

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

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Rep. Bernie O'Neill, Chair  
Finance Committee  
Pennsylvania House of Representatives  
Harrisburg, PA

RE: **Opposition to HB 1511 – creating a New Tax on Travel Agents**

Dear Chairman O'Neill and members of the committee,

We ask that you **not** advance HB 1511 which creates a new tax on services provided by travel agents and online travel companies. HB 1511 imposes a new tax on the fees travel agents charge for researching, comparing, and booking rooms for travelers.

Cities and states favor hotel taxes since they fall mostly on visitors – not on resident voters. But under HB 1511, this approach would backfire since the new service tax would be paid *only* by Pennsylvanians – *not by travelers* from out-of-state.

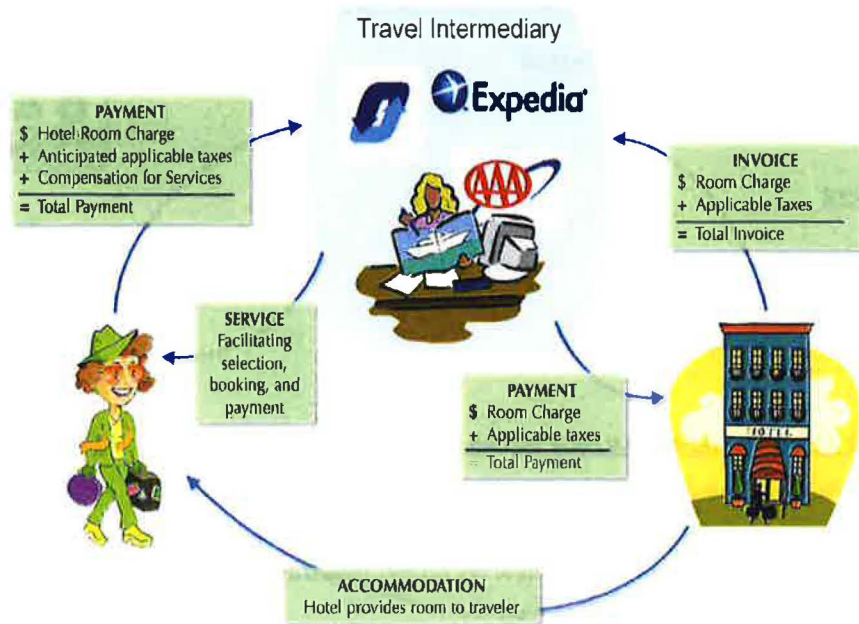
### **Imposes a new tax on Pennsylvanians**

Today, Pennsylvania does not impose sales tax or lodging tax on service fees charged by travel agents. These service fees compensate travel agents for researching and comparing available hotel options, booking the room, and handling payment to the hotel. But HB 1511 would impose a new tax on these service fees provided by travel agents and online travel companies, a tax that is passed on to your constituents.

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

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

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



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

The new tax imposed on booking service fees by HB 1511 would impact only Pennsylvania’s citizens and businesses. That’s because of the rules for determining the source jurisdiction for taxable services – when a tourist uses a travel service, the reservation service fee is sourced to the traveler’s home location – not to the traveler’s destination.

For example, say two tourists are booking a hotel room in Pennsylvania. One lives in Cleveland, the other in Somerset. The Ohio tourist would *not* pay the tax created by HB 1511 when they booked through a travel agent since they received their booking services outside of Pennsylvania.<sup>1</sup> But, the tourist living in Somerset who books through a travel agent *would* pay the tax created by HB 1511.

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

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

Pennsylvania travel agents routinely create packages that bundle hotel rooms, food, travel, and events into one price. But HB 1511 allows Harrisburg tax collectors to impose their occupancy taxes on all kinds of goods and services when included in travel packages:

- taxi from the airport to the hotel
- food served at a hotel restaurant
- tickets to Pittsburgh Penguins Games

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

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

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

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

### **Minimal revenue generated**

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

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

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

### **Avoid the conflation of travel services and lodging providers**

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

Instead of passing HB 1511 we suggest amending it to clarify when an occupancy tax applies. We suggest substituting the existing bill text with this language from Missouri law:

*"Any tax imposed or collected by any municipality, any county, or any local taxing entity on or related to any transient accommodations, whether imposed as a hotel tax, occupancy tax, or otherwise, shall apply solely to amounts actually received by the operator of a hotel, motel, tavern, inn, tourist cabin, tourist camp, or other place in which rooms are furnished to the public.*

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

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

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

Sincerely,  
Carl Szabo

Vice President and General Counsel, NetChoice

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

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

**Online Travel Companies Do Not Collect and Fail to Remit Taxes**

Virtually every court that has addressed the claims that online travel companies (“OTCs”) have collected but failed to remit taxes has rejected them. Those courts have instead found that hotel tax is due only on the net rate charged by the hotel, not the margin and service fees charged and retained by the OTCs, and that tax is properly being collected and remitted on the net rate.

Case	Result on this issue
<i>City of Findlay v. Hotels.com</i> , 2010 WL 4806850 (N.D. Ohio Nov. 18, 2010).	<b>For OTCs:</b> As to “whether [OTCs] have deceived consumers by pocketing amounts charged as taxes,...there is no evidence [OTCs] have done so here.” <u>(Court found no evidence that OTCs collect but do not remit taxes even after giving plaintiffs two years to conduct discovery on that claim.)</u>
<i>City of Columbus, et al. v. Hotels.com, L.P.</i> , 693 F.3d 642 (6th Cir. 2012).	<b>For OTCs:</b> “[I]t is also undisputed that a portion of that combined charge was actually remitted to the hotels as a tax due on the wholesale value of the hotel room. The localities have not come forward with evidence suggesting that the online travel companies labeled charges as taxes when, in fact, the money collected was not remitted as a tax.”
<i>Expedia v. City of Anaheim</i> , No. JCCP 4472, 2010 WL 8721517 (Cal. Sup. Ct. Feb. 1, 2010), <i>affirmed by</i> No. B230457 (Cal. Ct. App. Nov. 1, 2012), <i>pet. denied by</i> No. S207192 (Cal. Jan. 23, 2013).	<b>For OTCs:</b> “OTCs use the net rate to calculate the transient occupancy tax...”
<i>City of Atlanta v. Hotels.com</i> , 710 S.E. 2d 766 (Ga. May 16, 2011).	<b>For OTCs:</b> “OTCs calculate the hotel occupancy tax amount based on the wholesale rate the OTC negotiates with hotels...and not on the retail room rate the OTC charges the customer.”
<i>Travelscape, LLC v. South Carolina DOR</i> , 705 S.E.2d. 28 (S.C. Jan. 18, 2011).	<b>For OTCs:</b> “The tax recovery charge, which is based on the net room rate, correspond with the sales tax owed by the hotel.”

<p><i>City of Philadelphia v. City of Philadelphia Tax Review Board</i>, 37 A.3d 15 (Pa. Cmwlth. 2012), <i>alloc. denied</i>, 50 A.3d 1253 (Pa. 2012).</p>	<p><b>For OTCs:</b> “When a customer made a hotel reservation on Expedia’s website, the customer was charged the discounted room rate, plus a facilitation fee, a service fee, a tax recovery charge, and an amount equal to the City’s Hotel Tax. Expedia calculated the Hotel Tax solely on the room rate and did not include any fees in this calculation.”</p>
<p><i>Orange County, FL v. Expedia et al</i>, Case No. 48-2006-CA-2104-O, Ninth Judicial Circuit Court, Orange County, FL (Jan. 20, 2011).</p>	<p><b>For OTCs:</b> “In calculating the amount of taxes owed, the contracts between the Defendants and the hotels call for calculation and payment of taxes on the ‘wholesale’ price of the room, not the ‘retail’ price paid by the ultimate consumer.”</p>
<p><i>City of Gallup v. Hotels.com</i>, No. 2:07-cv-00644-JEC-RLP (D.N.M. Mar. 29, 2013).</p>	<p><b>For OTCs:</b> “Plaintiff has offered insufficient evidentiary support for its sole remaining collected-but-unremitted theory and the claim will be dismissed.”</p>
<p><i>Wake County, et al. v. Hotels.com, L.P., et al.</i>, No. 06-CVS-16256, 2012 WL 6673127 (Gen. Ct. of Justice, N.C. Dec. 19, 2012), <i>affirmed by</i> 762 S.E.2d 477 (N.C. Ct. App. 2014), <i>pet. rev. denied</i>.</p>	<p><b>For OTCs:</b> “[The counties] have been unable to direct this Court to any binding legal precedent to support a ‘collected-but-not-remitted’ theory of recovery.”</p>
<p><i>City and County of San Francisco, California v. Hotels.com, L.P.</i>, No. JCCP 4472, Notice of Ruling on Online Travel Companies Motion for Summary Adjudication (Los Angeles Superior Court Feb. 28, 2013).</p>	<p><b>For OTCs:</b> “Any consideration received by the O.T.C.’s above a net rate must consequently be for services other than providing the use or possession or the right to use or possess a room.”</p>
<p><i>City of Los Angeles, California v. Hotels.com, L.P.</i>, No. JCCP 4472, Notice of Rulings from April 18, 2013 (Los Angeles Superior Court April 23, 2013).</p>	<p><b>For OTCs:</b> “The online travel companies should not be held liable for markups, fees, commissions, and profits above the amounts that are received from the consumer and turned over to the hotel for the net rate for occupancy.”</p>
<p><i>Hamilton County, OH v. Hotels.com, L.P.</i>, 2013 U.S. Dist. LEXIS 124507, 2013 WL 4679942 (N.D. Ohio Aug. 30, 2013).</p>	<p><b>For OTCs:</b> “Plaintiffs have not pointed to any evidence showing that Defendants failed to remit money they collected as taxes... Each of Plaintiffs’ 30(b)(6) witnesses testified that they could not identify a specific instance where any of the Defendants collected but did not remit taxes.”</p>

*Rome v. Hotels.com, L.P., et al.*, 549 Fed. Appx. 896 (11th Cir. 2013).

**For OTCs:** “While the Localities offer facts that they hope raise the Court's eyebrows, they, after years of discovery, have failed to present sufficient evidence that raises a genuine question that the OTCs, in fact, collected any taxes above the wholesale rate.”