

Testimony of Shawn McBurney  
Senior Vice President for Governmental Affairs  
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Before the Pennsylvania House Committee on Tourism & Recreational Development  
October 29, 2013

Chair Stern, Democratic Chair Kirkland, and members of the committee, thank you for the opportunity to testify today.

My name is Shawn McBurney and I am Senior Vice President for Governmental Affairs of the American Hotel & Lodging Association.

The American Hotel & Lodging Association (AH&LA) has served the hospitality industry for more than a century and is the sole national association representing all sectors and stakeholders in the lodging industry, including individual hotel property members, hotel companies, student and faculty members, and industry suppliers. Headquartered in Washington, D.C., AH&LA provides members with national advocacy in Congress and the executive branch, education, research and information, and other services to the lodging industry. We are proud to have the Pennsylvania Restaurant & Lodging Association as one of our partner state associations that provide state and local representation and additional benefits to our joint members.

We very much appreciate the committee examining the issues surrounding the proper tax treatment of hotel rooms booked online. We support legislation that would clarify Pennsylvania law to ensure that the hotel room stays are taxed equally, regardless of the channel by which they were booked.

The issue comes down to a simple question: does Pennsylvania want to tax Pennsylvania hotels at a higher effective rate than out-of-state companies for the same transaction?

As noted in the graphic on page five of this testimony, when a guest books a room through a hotel's website, they see the price of a room advertised, let's say for \$100. When the guest clicks through to see the final price, the website will display the retail price plus applicable taxes. Let's assume the tax for that jurisdiction is 10%, so the guest would see \$10 charged as tax, resulting in a final price of \$110.

The guest would then reserve the room and once they completed the stay, they would be charged \$110. The hotel would keep the \$100 for the room and remit the \$10 as tax.

When the guest books a room through an online travel company, or OTC, such as Expedia, Orbitz, or Travelocity, they would see the same room for the same price or even higher. Let's assume the OTC advertises the room for \$100 as well. When the guest clicks through to see the final price, the website would show the retail price plus "taxes and fees" totaling \$110 or within pennies of that amount.

If the guest reserves the room, the OTC charges them immediately and holds the money until the guest checks out of the hotel. When the guest checks out, the OTC remits to the hotel the contracted amount it agreed to pay for the room. Let's assume that amount is \$80. The \$20 difference between the \$100 retail price and the \$80 wholesale cost is profit for the OTC which is its compensation for marketing the room.

However, the OTC chooses to base the 10% tax on its wholesale cost of \$80 rather than the retail price of \$100 that they advertised and charged the guest. In this example the OTC would remit only \$8 in tax rather than the \$10 the hotel remits.

Pennsylvania is not alone in examining this issue. States and local governments throughout the country have taken action to address this controversial practice.

The cities of Columbus and Atlanta, Georgia both sued OTCs over this issue. Those cases were ultimately decided in the Georgia Supreme Court that the OTCs were required to remit taxes under Georgia law based on their retail prices, not their wholesale costs.

The Supreme Court of South Carolina made a similar decision after that state sued an OTC over the same issue. The court ruled for the state and concluded that the controlling statute "imposes a sales tax on the gross proceeds received by [the OTC] in exchange for furnishing hotel accommodations in South Carolina." South Carolina now requires all OTCs to remit hotel taxes directly to the state based on the retail prices of the rooms they sell.

In Texas, the City of San Antonio and over 170 other Texas cities sued the OTCs. In April of this year, the U.S. District Court, Western District, San Antonio Division found that the OTCs were required to remit based on their retail prices and ordered them to pay \$55 million in back taxes.

Similar outcomes have occurred in other courts around the country as well.

Some states have enacted legislation to clarify their laws which were written decades before the creation of the internet and the OTCs.

North Carolina, New York City, Oregon, New York State, and Washington, DC have all enacted clarifying legislation to ensure that their tax laws are applied equally to room reservations regardless of whether the rooms were booked through an OTC or directly through a hotel's website.

This summer, the Executive Committee Task Force on State and Local Taxation of the National Conference of State Legislators (NCSL) unanimously passed a resolution recommending that states enact legislation clarifying tax laws to ensure OTC's remit taxes on their retail prices. That resolution can be found on pages six and seven of this testimony.

As a result, we anticipate other states clarifying their laws as well.

AH&LA first became involved in this issue when we learned that the OTCs were pressing for legislation in Congress that would prevent new lawsuits against them and preempt Pennsylvania and every other state and locality in the country from exercising their tax authority over hotel room stays.

The legislation they were advocating would prevent any state or local government from taxing OTCs for anything over their wholesale costs. Not only would it create a preferential tax category for OTCs, it would result in a higher effective tax rate being imposed on every hotel in the country relative to the OTCs. In addition, the legislation specifically banned any hotel from their tax preference.

AH&LA joined with the National Association of Black Hotel Owners, Operators & Developers, the Latino Hotel & Restaurant Association, the Asian American Hotel Owners Association, the Destination Marketing Association International, the International Franchise Association, the National League of Cities, the International Association of Assembly Managers, the U.S. Conference of Mayors, the Government Finance Officers Association, the National Association of Counties, the Federation of Tax Administrators, the Hospitality Asset Managers Association, and the American Federation of State, County, and Municipal Employees in opposing that legislation.

There has been a great deal of confusion about this issue. The OTCs have asserted that having them comply with the law equally with hotels would be unconstitutional based on the Commerce Clause.

That claim is patently false. The OTCs already remit tax, they merely choose to base it on their wholesale costs rather than their retail prices.

Further, that assertion and has been rejected by several courts, including two state supreme courts, where it has been raised.

Another false claim raised is that tourism would dramatically suffer in any state or city that had equal tax treatment for hotels and OTCs. As noted in the transaction examples, hotel guests pay the same final price or more for hotels booked through OTCs such as Expedia, Orbitz, and Travelocity.

Contrary to that claim, in jurisdictions where laws have been clarified to ensure equal tax treatment, occupancy rates have increased, rather than decreased. In New York City, hotel occupancy rates were 4.1% higher one year after the city clarified its ordinance and in South Carolina, hotel occupancy rose 2% in a year.

Another claim made by the OTCs is that equal tax treatment of room stays would create a so-called "new tax." Clearly hotel taxes are not new – they have existed for decades. Clarifying laws to ensure equal application of those laws is not creating anything new, it

is simply confirming that the tax is owed on the retail price, rather than on the OTCs' wholesale costs.

The OTCs also claim that if the law is applied equally to them, traditional travel agents will be harmed. That is also untrue. Transactions with traditional travel agents already comply with the law in the same way direct hotel bookings do. Ensuring that OTCs comply equally will have no effect whatsoever on traditional travel agent transactions.

The tax remittance practices of the OTCs has created, in effect, a discriminatory policy against Pennsylvania hotels that employ workers throughout the state in favor of out-of-state companies.

The lodging industry greatly appreciates the committee's attention to this issue. Because of their controversial remittance practices, OTCs enjoy a special tax preference over Pennsylvania hotels which are essentially being punished for being diligent, following the law, employing workers, and paying their taxes.

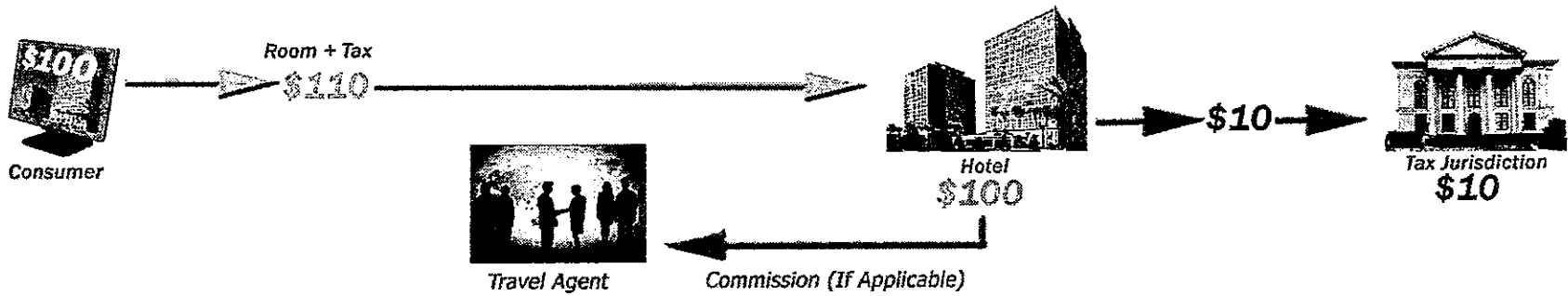
We strongly support legislation that will ensure that Pennsylvania's tax laws are applied equally to in-state hotels and out-of-state companies.

Thank you for the opportunity to testify. I am happy to answer any questions you have.

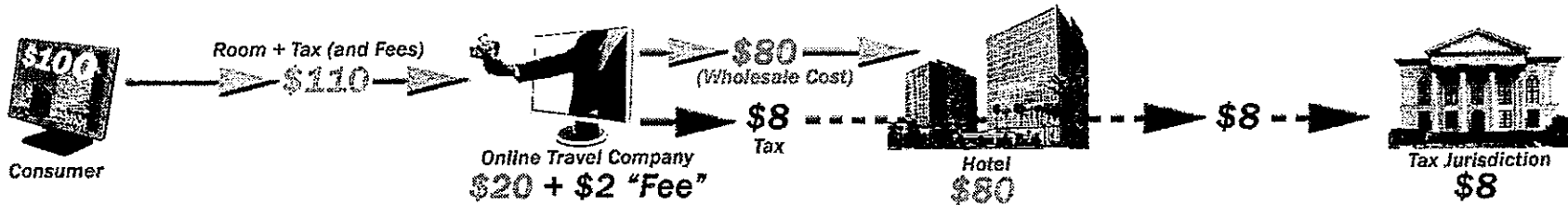
Consumer Sees \$100 Room  
Consumer Pays (With 10% Jurisdiction Tax) \$110

### Direct Hotel Booking

Tax Remitted



### Online Travel Company Booking



**TITLE: Online Travel Company Principles**

**COMMITTEE: Executive Committee Task Force on State and Local Taxation**

**TYPE: Resolution**

With the emergence of the digital economy, state and local tax codes continue to have difficulty keeping up with rapidly advancing technology. One challenge states and localities face is the taxation of online travel companies (OTC), which act as intermediaries between costumers and operators of short-term lodging, such as hotels, motels, inns and bed and breakfasts.

NCSL recognizes that the OTC business model is to contract with the businesses in the lodging industry to market rooms, allowing those businesses to fill rooms they otherwise might not. The OTCs sell the rooms to consumers/customers at a retail price that is equal to or higher than what the customer would pay if they purchased the same room directly from that business. The OTCs then remit to the business a pre-negotiated contracted wholesale rate for the room and taxes due on the wholesale rate, retaining the difference as profit (the compensation for marketing the room). The OTCs have complete control over the transaction, including the remittance of taxes.

States and localities contend that this business model of only remitting taxes on the wholesale price OTCs pay the lodging business rather than on the retail rate the customer is paying, results in a shortage of revenue remitted from the sales/occupancy taxes charged. In addition, a higher effective tax rate is imposed on hotels that remit taxes based on the retail rate customers are paying. The OTC business model also raises concerns about transparency and clarity of charges to the customer. As courts continue to hear lawsuits regarding OTC tax remittance practices, states continue to examine possible legislative statutory solutions to ensure codes are clear and factor the relatively new role OTC's play in the marketplace.

The National Conference of State Legislatures' Executive Committee Task Force on State and Local Taxation has studied online travel companies and has developed the following principles that states should consider when addressing taxation of lodging accommodations:

1. To promote transparency for taxpayers, states should consider legislation that requires online travel companies, and hotel websites to:

- A) Publicly and explicitly display the charges, and resort fees, ultimately leading to the final price to the user.
  - B) Require that taxes, fees, and service charges be separately stated instead of bundling them together.
  - C) If a business does not comply with 1. (A) or (B) then impose tax on the entire bill.
2. To ensure full collection of taxes that are due and to promote equity and fairness in the tax code, states should consider requiring OTCs to remit taxes based on the rental price paid by the user.
3. To ensure that taxation is efficient, states should consider:
- A) Imposing any tax on online travel companies through statutory impositions and not through administrative regulation;
  - B) Carefully devising definitions so that there is clarity to buyers and sellers of hotel rooms.

*Adopted by the NCSL Executive Committee Task Force on State and Local Taxation August 12, 2013*