

## Hamilton, Cassandra (TAX)

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**From:** Peterson, Kristen (TAX)  
**Sent:** Tuesday, October 19, 2010 11:51 AM  
**To:** Hamilton, Cassandra (TAX)  
**Subject:** FW: ITSA Comments on the Study on the Feasibility of Implementing Senate Bill 452  
**Attachments:** image001.png; ITSA VA SB 452 Study Comments.pdf

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**From:** asackler@interactivetravel.org [mailto:asackler@interactivetravel.org]  
**Sent:** Friday, October 01, 2010 3:43 PM  
**To:** Peterson, Kristen (TAX)  
**Subject:** ITSA Comments on the Study on the Feasibility of Implementing Senate Bill 452

Dear Ms. Peterson:

Please find attached the comments of the Interactive Travel Services Association on the draft Study on the Feasibility of Implementing Senate Bill 452. ITSA appreciates the opportunity to present its views.

Thank you.

Art Sackler

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Kristen D. Peterson  
Office of Tax Policy, Policy Development Division  
Virginia Department of Taxation  
Main Street Centre, 15th Floor  
600 East Main Street  
Richmond, VA 23219

October 1, 2010

Dear Ms. Peterson:

Thank you for your careful attention to the issues regarding Senate Bill No. 452, and for providing the opportunity to comment on the draft Study on the Feasibility of Implementing Senate Bill 452 (the “Draft Study”). ITSA, an organization whose members include online travel companies (“OTCs”), Global Distribution Systems, independent travel distributors, and other travel-service companies, sincerely appreciates the opportunity to comment.

We understand that S.B. 452 is designed to expand both the retail sales and use taxes and local transient occupancy taxes to include fees that “accommodations intermediaries” (including OTCs) charge customers who reserve hotel rooms through such intermediaries. S.B. 452 would also require accommodations intermediaries to collect and remit taxes on such “accommodations fees.”

As you continue your analysis of the bill and of its potential unanticipated consequences—including an adverse impact on travel to Virginia—we would appreciate your consideration of the following:

- \* *Virginia recognizes that OTCs provide services, not accommodations.*

As the Draft Study points out, Virginia has previously confirmed that current law does not require OTCs to collect taxes. In Public Document 06-139, the Tax Commissioner noted that the facilitation fees charged by OTCs are for “providing a service in connection with taxable transient accommodations”—not for “providing...accommodations.” (emphasis added) Because OTCs do not provide transient accommodations, the Tax Commissioner concluded that OTCs are “not liable to collect and remit tax “on their fees.

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\* ***Consistent with direction from the Commissioner, OTCs do not collect taxes.***

Accordingly, OTCs do not collect taxes. Instead, the accommodations providers, i.e., the hotels, collect taxes on the rates they have agreed to accept for their rooms, and they remit those taxes to the appropriate taxing jurisdictions. We believe it would be helpful, and certainly more accurate, for the final version of the Draft Study to reflect this fact, and to make clear that OTCs do not collect Virginia taxes. Rather, OTCs collect a tax recovery charge, which is an amount that is intended to cover the state and local taxes that a hotel is expected to charge, and that the hotel is obligated under current law to—and, to the best of the OTCs’ knowledge, does—collect and remit.

\* ***Consistent with Virginia’s interpretation of the law, no court has ever concluded that OTCs are hotels, innkeepers or accommodations providers.***

As the Draft Study notes, litigation in several jurisdictions focuses on whether OTCs are required to collect and remit sales or hotel taxes and to pay taxes for past periods. As the Draft Study mentions, there have been multiple court decisions on this issue; however, the draft does not point out that no court has held that the OTCs must pay back taxes.

\* ***The Multistate Tax Commission (“MTC”) proposal has not been approved.***

The Draft Study explains that the MTC has been working since 2004 to develop a model statute that would tax intermediaries’ service fees, and that the MTC draft is being circulated to MTC member states for review. Since the date of the Draft Study, the MTC proposed model statute has failed to receive sufficient votes from MTC state representatives to move to the next step of the MTC process.

\* ***The long-standing Internet Tax Freedom Act prohibits imposition of discriminatory, internet-only taxes.***

Interestingly, the Draft Study acknowledges the Virginia legislation’s apparent intent to expand taxes to reach only OTCs and not traditional, brick-and-mortar travel agents and service providers. The Internet Tax Freedom Act (Pub. L. 105-277, div. C, tit. XI, § 1101(a)(1), as amended by Pub. L. 108-435, §§ 2-6A) prohibits such discriminatory taxation. Enactment of a tax that applies to the online travel companies, but not to brick and mortar travel agents and others who offer reservations services, would violate this federal law.<sup>1</sup>

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<sup>1</sup> ITSA does not imply by this that the tax should be made applicable to brick and mortar travel agents or other travel intermediaries. Applying this tax to any intermediaries is bad tax policy, and will be counterproductive to travel to Virginia, so-called “multiplier effect” businesses related to travel in Virginia and, ultimately, tax receipts in Virginia.

\* ***The potential revenue numbers are overstated.***

As the Draft Study accurately notes, many of the OTCs do not have nexus with Virginia and would not be subject to tax collection responsibilities even if S.B. 452 were enacted. Moreover, the revenue estimates included in the report appear to be based on overestimates not only of the proportion of rooms booked through OTCs' merchant hotel model (as opposed to directly through hotels' proprietary websites or pursuant to other OTC business models), but also of the fees charged by OTCs. We also believe the Draft Study's estimated fee of 32.5% of the price of the hotel room is far higher than the actual fees that the OTCs charge in transactions with respect to Virginia hotel booking transactions. The overestimated revenue projections may also be related to the inaccurate assumption that hotels typically set aside blocks of rooms for the OTCs.

ITSA and the OTCs recognize the importance of good tax policy, equity among consumers, and a stable tax base for Virginia. We respectfully submit that imposing additional taxes on services provided by the OTCs would hurt, rather than help, each of these goals.

Sincerely,



Arthur B. Sackler  
Executive Director  
Interactive Travel Services Association