

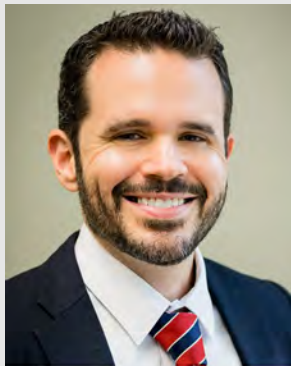
Tourism Tax Reporting: New Gray Areas

by Steven M. Hogan

Reprinted from *State Tax Notes*, October 2, 2017, p. 49

Tourism Tax Reporting: New Gray Areas

by Steven M. Hogan



Steven M. Hogan

Steven M. Hogan is a shareholder with the Ausley McMullen law firm in Tallahassee, Florida. His tax practice focuses on state and federal tax controversy and planning. He serves as director of the Florida Bar Tax Section's State Tax Division and as an adjunct professor at the Florida State University College of Law.

In this edition of Florida Tax Today, Hogan explains the new reporting requirements for local tourism organizations that partner with the state, and ways in which those requirements are ill-defined.

In the 2017 Florida legislative session, House Speaker Richard Corcoran (R) made it a priority to focus on how state dollars are spent for the economic development, including promoting tourism.¹ Florida has invested heavily in tourism marketing over the years. The structure that has emerged is one that includes both state-level marketing efforts through the state's official tourism planning organization, VISIT FLORIDA — a nonprofit, public-private partnership — and local destination marketing organizations (DMOs) run at the local level.²

Local tourism marketing efforts are largely funded by specialized taxes aimed at tourists,

such as "bed taxes" paid by tourists and other short-term visitors. They help pay for the costs of attracting more tourists to the local area that imposes the tax.³ Through H.B. 1A, the Legislature created significant new reporting requirements for DMOs that do business with VISIT FLORIDA. These changes have created new, undefined gray areas that DMOs must consider.

H.B. 1A Arrives

H.B. 1A was passed during the 2017 special session, and Gov. Rick Scott (R) signed the bill into law on June 26.⁴ The most relevant portions of H.B. 1A for DMOs are the creation of new Florida Statutes sections 288.1226(6)(b) and 288.1226(13)(c). New section 288.1226(6)(b) generally prevents VISIT FLORIDA from counting contributions from government entities when calculating the required "one-to-one match" between state funding and outside contributions.⁵ However, contributions from government entities that receive more than 50 percent of their funding from taxes collected under section 125.0404 can be used as part of VISIT FLORIDA's match calculation. Practically, that means that contributions from DMOs that are funded by the tourist development tax (TDT) under section 125.0104 will count for VISIT FLORIDA's match calculation.

New section 288.1226(13)(c) creates reporting requirements for government entities that partner with VISIT FLORIDA. The full text of that provision states:

³ One example is the tourist development tax (TDT) governed by Fla. Stat. section 125.0104. The TDT cannot be used for general revenue purposes and is narrowly focused on raising revenue that must be spent for tourism purposes. See Fla. Stat. section 125.0104(5) (detailing authorized uses of TDT revenue).

⁴ Ch. 2017-233, Laws of Fla.

⁵ This match is required under new Fla. Stat. section 288.1226(6)(a).

¹ See Dara Kam, "House Speaker Corcoran Starts Session With Combative Tone," *Palm Beach Post*, Mar. 7, 2017.

² See visitflorida.com, About Us; and fadmo.org, Florida Association of Destination Marketing Organizations, Destination Marketing Organizations Defined.

(c) 1. Any entity that in the previous fiscal year received more than 50 percent of its revenue from the corporation or taxes imposed under [section] 125.0104, [section] 125.0108, or [section] 212.0305, and that partners with the corporation or participates in a program, cooperative advertisement, promotional opportunity, or other activity offered by or in conjunction with the corporation, *shall annually on July 1 report all public and private financial data to the Governor, the President of the Senate, and the Speaker of the House of Representatives, and include such report on its website.*

2. The financial data shall include:

- a. The total amount of revenue received from public and private sources.
- b. The operating budget of the partner entity.
- c. Employee and board member salary and benefit details from public and private funds.
- d. An itemized account of all expenditures by the partner entity on the behalf of, or coordinated for the benefit of the corporation, its board members, or employees.
- e. Itemized travel and entertainment expenditures of the partner entity.⁶

Under the new language, the reporting requirement will potentially be triggered by receipt of funds from VISIT FLORIDA, the TDT (section 125.0104), the tourist impact tax (section 125.0108), or the convention development tax (section 212.0305).

Gray Areas Part I: Two-Prong Analysis

The reporting requirement applies only if an entity satisfies the two prongs of the statutory test: (1) the entity received more than 50 percent of its

revenue in the prior fiscal year from the specified sources; and (2) the entity partners with VISIT FLORIDA in the fiscal year, or participates in a program, cooperative advertisement, promotional opportunity, or other activity offered by or in conjunction with VISIT FLORIDA.

Those requirements raise the following issues for DMOs:

- **Calculation of the 50 percent threshold.**

The first prong of the analysis is met when an entity receives more than 50 percent of its revenue in the prior fiscal year from specified sources. The statute does not state whether the enumerated sources are to be considered on their own or collectively to meet the 50 percent threshold.

This threshold is calculated based on the previous fiscal year. Left unaddressed is what fiscal year applies. Florida operates on a fiscal year starting on July 1 and ending on June 30 of the following calendar year. Though that may be the fiscal year referenced in the law, the issue is unresolved.

- **Partnering with VISIT FLORIDA.** The statute does not define what is meant by an entity partnering with VISIT FLORIDA. This term is open for interpretation. In the absence of a definitive judicial ruling, the meaning of partnership in this context is unresolved.

- **Participation in VISIT FLORIDA programs.** The statute does not define what is meant by an entity that participates in a program, cooperative advertisement, promotional opportunity, or other activity “offered by or in conjunction with” VISIT FLORIDA. In the absence of a definitive judicial ruling, the meaning of participation in this context is unresolved.

Gray Areas Part II: Annual Report

If an entity decides that it satisfies the two-prong analysis and must file a report, the report will be due on July 1 on an annual basis. The first report would be due on July 1, 2018. The report is not made to VISIT FLORIDA; it is to be submitted to the governor, the president of the Senate, and

⁶Ch. 2017-233, section 17, Laws of Fla. (emphasis added).

the speaker of the House of Representatives. The reporting entity must also post the report on its website.

These requirements raise the following issues for DMOs:

- **What reporting period?** The statute does not state what period should be covered by the annual report. Given the statute's reference to the previous fiscal year for calculation of the 50 percent threshold, the statute may refer to a fiscal year reporting basis. The entity filing the report should decide on the period that it is practically able to gather data for.
- **Who audits the reports?** There is no provision in H.B. 1A granting any particular entity oversight or audit responsibilities to ensure that the reports are filed. One could expect, however, that the governor, the president of the Senate, and the House speaker might create mechanisms to determine whether the proper entities filed reports and whether those reports met the statutory requirements.
- **What financial data to include?** The financial data that must be reported should include "the total amount of revenue received [by the entity] from public and private sources." This line item appears straightforward. The report must include the operating budget of the reporting entity. There is no guidance on how detailed this budget must be. The report must include "employee and board member salary and benefit details from public and private funds." This provision can be read to exclude reporting of salary and benefit details received from sources outside of the entity — that is, there would be no requirement to report a board member's salary from private employment. While this is a reasonable way to read the statute, each affected entity must make its own decision.⁷

The report must include an "itemized account of all expenditures" by the entity for the benefit of VISIT FLORIDA, its board members, or its employees and "itemized travel and entertainment expenses" of the reporting entity. There is no guidance on how detailed these itemized accounts must be.

Conclusion

These new reporting requirements are the latest example of greater state-level scrutiny of the use of state tax revenue for economic development. The gray areas in this new reporting regime will take some time to work through. DMOs and other entities affected by the terms of H.B. 1A should consider creating a compliance plan for the new reporting requirements. ■

⁷ This issue is already causing confusion among DMOs and the office of the speaker. See Arek Sarkissian, "House Leader Wants Answers from Local Tourism Agencies on Spending," *Tallahassee Democrat*, Aug. 25, 2017.