5% tax rate x \$20.00 accommodations fee) to [the state or local tax agency]. Provider remits the \$4.00 tax to the [state or local tax agency].

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