

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Finance and Tax Committee

BILL: PCS for SB 2518 (633490)

INTRODUCER: Finance and Tax Committee

SUBJECT: Taxes on Transient Rentals

DATE: April 13, 2009                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	ODonnell	McKee	FT	<b>Pre-meeting</b>
2.	_____	_____	CM	_____
3.	_____	_____	GA	_____
4.	_____	_____	WPSC	_____
5.	_____	_____	RC	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

PCS 2518 addresses state and local tax issues related to the activity of facilitating the rental, leasing, letting, or granting a license to use transient rental accommodations during the course of which payment is received from a guest. The tourist development tax, the tourist impact tax, the transient rentals tax, the convention development tax, and the municipality resort tax are affected by the bill.

The PCS provides that the business of renting includes offering information regarding the availability of transient rental accommodations, disclosing or establishing the amount a guest is charged and facilitating a reservation or booking on another's behalf, when receiving a payment during the course of engaging in these activities consists of, in any part, an amount that is subject to transient rental tax.

Persons who engage in the stated activities must collect tax on the total amount paid by the guest without deduction for separately stated items unless explicitly allowed. These persons are required to register with the Florida Department of Revenue (DOR) and/or the appropriate political subdivision, and to collect and remit the proper taxes.

The PCS prohibits a hotel owner from providing transient accommodations to businesses’ engaging in the specified taxable activities unless the business is registered as a dealer and after informing the hotel owner that they agree in writing to collect tax on the total price paid.

The PCS defines persons who enter into agreements with a hotel owner in furtherance of the rental of transient accommodations as being dealers. DOR may adopt emergency rules to allow, among other things, for a single application for registration with the department that identifies each county in which transient accommodations are located.

The PCS states the legislative intent that the changes made have no retroactive application to pending issues regarding the application of Florida law.

The Revenue Estimating Conference has not yet determined the impact of this PCS. The Conference estimated the revenue impact of a similar bill, CS/SB 1970, as follows:

	FY 2009-10 Annualized	FY 2009-10 Cash	FY 2010-11 Cash	FY 2011-12 Cash	FY 2012-13 Cash
General Revenue	23.7	21.7	24.9	26.3	27.4
State Trust	.1	.1	.1	.1	.1
Total State Impact	23.8	21.8	25.0	26.4	27.5
Revenue Sharing	.8	.7	.8	.9	.9
Local Gov’t Half Cent	2.3	2.1	2.4	2.5	2.6
Local Option	2.2	2.1	2.4	2.5	2.6
Total Local Impact	5.3	4.9	5.6	5.9	6.1
Total Impact	29.1	26.7	30.6	32.3	33.6

This PCS amends sections 212.03 and 212.06(2) of the Florida Statutes. The PCS creates an undesignated section of Florida law.

**II. Present Situation:**

Taxation of Transient Rentals

Transient rentals are rentals or leases of accommodations for 6 months or less. Accommodations include stays in hotels, apartment houses, roominghouses, tourist or trailer camps, mobile home parks, recreational vehicle parks, or real property.<sup>1</sup>

Currently, transient rentals are potentially subject to the following taxes:

1. Local Option Tourist Development Taxes: Current law authorizes five separate tourist development taxes on transient rental transactions. Section 125.0104(3)(a), F.S., provides that the local option tourist development tax is levied on the “total consideration charged for such lease or rental.”

<sup>1</sup> These accommodations are defined in s. 212.02(10), F.S. See also Rule 12A-1.061(2)(f), F.A.C.

- a. The tourist development tax may be levied at the rate of 1 or 2 percent.<sup>2</sup> Currently, 59 counties levy this tax at 2 percent; all 67 counties are eligible to levy this tax.<sup>3</sup>
  - b. An additional tourist development tax of 1 percent may be levied.<sup>4</sup> Currently 41 counties levy this tax; only 54 counties are currently eligible to levy this tax.<sup>5</sup>
  - c. A professional sports franchise facility tax may be levied up to an additional 1 percent on transient rental transactions.<sup>6</sup> Currently 28 counties levy this additional tax; all 67 counties are eligible to levy this tax.<sup>7</sup>
  - d. A high tourism impact county may levy an additional 1 percent on transient rental transactions.<sup>8</sup> Only Monroe, Orange, and Osceola counties have been designated as high tourism impact counties eligible to impose this tax, but only Orange and Osceola counties impose the tax.<sup>9</sup>
  - e. An additional professional sports franchise facility tax no greater than 1 percent may be imposed by a county that has already levied the professional sports franchise facility tax.<sup>10</sup> Out of 65 counties eligible to levy this tax, only 13 do.<sup>11</sup>
2. Local Option Tourist Impact Tax: The local option tourist impact tax under s. 125.0108, F.S., is levied at the rate of 1 percent of the total consideration charged. Only Monroe County is eligible and does levy this tax in areas designated as areas of critical state concern because they created a land authority pursuant to s. 380.0663(1), F.S.<sup>12</sup>
  3. Local Convention Development Tax: The convention development tax under s. 212.0305, F.S., is charged on the total consideration charged for the transient rental. Each county operating under a home rule charter, as defined in s. 125.011(1), F.S., may levy the tax at 3 percent (Miami-Dade County); each county operating under a consolidated government may levy the tax at 2 percent (Duval County); and each county chartered under Article VIII of the State Constitution that had a tourist advertising district on January 1, 1984, may levy the tax at up to 3 percent (Volusia County).<sup>13</sup> No county authorized to levy this tax can levy more than 2 percent of the tourist development tax, excluding the professional sports franchise facility tax.<sup>14</sup>
  4. Municipality Resort Tax: Municipalities may levy the municipal resort tax at a rate of up to 4 percent on transient rental transactions.<sup>15</sup> The tourist development tax may not be levied in any municipality imposing the municipal resort tax. The tax is collected by the

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<sup>2</sup> Section 125.0104(3)(c), F.S.

<sup>3</sup> 2008 Local Government Financial Information Handbook, prepared by the Florida Legislative Committee on Intergovernmental Relations.

<sup>4</sup> Section 125.0104(3)(d), F.S.

<sup>5</sup> See fn. 2, supra.

<sup>6</sup> Section 125.0104(3)(l), F.S.

<sup>7</sup> See fn. 2, supra.

<sup>8</sup> Section 125.0104(3)(m), F.S.

<sup>9</sup> See fn. 2, supra.

<sup>10</sup> Section 125.0104(3)(n), F.S.

<sup>11</sup> See fn. 2, supra.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Section 125.0104(3)(b), (3)(l)4., and (3)(n)2., F.S.

<sup>15</sup> Chapter 67-930, L.O.F., amended by chs. 82-142, 83-363, 93-286, and 94-344, L.O.F.

municipality. Currently only three municipalities in Miami-Dade county are eligible to impose the tax.

5. State Transient Rental Tax: The transient rentals tax under s. 212.03, F.S., is levied in the amount of 6 percent of the total rental charged for the living quarters or sleeping or housekeeping accommodations in, from, or part of, or in connection with any hotel, apartment house, roominghouse, or tourist or trailer camp.

In general, the local taxes are adopted by ordinance that must be approved by a referendum election of the voters of the county or area where the tax is to be levied. The local taxes on transient rentals are required to be remitted to DOR by the person receiving the consideration, unless a county has adopted an ordinance providing for local collection and administration of the tax.<sup>16</sup> Further, the use of the proceeds from each tax may only be used as set forth in the authorizing statute.

Certain rentals or leases are exempt from the taxes; these include rentals to active-duty military personnel, full-time students, bona fide written leases for continuous residence longer than 6 months, and accommodations in migrant labor camps.<sup>17</sup>

Every person desiring to engage in or conduct business in this state as a dealer or to lease, rent, or let or grant licenses to use accommodations that are subject to tax under s. 212.03, F.S., must file with DOR an application for a certificate of registration for each place of business prior to engaging in such business.<sup>18</sup> A separate application is required for each county where property is located. Agents, representatives, or management companies that collect and receive rent as the accommodation owner's representative are required to register as a dealer and collect and remit the applicable tax due on such rentals to the proper taxing authority.<sup>19</sup>

In addition to the certificate of registration, each newly registered dealer also receives an initial resale certificate from DOR. The resale certificate is renewed annually for dealers with an active sales tax account, and expires on December 31 each year.<sup>20</sup> An annual resale certificate allows registered dealers to make tax-exempt purchases or rentals of property or services for resale, including re-rental of transient rental property and resale of tangible personal property. The annual resale certificate may not be used to make tax-exempt purchases or rentals of property or services that:

- Will be used rather than resold or rented.
- Will be used before selling or renting the goods.
- Will be used by the business or for personal purposes.<sup>21</sup>

### Rental of Accommodations Online<sup>22</sup>

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<sup>16</sup> Also known as "self-administering."

<sup>17</sup> Section 212.03(7), F.S. See also ss. 125.0104(3)(a), 125.0108(1)(b), 212.0305(3)(a), F.S.

<sup>18</sup> Section 212.18(3)(a), F.S.

<sup>19</sup> Rule 12A-1.061(7), F.A.C.

<sup>20</sup> Section 212.18(3)(c), F.S.

<sup>21</sup> Annual Resale Certificate for Sales Tax (Guidelines), at <http://dor.myflorida.com/dor/taxes/resale.html> (last visited 3/20/2009).

Some websites specialize in offering reservations of transient rental accommodations. These are generally independent third parties who act either as an agent or a merchant. Travel agents have been allowed computerized access to search hotel room inventories and to book discounted hotel rooms in the name of, and for the account of, other people (i.e., as intermediaries) since the 1970s.

When an internet intermediary facilitates accommodation reservations acting as an agent, the intermediary is acting as a middle-man between the customer and the accommodation owner to reserve a room. Generally, the customer reserves a room with a credit card, and does not pay the hotel bill until check-out, at which point taxes are charged. In these circumstances, at the time of reservation online, the customer is typically advised that taxes may or may not be included in the total cost listed on the website. The accommodation owner compensates the agent with a commission based on the room rate set by the hotel. With this method, the room rate is subject to tax without any reduction for the commission paid. Agents do not arrange in advance of the customer's transaction to purchase room inventory at the hotel.

When an internet intermediary acts as a merchant, it enters into a contract with an accommodation owner to offer rooms to the public. The accommodation owner agrees to make rooms available for reservation at a negotiated rate that cannot be disclosed to the public.<sup>23</sup> The merchant agrees to pay the owner the negotiated room rate and to also forward money it collects from the customer to pay applicable taxes. The merchant advertises a room rate on the website with disclosures for separate charges for "taxes and service fees."<sup>24</sup> Because internet intermediaries lump together what they charge in "taxes and service fees," consumers do not know how much they are paying for each. The website is the merchant of record for reservation of the room, and it initiates a charge to the customer's credit card for the full room rate plus the disclosed line items. The consumer receives confirmation of the reservation from the merchant. When the accommodation owner sends the merchant an invoice for the room after the consumer's stay, the merchant pays the negotiated room rate and the tax due on that amount. If no invoice is sent, the merchant may keep the money.<sup>25</sup>

The issue of on-line reservations of accommodations by internet intermediaries has surfaced as a result of two main factors: 1) the increase in reservations of accommodations through websites; and 2) tax laws that were adopted before the existence of internet intermediaries. There has been some dispute and question as to the proper amount against which state and local transient rental taxes are levied.

#### *"Taxes and Fees" Charged by Websites*

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<sup>22</sup> Much information for this section was obtained from Interim Project 2005-131, Senate Committee on Government Efficiency Appropriations (Nov. 2004); and Issue Brief 2009-320, Senate Committee on Finance and Tax (Oct. 2008).

<sup>23</sup> The negotiated rate is also referred to as a discounted or wholesale price or rate.

<sup>24</sup> Because the tax paid by the internet intermediary is based on the wholesale rate, not the retail rate, the fee portion is much larger than it might seem. The rationale given by internet intermediaries for not breaking out taxes and fees is that other on-line merchants would know what type of deals they made with accommodation owners. The standard facilitation fee on such internet room rates is 25 percent.

<sup>25</sup> For a detailed description of the merchant model, see, Columbus, Georgia v. Expedia, Civil Action No. SU-06-CV-1974-7 (Superior Court, Muscogee County, Ga, Sept. 22, 2008).

Internet intermediaries argue that the tourist development tax is measured by the amount paid to the accommodation owner or operator for the right to use the transient accommodation (negotiated rate) and that the facilitation fee<sup>26</sup> is not subject to tax because it is not an amount paid to the owner (generally the difference between the retail rate and the negotiated rate). They argue that the taxable incident is not the isolated receipt of the rental payment, but the exercise of the privilege – the assemblage of activities consistent with ownership. Under this line of reasoning, money received to facilitate a booking, process a reservation application, or provide a similar service, is not subject to tax when a company lacks an ownership interest in the accommodation. This position extends to the tax treatment of customer charges variously labeled as “tax reimbursements,” “tax recovery charges,” or “taxes and fees.”

Local governments interpret the law such that internet intermediaries acting as merchants are sales tax dealers and that the total amount of each transaction is taxable. The internet intermediary acts in place of the accommodation owner in renting, leasing, or letting the real property, tangible personal property, and services as part of the accommodation. Local governments contend that dividing the sale of an accommodation reservation into discrete transactions ignores the sale’s singular nature. They are concerned that allowing intermediaries to shoehorn customary accommodation services into the non-taxable category will erode the tax base.

#### *When Taxes Should Be Remitted*

Internet intermediaries argue that the tax is not due at the time money is paid by the consumer. Instead, it should be remitted by the hotel or facility, as owner of the accommodation, once the negotiated room charge is forwarded to the owner after the consumer’s stay.

Local governments argue that transient rental tax is due at the time of collection, not later when the accommodation owner is paid the negotiated rate.

#### *Florida Department of Revenue*

DOR does not take an official position on whether tax is due on the amount collected and retained by Internet room providers. The department does not take a position on whether tax is due on the additional charges variously labeled as “tax reimbursements,” “tax recovery charges,” or “taxes and fees.” Additionally, DOR does not take a position on whether tax should be remitted at the time the customer pays for the reservation.

#### *Litigation in Florida*<sup>27</sup>

Orange County, Florida, self-administers the local tourist development tax. It brought a lawsuit against internet intermediaries Expedia and Orbitz to determine whether tax is due “on the difference between the wholesale price and the retail price they receive for the rooms when they re-sell them.”<sup>28</sup> The trial court dismissed the case, ruling that the county must complete audits first to estimate taxes due. The appellate court reversed the trial court. The opinion did not

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<sup>26</sup> A facilitation fee generally involves money received to facilitate a booking, process a reservation application, or provide a similar service.

<sup>27</sup> Lawsuits in other states “are based on the specific language of each jurisdiction’s taxing scheme and on the variety of causes of action pled. . . .” Orange County v. Expedia, Inc. et al., 985 So.2d 622, 630 (5th DCA, 2008), rehearing denied, Expedia, Inc. v. Orange County, 999 So.2d 644 (Fla., 2008) (unpublished disposition).

<sup>28</sup> Orange County, at 2.

suggest who might eventually win, only that the county is entitled to know whether it can lawfully assess the tourist development tax before attempting to audit the companies. Jurisdiction is now with the trial court to hear and evaluate the case.

### III. Effect of Proposed Changes:

Section 1 of the PCS adds two new subsections to s. 212.03, F.S., to address state and local tax issues related to the business of renting, leasing, letting, or granting a license to use transient rental accommodations. For purposes of ss. 212.03, 125.0104, 125.0108, and 212.0305, F.S., and ch. 67-930, L.O.F., as amended, taxable business activities include:

- Offering information about the availability of rentals located in Florida;
- Disclosing or establishing the amount a guest is charged for rentals located in Florida;
- Assisting in making reservations for rentals located in Florida;
- Participating in arranging for the occupancy of rentals located in this state on behalf of another person.

The terms “total rent,” “total consideration,” “consideration,” or “rent,” as used in the above mentioned statutes or laws, are defined to include:

- All amounts paid to a person engaged in a taxable activity; or
- Otherwise collected or paid as a condition of the right of occupancy,
- But, excluding mandatory fees imposed for the availability of communications services or separately stated taxes and fees.

Persons who engage in the activities defined as subject to tax by the bill are required to register with DOR, and/or the appropriate political subdivision, and to collect and remit the proper taxes. The owner or operator is not permitted to make rooms available to persons engaged in an activity subject to tax unless the person engaging in such activity registers as a dealer and agrees to collect tax on the total price paid by the customer. If the owner or operator fails to obtain a resale certificate, they are liable for tax on the total amount subject to tax.

DOR is authorized to adopt a rule allowing a single application for registration with the department that identifies each county in which transient accommodations are located. However, persons engaged in this business must register with each political subdivision that collects its own taxes without aid of DOR. Such person may file consolidated returns as provided in s. 212.11(1)(e), F.S.

Dealers are required to add the amount of the tax to the total rent and to separately itemize the sales tax and local tax due on the customer’s invoice. Tax is due at the moment of collection.

Section 2 creates s. 206.06(2)(m), F.S., to define a person as being a dealer if they have an agreement with a hotel owner to offer transient rental accommodations in Florida and receive a payment consisting of, in any part, an amount subject to the transient rental tax .

Section 3 provides that DOR may adopt emergency rules to implement the provisions of the bill.

Section 4 provides that the bill is not intended to have any impact on disputes that may arise about the application of the tax under prior law.

Section 5 provides an effective date of July 1, 2009.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

The Revenue Estimating Conference has not yet determined the impact of this PCS. The Conference estimated the revenue impact of a similar bill, CS/SB 1970, as follows:

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Total Impact	29.1	26.7	30.6	32.3	33.6

B. Private Sector Impact:

Persons renting, leasing, or letting transient rental accommodations who have not previously been required to register will be required to register with DOR, or applicable local jurisdictions, and remit taxes to them accordingly.

The consideration or rent paid to use the accommodations may encompass additional tax dollars not previously being remitted.



C. **Government Sector Impact:**

DOR stated that the operational impact on their department could not be determined.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**PCS by Finance and Tax**

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This PCS amends sections 212.03 and 212.06(2) of the Florida Statutes. The PCS creates an undesignated section of Florida law.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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