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UNDERSTANDING THE NEW LAW ON TRANSIENT RENTALS – ACT 326 **(2014 UPDATE)**

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OVERVIEW

Act 326 requires condominium and other homeowner associations to submit information electronically (not by mail) about all association members who may be leasing their properties as transient accommodations. The State of Hawaii Department of Taxation (“Tax Department”) takes the position that associations are required only to submit the information “maintained” in their records. As long as the associations ask their members for updated information on the use of their units on an annual basis, the associations will be deemed to have “maintained” their records. Otherwise, they could be liable for any “willful” failure to supply information in their records.

BACKGROUND

Act 326 became law without the Governor’s signature on July 10, 2012. The stated purpose of this act was to “*foster consumer protection in the State’s transient accommodations market and ensure greater compliance with applicable state and county laws by operators of transient accommodations in the State.*” The act does so by requiring the operator of a transient accommodation to designate a local contact residing on the same island where the transient accommodation is located. The act also requires that all advertisements and solicitations on websites for transient accommodations display registration identification numbers.

Note that “transient accommodation” is not just hotel-type use. Instead, the term is defined by HRS §237D-1 as, “*furnishing of a room, apartment, suite, or the like which is customarily occupied by a transient for **less than one hundred eighty consecutive days.** . . .*” That means many who are renting to those who might be considered “long-term” tenants could still be deemed to be engaged in transient accommodations under act 326.

Unfortunately, the act goes significantly beyond the purpose stated above by requiring community, condominium, and other similar associations to report relevant information to the Tax Department about all owners who may be leasing their property as a transient accommodation, “*to help ensure compliance with appropriate state and county tax laws.*” The legislature decided that requiring community, condominium, and other similar associations to

provide that information to the Tax Department permits additional enforcement of relevant state and county tax laws.

In the specific terms of the act:

*Any nongovernmental entity with covenants, bylaws, and administrative provisions which is formed pursuant to chapter 514A, 514B, or 421J, shall provide the department with all relevant information, maintained in its records, related to all operators who may be leasing their property as transient accommodations by December 31 of each year, or within sixty calendar days of any change in the relevant information, operation, or ownership of the transient accommodation. Any person or entity who **wilfully** fails to supply information required under this subsection shall be subject to the penalties under section 231-35; provided that a person or entity shall not be subject to any term of imprisonment or probation under section 231-35.*

(Emphasis added.)

The use of the word “wilfully” suggests inadvertently overlooking something will not result in liability. Nevertheless, act 326 appears to create potential liability for associations located in areas where transient rentals are permitted, because of the penalties that exist under section 231-35. Section 231-35 states:

§231-35 Wilful failure to file return, supply information, or secure a license.
Any person required to make a return, make a report, keep any records, supply any information, or secure any license required under title 14, who wilfully fails to make the return, make the report, keep the records, supply the information, or secure the license, at the time or times required by law, shall in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction, shall be subject to one or any combination of the following:

- (1) A fine of not more than \$25,000;*
- (2) Imprisonment of not more than one year; or*
- (3) Probation;*

provided that a corporation shall be fined not more than \$100,000.

(Emphasis added.)

It is more than possible that an association could be deemed a corporation for purposes of this provision, especially if the association IS incorporated (as many are).

From the beginning, the Governor recognized the burden an association would face under an expansive interpretation of act 326. Therefore, he did not actually sign the bill that became act 326 (House Bill No. 2078, H.D. 2, S.D. 2, C.D. 1) in 2012. Instead, he allowed the bill to become law without his signature. Moreover, in the Governor’s Message attached to the act he stated that he had confirmed with the Attorney General that associations are only required to provide information actually in their records.

The Tax Department originally seemed to go further by suggesting there was no limitation on the information an association would have to provide to the Tax Department. That seems to have changed in Tax Announcement 2014-02 (**attached**), which is consistent with the Governor's message and states on pages 5-6:

No penalties will be imposed on Associations who fail to provide relevant information where the law does not require an operator to provide that relevant information to the Association. Please also note that Associations are required only to submit the information maintained in their records and will not be penalized for failing to provide information that was never provided to them by the operators operating transient accommodations. For purposes of maintaining their records, the Department will deem an Association's records to be sufficient if it sends out a once yearly communication by mail, email, phone or otherwise, to all owners, asking for updated relevant information. Associations do not have an affirmative duty to gather information that operators fail to provide to them in response to any such communication. However, this does not excuse a willful failure to receive information that is made available by an operator.

(Emphasis added.)

This confirms that although the act requires an association to provide “*all relevant information maintained in its records, related to all operators who may be leasing their property as transient accommodations*”, associations will only be required to provide information that is actually in their records.

[Note that there were attempts to address this issue legislatively in 2013. Unfortunately, although the issue was to have been clarified in the 2013 legislative session by SB500 or HB474, the bills did not pass the legislature. Nevertheless, HB474 has been heard in the 2014 Legislative Session.]

REPORTING REQUIREMENTS

March 31, 2013 was the original date for associations to provide the Tax Department with relevant information about any transient accommodations operating in the project managed by the association. That deadline was later changed to December 31, 2013 and, finally, in *Department Of Taxation Announcement No. 2014-02*, dated January 16, 2014, to **on or before April 30, 2014**. Note, however, the following important qualifications to that requirement:

- If any units on the property were operated as transient accommodations on or after January 1, 2013 (no 2012 information is required), and before January 1, 2014, the information relevant to those units must be reported to the Tax Department by the **April 30, 2014**, date.
- If units are operated as transient accommodations **on or after** January 1, **2014**, the information must be reported before the end of the year, or updated within 60 days of a change in the association's records, whichever is later.
- Information related to units **not** used as transient accommodations during the year, such as owner-occupied or long-term tenant-occupied units, need not be reported.

- If a unit has been used as a transient accommodation since January 1, 2013, but at the time of reporting is **no longer** being used as a transient accommodation, the association must report the unit's information but should mark the unit as "**inactive**" when submitting the information.
- If during the course of the year the status of units at the project does not change (i.e., all units being operated as transient accommodations continue to be operated as transient accommodations under the same circumstances, and all units not being operated as transient accommodations continue to not be so), the association need not do anything (but the Tax Department advises logging on to the site at least once a year to double check the association's information on the site).

As for the information that must be reported, if any units in a project are being operated as a transient accommodation, the board must report:

- (1) The project's tax map key number;
- (2) The project's name;
- (3) The project's address;
- (4) The name, mailing address and telephone number of the owner of any unit used as a transient accommodation on or after January 1, 2013;
- (5) The name, mailing address and telephone number of the operator of such unit(s). (Note: the unit owner and operator can be the same person.);
- (6) The name, mailing address and phone number of the designated local contact for units being operated as transient accommodations. (Note: the local contact can be the same as the owner and/or operator if that person or entity is on the same island as the unit.);
- (7) The transient accommodations tax license number of all operators operating units as transient accommodations (i.e., the number issued under HRS 237D-4);
- (8) The website address of all websites on which the units were advertised.

HOW TO REPORT:

Associations must report information to the Tax Department electronically via the following website: <https://dotax.ehawaii.gov/resreport>. The website contains instructions for setting up an account as well as for reporting and updating the information. **Associations should NOT send information to the Tax Department by mail as this will not be deemed compliance for purposes of Act 326 and an association may still be subject to penalties.** If you have any questions about the website, the Tax Department recommends sending an email to: Tax.Act326.Reporting@hawaii.gov.