

HAWAII VACATION RENTAL UPDATE: NEW ADVERTISING REQUIREMENTS AND POSTING RULES FOR TRANSIENT ACCOMMODATIONS

Act 204 of 2015, Effective January 1, 2016, Imposes Specific Requirements On Advertisers and Operators Of Hawaii Vacation Rentals

In Hawaii's statutory tax scheme, temporary lodgings (less than 180 days) are described as "transient accommodations" and subject to a Transient Accommodations ("TA") Tax. The TA Tax applies to traditional temporary lodgings, such as hotel rooms, timeshare units, and B & Bs, as well as the growing category of "vacation rentals."

On July 2, 2015, Governor David Y. Ige signed [Act 204 of 2015](#) into law. The law will be effective January 1, 2016. Act 204 abandons some requirements of [Act 326 of 2012](#) and represents a new direction for the Department of Taxation's regulation of vacation rental units.

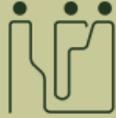
According to its introductory language, Act 204 advances "consumer protection" by requiring a "local contact" on the same island as the rental unit, in case of emergency, natural disaster, or questions concerning the accommodation. In contrast to the prefatory content, the testimony submitted to the Legislative Committees overwhelmingly addressed tax compliance and professional licensing issues. Typical tax testimony was: "illegal home-based vacation rentals are not paying their fair share of the TAT." [HGEA Testimony](#), 4/2/2015.

Act 204 is likely to directly impact advertising practices in Hawaii's "vacation rental" industry. Advertising without a tax number may be significantly more difficult and will be subject to significant new financial penalties. Whether the change in advertising practices increases tax compliance by vacation rental operators is uncertain.



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The Department Of Taxation's Summary

In [Tax Announcement 15-02](#) (July 28, 2015), the Department of Taxation “summarizes” changes to Hawaii tax law as a result of the 2015 Legislative Session. With respect to Act 204(15), the Department states:

Act 204: Local Contact Information and Tax Registration Number Required in Transient Accommodations Advertisements Act 204 (Senate Bill 519, S.D. 2, H.D. 3, C.D. 1) is effective January 1, 2016.

It requires TAT registration numbers and local contact information to be displayed in all transient accommodation units and in all advertisements of those units.

Operators or plan managers that do not have the TAT registration number or local contact information properly displayed both in the unit and in the advertisement of the unit may be cited and fined.

Additionally, transient accommodation brokers such as website operators, online travel agencies, or online booking agencies that do not provide a unit's TAT registration number and local contact information in all advertisements for the unit may be cited and fined.

Act 204 also makes clarifying, nonsubstantive amendments to the definition of “transient accommodation” under section 237D-1, HRS.

Regulation Explicitly Includes “Single Family Dwellings” And Now Reaches “Transient Accommodations Brokers”

Act 204 makes important refinements and additions to definitions in Hawaii’s Chapter 237D (Transient Accommodations Tax.)

First, the refinement: Section 3 amends the definition of a “transient accommodation” to *specifically include a “single-family dwelling.”* Here is the text of Act 204, with new language underlined:



"Transient accommodations" means the furnishing of a room, apartment, suite, single family dwelling, or the like [~~which is customarily occupied by~~] to a transient for less than one hundred eighty consecutive days for each letting [~~by~~] in a hotel, apartment hotel, motel, condominium property regime or apartment as defined in chapter 514A or unit as defined in chapter 514B, cooperative apartment, dwelling unit, or rooming house that provides living quarters, sleeping, or housekeeping accommodations, or other place in which lodgings are regularly furnished to transients [~~for consideration.~~]

The Department of Taxation's Tax Announcement, excerpted above, characterizes this as a "clarifying, nonsubstantive amendment." Whether interpreted as a "clarification" or an addition, lodgings not "customarily occupied" by a transient "for consideration," *including single family dwellings*, are within the definition of HRS 237D-1 effective January 1, 2016.

Next, the outright additions: Section 3 adds a "local contact" and a "transient accommodations broker." While this article is not about the "local contact," Act 204 generally consolidates provisions of Act 326 regarding the local contact into a single definition.

Section 3 introduces a "transient accommodations broker":

...any person or entity, including but not limited to persons who operate online websites, online travel agencies, or online booking agencies, that offers, lists, advertises, or accepts reservations or collects whole or partial payment for transient accommodations or resort time share vacation interests, units, or plans.

This definition is considerably broader than the Department's Summary, and is not limited to online travel companies ("OTCs") or internet websites. Obvious "TA Brokers" are: certain OTCs, on-line companies such as Homeaway.com and Airbnb.com, and Hawaii-licensed real estate professionals managing vacation rentals for owners.



Duties Of Operators and Transient Accommodations Brokers

Chapter 237D at present (2015) requires “operators” of transient accommodations to register for the appropriate license, display the licensing information, have a “local contact” (a defined term), and provide the local contact’s information to vacation renters. See, HRS 237D-4(a) ([here](#)); DoTax Unofficial Compilation ([here](#),) Page 4; Tax Announcement 2014-03, ([here](#)) Page 5.

As described above, Act 204 adds a new regulated participant, the “transient accommodations broker.” (“TA Broker”) This new category could have significant overlap with “operators,” but includes any person or entity that, with respect to a transient accommodation:

- “offers, lists, advertises;” or,
- accepts reservations for; or,
- collects whole or partial payments.

The Hawaii Department of Taxation is familiar with some prominent transient accommodations brokers, as it has audited and litigated the imposition of general excise and transient accommodations taxes against them over the past several years. In March 2015, the Hawaii Supreme Court concluded that internet based online travel companies, described as “OTCs,” were liable for general excise tax but not transient accommodations tax. See, “[Three Points From Hawaii’s Travelocity Decision.](#)”

Act 204 imposes duties on operators and TA Brokers with respect to both registration posting and the content of advertising.

Posting. Act 204 requires operators to “conspicuously” display either the tax registration or the place where the tax registration may be inspected and examined.¹ At the same location in the unit, the local contact information (name,

¹ Act 204 states that “any person” may be cited for failure to conspicuously post the registration/notice, or local contact information. Presumably, this ‘any person’ would be the operator of the TA unit.



phone number, e-mail address) must be provided. See, [Act 204](#), Section 4 (amending 237D-4(b).)

Advertising. Any transient accommodation advertisement shall “conspicuously” provide the registration identification number or an electronic link to the registration identification number of the operator or plan manager. With respect to advertising the local contact information (name, phone number, e-mail), it can either be “provided to the transient or occupant prior to the furnishing of the transient accommodation or resort time share unit” or in the advertisement itself. See, Act 204 and HRS 237-D4(c)(1)(2), as amended.

Summary of Act 204’s Posting And Advertising Requirements

Posted in the Unit, In the Same Place, “Conspicuously,”

1. Registration Number OR Place Where Registration May Be Inspected; and,
2. Local Contact Name, Phone Number, And Electronic Mail Address.²

Included In All Advertisements, “Conspicuously,”

1. Registration Number OR Electronic Link to Registration Number; and
2. Local Contact’s Name, Phone Number, and E-Mail Address BUT no violation if this information is provided PRIOR to the furnishing of the unit.

Civil Sanctions For Failure To Comply With Posting And Advertising Requirements

Act 204 provides for escalating civil sanctions for failure to comply with the notice and provisions, starting with a minimum of \$500 per day for a first violation, \$1,000 per day for a second violation, and \$5,000 per day for third and subsequent violations.

² The “citation” section for the registration and local contact posting provision differs slightly in language, suggesting that a citation may only be issued if both a phone number *and* e-mail are omitted.



Act 204 does not provide for mitigation of civil sanctions for advertising or posting violations because the operator actually had the appropriate license or was in full tax compliance. This is a contrast, for instance, to citations for failure to produce a tax license upon demand by the Department, to which possession of a license is an “absolute defense.” See, [HRS 231-94](#).

Funding For Civil Sanctions Enforcement

Act 204 increases the revenues available to be deposited in the tax administration fund (for the Department of Taxation’s Special Enforcement Section) from \$500,000 to \$700,000 per fiscal year. Act 204, Section 2.

Comparing Act 204 To Act 326

Did Act 326 (of 2012) fail in its objectives? The Legislature has not extended many of its provisions and has modified others. During legislative proceedings for Act 204, the Department of Taxation repeatedly urged the Legislature to let Act 326 expire.

Problems With Act 326

Act 326 required that the tax license number be displayed on all on-line websites for vacation rentals. This applied to all categories of vacation rentals. My non-scientific review of vacation rental websites, including websites operated by Hawaii-licensed realtors, suggests some level of non-compliance.

Act 326 imposed some onerous duties on certain non-participants in the vacation rental market. Directed at condominium and homeowners’ associations, Act 326 required associations to collect information, initially both on their own and from unit owners (later just from the unit owners) and report it to the Department of Taxation. The Legislature believed requiring condominium and homeowner associations to report vacation rentals would “help ensure compliance with appropriate state and county tax laws.” [Act 326, Section 1](#). The Legislature also believed that Act 326 would result in information sharing between the Department of Taxation and the individual counties. See, Act 326, Section 2.



The Department struggled to administer Act 326's informational reporting, repeatedly "postponing" the compliance deadline [see Tax Announcements 2013-02 and 2014-02 (deleted from DoTax website)], [Tax Announcement 2014-03](#) (extending the deadline to comply to June 30, 2014.) To give readers a sense of the delay, Act 326 required the initial reporting by December 31, 2012.

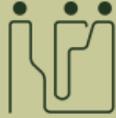
Only associations were required to obtain and provide information to the Department under this provision of Act 326. Vacation rental units not in an association, presumably including virtually all "single family dwellings," were therefore excluded from this informational-reporting requirement.

While not the subject of this article, Act 326 had various provisions regarding the "local contact." According to testimony for Act 204, and Hawaii's Real Estate Commission, these provisions may have encouraged vacation rental management activity by persons not licensed as real estate professionals.

Department of Taxation's Position On Extending Act 326

The Department of Taxation did not support an extension of Act 326. The Department of Taxation asserted that Act 326 was "not directly related to the Department's tax collection function," and testified accordingly. See, [here](#), [here](#), and [here](#).

The Department of Taxation did not testify on the final form of the present Act 204, which was modified after hearings were concluded and by the Legislative Conference Committee. Whether the Department of Taxation would view Act 204's commercial advertising provisions as "directly related to the tax collection function" is therefore unknown.



Act 204's New Approach To The "Transient Accommodations Broker" Is An Attempt To Increase Tax Reporting Compliance By Operators

As described above, Act 326 attempted to encourage tax compliance by TA operators by requiring third parties to provide information to the Department. Specifically, Act 326 required associations to collect and report vacation rental activity by property owners. Associations are not participants in, and do not have an economic role, in vacation rental activity.

Act 204 discards this approach in favor of influencing a direct vacation rental participant, the "TA Broker." A "TA Broker" is:

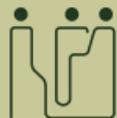
...any person or entity, including but not limited to persons who operate online websites, online travel agencies, or online booking agencies, that offers, lists, advertises, or accepts reservations or collects whole or partial payment for transient accommodations or resort time share vacation interests, units, or plans.

At least one major on-line vacation rental website does all three categories of activities. Many operators do one or more of these activities and can be considered as both operators and TA Brokers.

Potential Ramifications Of Act 204's New Regime & Sanctions

Act 326's requirement that internet advertisements contain the TA number has not become uniform practice in Hawaii's vacation rental industry. Act 204 (in connection with March 2015's *Travelocity* decision) will probably change this.

Act 204 also clarifies that single-family dwellings not traditionally used as transient accommodations are subject to the Transient Accommodations Tax, HRS 237D.



Transient Accommodations Brokers

Under Act 204, the Department can directly impose and collect fines for posting and advertising violations. [As noted, the actual possession of the requisite tax license and tax compliance does not appear to be a defense to advertising sanctions.]

A second (civil) step could be to pursue operators for unfiled, unpaid or underpaid GE and TA back taxes (and potentially income taxes.) TA Brokers with the requisite nexus and local contacts also might also have exposure for GE taxes on their fees.³

To avoid civil sanctions, prudent marketing or booking services are likely to require listings to contain the TA license number and the required “local contact” information. While Act 204 provides methods whereby its local contact provisions can be satisfied otherwise, prudent business practice for an on-line service would not be to rely upon a third party to meet an obligation for which it could conceivably be fined.

Vacation Rental Owners And Operators

The follow-on impact of Act 204 may be that TA units without a TA license, or unwilling to have the license number on-line, may not be able to avail themselves of common marketing approaches.

My anecdotal observation is that there are licensed, tax-compliant TA operators that do not want to be identified as TA operators. At least some vacation rentals do not comply with county regulations, association rules, or other restrictions. These operators will face difficult decisions.

³ See, [In re Matter of Tax Appeal of Travelocity.Com, L.P., v. Director of Taxation, State of Hawaii.](#)



Local Contacts

On-line advertisers and OTCs are likely to require the local contact information be listed, which may mean that local contacts can be readily identified should anyone choose to make the effort. Local contacts therefore may face some new challenges.

According to the Hawaii Real Estate Commission, local contacts not licensed as real estate professionals are limited in their services by Hawaii licensing law. See, [Hawaii Real Estate Commission Bulletin, November 2013](#).

Local contacts may want to avoid being considered a TA Broker by virtue of their activities. TA Brokers are subject to the civil sanctions for non-conforming advertisements. For instance, a local contact that collects payment in whole or in part by definition will be a TA Broker.

Concluding Thoughts

The Department of Taxation's level of enforcement for Act 204 is unknown. Self-funding through revenue generated by citation enforcement is available up to \$200,000 per year.

Major on-line vacation rental websites will probably not wait and see the Department's level of interest, but will rather require information to be listed in advertisements.

Vacation rental owners without tax licenses, or unwilling to publicly disclose their licensing status, may be unable to advertise on major website and may turn to smaller or customized advertisers unfamiliar with Act 204 or willing to ignore its requirements.

Ultimately, whether TA compliance increases, especially on "single family dwellings," is a question for the future.