

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

Steve DelBianco, President and CEO
1401 K St NW, Suite 502
Washington, DC 20005
703-615-6206
www.netchoice.org



Hearing date: April 19, 2021

Senator Bob Giuda, Chairman
Senate Ways & Means Committee
New Hampshire State Senate

RE: **Opposition to HB 15 – Creating a New tax on travel agents and car sharing services**

Dear Chairman Giuda and members of the committee,

We ask you **not** advance HB 15 as it creates a new tax on services provided by travel agents and online travel companies for researching, comparing, and booking rooms for travelers, and for New Hampshire residents who share their cars and trucks.

Cities and states favor hotel and rental car taxes since they fall mostly on visitors – not on residents and voters. But under this new language, this approach would backfire since the new service tax would be paid *only* by New Hampshire citizens – *not by travelers* from out-of-state.

Imposes a new tax on New Hampshire citizens

Today, New Hampshire 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. This new language would impose a new tax on these service fees that travelers pay to travel agents and online travel companies, a tax that is passed on to your constituents.

The new tax created by HB 15 will undermine New Hampshire's effort to protect state businesses from out-of-state tax collectors

Governor Sununu said: "As Governor, I am going to do everything in my power to fight this outrageous attempt to force New Hampshire's businesses to collect out of state taxes."¹ The Governor was referring to the US Supreme Court case *South Dakota v. Wayfair*,² which tested the longstanding *Quill* ruling that states can only impose sales tax on businesses with a physical presence in the state.

New Hampshire's amicus brief argued that states should not be able to force out of state businesses to collect and remit taxes. While the state lost when the Supreme Court reversed the *Quill* standard, the underlying US Constitutional Commerce Clause protections against under burdens remain.

Today, more than ever, New Hampshire should stand-up to stop tax collectors from California, New York, or Massachusetts from harassing New Hampshire businesses that have no physical presence in those states.

¹ Press Statement, Gov. Chris Sununu, *New Hampshire to Fight Internet Sales Tax* (Jan. 31, 2018)

² *South Dakota v. Wayfair Inc. et al*, Case No. 3:2016cv03019 (S.D. Dist. Ct. May 15, 2016).

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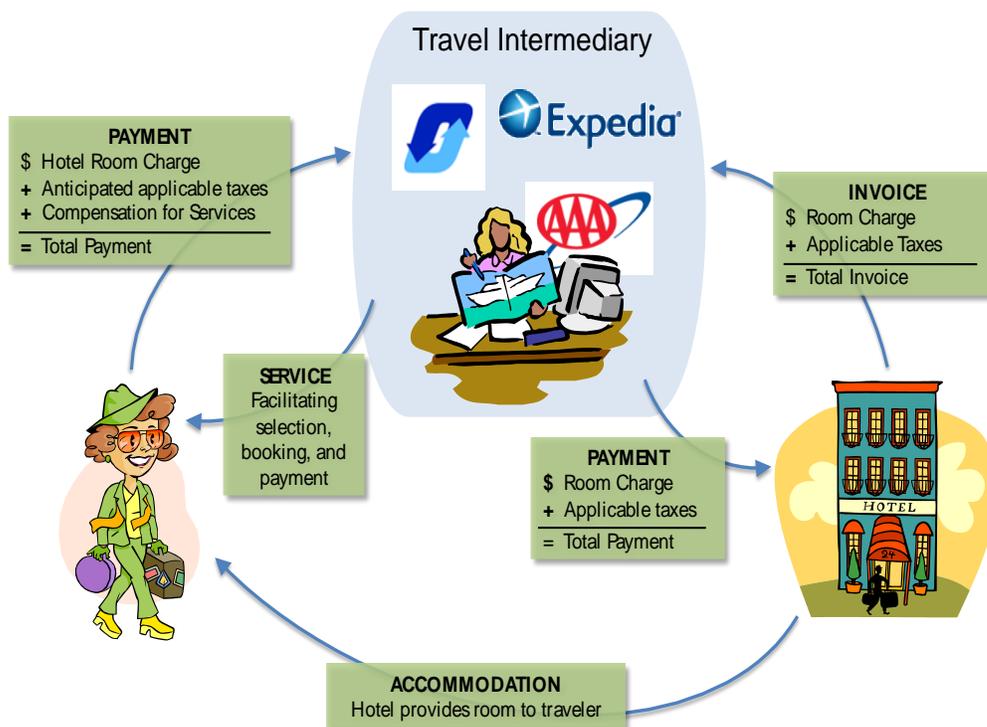
- Governor Sununu referring to Wayfair v South Dakota

While the new tax supporters say that state lines are no barrier to tax collection by empowering New Hampshire tax collectors to impose taxes on online car-sharing platforms that have no presence in New Hampshire. This encourages foreign states to show that even New Hampshire’s legislators think that states *should* be able reach across borders for tax collection purposes and that the US Supreme Court was right to overturn *Quill*.

New Hampshire should protect its businesses from tax collectors across the country that are trying to force New Hampshire businesses to travel to those states to defend themselves in foreign state courts.

Most travel agents and travelers use online services to research, compare, and book travel

From a decade of working on this issue in states, 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 *New Hampshire* citizens book their travel

A new tax imposed on booking service fees by the “facilitator” language would impact only New Hampshire citizens and businesses. That’s because of existing 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 New Hampshire. One lives in Massachusetts, the other in Conway. The Massachusetts tourist would *not* pay the tax created by this new language when they booked through a travel agent since they received their online booking services outside of New Hampshire.³ But, the tourist living in Conway who books through a travel agent *would* pay the tax created by the “Gross rental receipts” definition.

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

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

New Hampshire travel agents routinely create packages that bundle hotel rooms, food, travel, and events into one price. But the definition of Gross rental receipts creates a new tax on all kinds of goods and services when included in travel and vacation packages:

- taxi from the airport to the hotel
- food served at a hotel restaurant
- wine tastings

A new tax on service fees would only be collected by New Hampshire-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 New Hampshire.

As noted above, out-of-state travel agents and websites already collect and remit lodging taxes when they make payment to the New Hampshire 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.

To consider another example, say that a West Virginia tourist uses a West Virginia travel agent to book a New Hampshire hotel room. West Virginia *already* taxes travel agent service fees provided to state residents receiving the service at their home location. So, any West Virginia-based travel agent or website is already collecting sales tax on the service fee when booking West Virginia travelers at New Hampshire hotels. In fact, this new tax would attempt to impose *double taxation* of the same service fee paid by this West Virginia tourist, which was probably not the intention of the bill’s authors.

Please remember that this bill would impose new taxes only on New Hampshire citizens, while placing your in-state travel services at a competitive disadvantage to out-of-state rivals.

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.

³ Note that the out-of-state tourist still pays the New Hampshire occupancy tax when they book the room.

First, as discussed above, the service taxes could not be imposed on any out-of-state traveler. Second, New Hampshire 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 New Hampshire's travel agencies and travel websites.

This new tax is at odds with American Legislative Exchange Council (ALEC) model acts

The American Legislative Exchange Council (ALEC) has adopted two model acts that make clear hotel and lodging taxes should be applied only on the amount received by the hotel – and not applied on the service fees charged by travel agents and online marketplaces.

ALEC's *Uniform Standard for Lodging Taxes Act* says:

“Sales price’ is the amount received by the Hotel Operator”

...

(2) Nothing in this part shall be construed to impose the tax on the separately stated service fee imposed by the online lodging marketplace on an online lodging transaction.

ALEC's *Travel Agent Tax Fairness Act* clarifies that:

“that taxes imposed as a sales tax on a hotel room and/or hotel tax or occupancy tax shall apply only to the amounts received by hotel operators, this legislation will promote continued growth in travel and tourism

This legislation protects incumbents by shielding them from competition

Another flawed provision of HB 15 is a handout to big car rentals, which provides a handout to big car rental companies. Rather than innovate, Big Rental is running the same playbook that has worked well in the past: get the state legislature to pass laws that benefit its bottom line at the expense of others. Digital newcomers threaten established firms that have spent decades—and untold money—forcing out competition and creating barriers to entry for newcomers. When it succeeds, this behavior results in higher prices for consumers and fewer jobs for Tennesseans.

Big Rental's fear of car-sharing platforms is not surprising. Indeed, a recent survey of rental-car operators revealed that “Competition from peer-to-peer networks (Turo, GetAround)” ranked as one of the top self-reported “threats” in 2020.⁴ It's not hard to see why. Peer-to-peer car sharing offers better service and deals than Big Rental does. First, they give consumers better choices, including specialty and antique cars. Second, they offer 24/7 roadside assistance. And third, they are more affordable than Big Rental—and they don't come with hidden fees.

To be sure, Big Rental's rent-seeking efforts are not unique. The hotel industry, for example, has been pushing legislation to crush Airbnb's growing popularity. Like Big Rental now, Big Hotels have pushed for unnecessary and harmful regulations under the guise of consumer protection. So, too, with taxi cabs toward ridesharing apps like Uber and Lyft. In all these cases, incumbents turned to the state for protection. And in all these cases, they used the guise of *consumer*

⁴ Auto Rental News, 2020 Fact Book 15 (2020), <http://digital.autorentalnews.com/factbook2020#&pageSet=6>.

protection to mask their true intent of *competition prevention*.

Big rental car chains benefit most from limits on car-sharing

Big rental car companies are backing legislation like the new tax amendment because they view the emergence of car-sharing as a threat to their business model. These big companies want to create artificial barriers to competition and are using legislation like *this new tax amendment as a form of competition prevention*.

Car-Sharing platforms are not rental car companies

While the big car rental companies want legislators to treat car-sharing as car-rental, the two activities are markedly different. Unlike Enterprise or Hertz, online platforms don't own the cars that are shared.

Big rental car companies enjoy \$3 billion in annual sales tax exemptions – something not available to car-sharing platforms.⁵

Moreover, big car rental companies take advantage of tax loopholes and business tax incentives. Such tax benefits are not available to a New Hampshire car owner who shares their car.

This legislation is anti-innovation and anti-consumer

The rise of digital platforms, especially peer-to-peer services, has threatened incumbents in many industries since this disruptive technology has proven so popular with consumers. So much so that incumbents have sought to squash innovation and strangle competition rather than invest in their own services and adapt to changing consumer preferences.

This legislation is no different. By forcing innovative platforms to assume liability for their drivers' actions, the legislation will drive many platforms from the market. And it sends a signal to other incumbents threatened by innovative peers: the way to succeed is not by winning on the merits, but by legislating against competition.

These efforts should not succeed. The peer-to-peer economy helps average Americans supplement their incomes by letting them rent assets they already own. Here, for example, car-sharing platforms let New Hampshire residents earn from their own cars, which they can then use to make car payments, pay insurance premiums, or cushion the financial blow from COVID lockdowns.

Avoid the conflation of travel services and lodging and rental providers

By maintaining the true distinction between travel service providers and hotel operators and car rental providers, you can help New Hampshire'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 this language we suggest amending it to clarify when an occupancy tax applies. We suggest substituting the existing bill text with this language from Missouri law:

⁵ See NetChoice Policy Note at NetChoice.org/CarSharingPolicyNote

“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.”⁶

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

Sincerely,

Steve DelBianco
President and CEO
NetChoice

NetChoice is a trade association that works to make the Internet safe for free enterprise and free expression.

⁶ Missouri HB 1442 (2010), signed into law July 2010 (emphasis added).

TRAVEL AGENT TAX FAIRNESS ACT

Summary

This legislation establishes a sensible framework to eliminate confusion and controversy in the imposition of sales and hotel occupancy taxes on services provided by travel agents and other travel intermediaries. The legislation clarifies that a travel agent service which helps travelers to research, compare, and book hotel reservations is not subject to those taxes that are imposed on hotel operators for the provision of a room. By clarifying that taxes imposed as a sales tax on a hotel room and/or hotel tax or occupancy tax shall apply only to the amounts received by hotel operators, this legislation will promote continued growth in travel and tourism.

Model Policy

Section 1. {Title} This Act may be cited as the “Travel Agent Tax Fairness Act.”

Section 2. {Legislative Findings} The Legislature finds that:

(A) Travel agents and online travel companies provide valuable services to travelers, showing comparisons of rates and amenities offered by multiple, competing hotel operators.

(B) These facilitation services are distinct from the provision of a room by the hotel where the traveler eventually stays.

(C) Travelers rely on community travel agents and online travel agents to research, compare, and book reservations.

(D) Sales taxes on hotel room and hotel occupancy taxes should not be imposed on services provided by travel agents and online travel companies.

Section 3. {General Rule}

(A) Notwithstanding any other provision of law to the contrary, any tax imposed on or collected in relation to any transient accommodations, whether imposed as a sales tax, a hotel tax, occupancy tax,

or otherwise, shall apply solely to amounts 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.

(B) 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.

(C) This section is intended to clarify that taxes imposed as a sales and/or hotel tax, occupancy tax, or otherwise, shall apply solely to amounts received by operators, as enacted in statutes authorizing such taxes.

Section 4. [Effective Date] This Act will become effective immediately upon signature by the Governor.

Approved by ALEC Board of Directors on September 19, 2010. Adopted by ALEC Communications and Technology Task Force and the Tax and Fiscal Policy Task Force at the ALEC Annual Meeting on Thursday July 23, 2015 and Friday, July 24, 2015.

Reapproved by ALEC Board of Directors on September 4, 2015.

Renewed by the Task Forces on Communications and Technology and Tax and Fiscal Policy on July 16-17, 2020

Renewal approved by the Board of Directors on August 9, 2020

UNIFORM STANDARD FOR LODGING TAXES ACT

Section 1. Definitions

[Appropriately designated section number] of the statutes is created to read:

- (1) “Hotel” means any structure or space, or any portion thereof, that:
 - (a) Is occupied, or intended or designed for occupancy, by transients for dwelling, lodging, or sleeping purposes; and
 - (b) Accepts on-site reservations for accommodations;
- (2) “Hotel operator” means the individual or individuals operating the hotel, whether as owner, lessee or otherwise;
- (3) “Local governing body” means the legislative body of a municipal, metropolitan, or county government;
- (4) “Department” means the department of revenue;
- (5) “Occupancy” means the use or possession, or the right to the use or possession, of any room, lodgings, or accommodations in a hotel or online lodging unit;
- (6) “Online lodging marketplace” or “marketplace” means any person or entity that provides a digital platform for compensation, through which a third party offers to rent an online lodging unit to an occupant;
- (7) “Online lodging operator” means any person or entity engaged in the business of renting to an occupant any online lodging unit offered through an online lodging marketplace;

(8) “Online lodging transaction” or “transaction” means any transaction in which there is a charge to an occupant by an online lodging operator for the occupancy of any online lodging unit;

(9) “Online lodging unit” or “unit” means any structure, or a portion thereof, used by an online lodging operator to provide room or space that is suitable or intended for occupancy by an occupant for dwelling, sleeping, or lodging purposes, in exchange for a charge to the occupant for the occupancy;

(10) “Person” means any individual, or group of individuals, that occupies the same room or unit;

(11) “Sales price” is the amount received by the Hotel Operator; and

(12) “Transient” means any person who exercises occupancy or is entitled to occupancy of any unit for a period of less than thirty (30) continuous days.

Section 2. Statewide Lodging Tax Created

[Appropriately designated section number] of the statutes is created to read:

(1) There shall be a tax upon the privilege of occupancy in any hotel or online lodging unit by any transient. The tax shall be an amount equal to:

(a) [Insert number] percent ([X]%) of the sales price charged to the occupant by the hotel or online lodging unit operator for occupancy in the hotel or online lodging unit for any county in which the hotel or unit is located; and

(b) [Insert number] percent ([X]%) of the sales price charged to the occupant by the hotel or online lodging unit operator for occupancy in the hotel or online lodging unit for any city in which the hotel or unit is located; or

(c) [Insert number] that is equal to sub. (a) and (b)] percent ([X]%) of the sales price charged to the occupant by the hotel or online lodging operator for occupancy in the hotel or online lodging unit in any county having a metropolitan form of government.

(2) Nothing in this part shall be construed to impose the tax on the separately stated service fee imposed by the online lodging marketplace on an online lodging transaction.

(3) No online lodging operator shall be subject to the taxes imposed by this section with respect to any online lodging transaction for which the online lodging operator has received written notice or documentation from an online lodging marketplace that such marketplace has paid or will pay the

taxes imposed by this section on such transactions. Any notice received under this subsection shall be proof sufficient regarding any liability of an online lodging operator for such taxes.

(4) The tax shall be collected and remitted by the hotel operator or online lodging marketplace, and administered by the department, in the same manner as provided by [insert statutory reference to the sales and use tax statutes] with respect to the sales and use tax.

(5) Hotel operators, online lodging operators and online lodging marketplaces that collect the tax pursuant to this part shall be subject to the administration and enforcement provisions set out in [insert statutory reference to the administration and enforcement sections of the sales and use tax statutes].

(6) Taxes collected pursuant to this part shall be distributed on a monthly basis by the department to the applicable local governing body in which the hotel or unit was located and the tax was collected. The department may deduct an administration fee of one and one hundred twenty-five thousandths percent (1.125%) of the collected tax to cover its expenses of administering the collection and distribution of the tax.

(7) The taxes received by the local governing body from the department may be used for purposes authorized by existing law.

Section 3. Local Governing Body Lodging Tax Repealed

- [Insert statutory reference] is repealed. All taxes levied pursuant to the authority granted by this section are null and void upon the effective date of this legislation.

NOTE: This section repeals the local lodging tax authorization statute and makes null and void all lodging taxes imposed by local governing bodies pursuant to the authority granted by the section. This is necessary to enact the statewide lodging tax instead.

NOTE: For purposes of this model policy, it is recommended that the lodging tax rate be equal to the state's sales and use tax rate or, if the state does not have a sales and use tax, not greater than five percent (5%).

Adopted by the Task Force on Communications and Technology and the Task Force on Tax and Fiscal Policy at the Annual Meeting, July 28, 2016.

Approved by the ALEC Board of Directors, September 12, 2016.