

Working Draft TIR 19-XX: Changes to the Room Occupancy Excise in An Act Regulating and Insuring Short-Term Rentals

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I. Introduction

An Act Regulating and Insuring Short-Term Rentals (the “Act”) was recently signed into law.^[1] The Act expands the application of the room occupancy excise in G.L. c. 64G to operators of short-term rentals as of July 1, 2019, and makes other changes to the room occupancy excise that impact all taxable accommodations as of March 28, 2019.^[2]

This Technical Information Release (“TIR”) explains the major tax provisions of the Act and their impact on operators and intermediaries that facilitate occupancy transactions.

The Department of Revenue (“Department”) anticipates issuing regulatory guidance later this year to explain the administration of the Act in greater detail. ^[3]

II. General Overview of the Room Occupancy Excise

The following is a general overview of the room occupancy excise imposed under G.L. c. 64G, as amended by the Act.

A. Accommodations Subject to the Excise

Prior to the Act, G.L. c. 64G, § 3 imposed an excise upon the transfer of occupancy by an operator in Massachusetts of “any room in a bed and breakfast establishment, a hotel, lodging house or a motel for a period of not more than 90 consecutive calendar days.”^[4] Beginning on or after July 1, 2019, the room occupancy excise also applies to a room in a “short-term

rental” for a period of not more than 31 consecutive calendar days, if a rental agreement was entered into on or after January 1, 2019. The term “short-term rental” means an occupied property that is not a hotel, motel, lodging house, bed and breakfast establishment or bed and breakfast home, where at least 1 room or unit is rented out by an operator through the use of advance reservations. A private owner-occupied property is considered a single unit if leased or rented as such. A short-term rental accommodation includes an apartment, house, cottage, and condominium. It does not include property that is rented out through tenancies at will or month-to-month leases. It also does not include time-share property.^[5]

For any taxable accommodation, the “operator” for purposes of G.L. c. 64G can be an owner, lessee, sublessee, holder of a mortgage in the property, licensee, or anyone else renting out the property. An operator need not be a resident of Massachusetts or a Massachusetts-based business for the room occupancy rules to apply.

B. Exemptions

Prior to the Act, G.L. c. 64G, § 2 provided for exemptions for the following types of accommodations:

- lodging accommodations at a federal, state or municipal institution;
- privately-owned and operated convalescent homes or homes for the aged, infirm, indigent or chronically ill;
- religious or charitable homes for the aged, infirm, indigent or chronically ill;
- summer camps for children up to 18 years of age or developmentally disabled individuals;
- lodging accommodations, including dormitories, at religious, charitable, educational and philanthropic institutions; and
- bed and breakfast homes (*e.g.*, homes with three or fewer rented rooms).

Lodging accommodations, including dormitories, at religious, charitable, educational and philanthropic institutions remain exempt. However, the Act modifies this exemption to provide that it does not apply to

accommodations provided by any such institution at a hotel or motel that is generally open to the public and operated by the institution.[6]

The Act creates new exemptions from the room occupancy excise for the following types of accommodations:

- lodging accommodations provided to seasonal employees by employers;
- alcohol and drug free housing certified by G.L. c. 17, § 18A;
- tenancies at will or month-to-month leases, and
- time-shares, as defined in G.L. c. 183B, § 2.[7]

Finally, the room occupancy statute continues to exempt transfers of occupancy if the occupant is an employee of the United States military traveling on official orders. The exemption has been extended to include short-term rentals used in such circumstances.[8]

The amendments to the exemption provisions apply to all transfers of occupancy on or after March 28, 2019.

C. Changes to the Definitions of Rent and Occupancy

The room occupancy excise applies to transfers of occupancy at specified accommodations, and is based on the amount of rent paid. The Act changed the definitions of both “rent” and “occupancy” for all operators and accommodations, effective March 28, 2019.

Under the Act, the total amount of rent that is subject to the excise includes all amounts paid by or on behalf of an occupant to an operator, or to an intermediary collecting and remitting the excise on behalf of the operator, even if not required for occupancy. The term “rent” includes all optional charges, including but not limited to the following: security deposits, insurance, linen fees, cleaning fees, booking fees, and charges for activities or services such as spa treatments. If the total amount of rent is less than \$15 per day, no tax is required to be collected.[9]

The term “occupancy” previously encompassed the use or possession or the right to the use or possession of a room in a bed and breakfast

establishment, hotel, lodging house or motel designed and normally used for sleeping and living purposes by a lessee, tenant guest or licensee. Such occupancies continue to be subject to the excise where the occupancy is for not more than 90 consecutive calendar days. Under the Act, “occupancy” now includes the use or possession or the right to the use or possession of a room in a short-term rental. For short-term rentals, a period of occupancy is subject to the excise only if it is for not more than 31 consecutive calendar days. If the duration of an occupancy exceeds 31 consecutive calendar days, in the case of a short-term rental, or 90 consecutive calendar days, in the case of all other types of accommodations, no excise is imposed on any portion of the stay, including the first 31 or 90 days, respectively.[10]

Under the Act, “occupancy” is further defined to now include the right to the use or possession of the furnishings or the services and accommodations, including breakfast in a bed and breakfast establishment, accompanying the use and possession of such a room.[11] Whether or not an occupant chooses to use any or all of the furnishings, services and accommodations offered by an operator is no longer relevant in determining the application of the excise. With this expansion of the definition of “occupancy” by the Act, the exception for “recreational establishments” under *Eastover, Inc. v. Commissioner of Revenue*, A.T.B. Docket Nos. 1467986-89 (1989), no longer applies.[12]

D. Collection and Remittance of the State and Local Excises; New Excises and Fees

In addition to the state room occupancy excise, each Massachusetts city and town may impose an additional local option room occupancy excise on the total amount of rent pursuant to G.L. c. 64G, § 3A. Most cities and towns have already adopted a local option excise. If a city or town currently has a local option excise, that excise automatically applies to a short-term rental starting July 1, 2019 for which a rental contract was entered into on or after January 1, 2019.[13] A convention center finance fee is also imposed on all transfers of occupancy by an operator in certain cities and towns in Massachusetts.[14] These provisions remain unchanged by the Act.

The Act provides for a new local excise on taxable transfers of occupancy in cities and towns in Massachusetts that are members of the Cape Cod and Islands Water Protection Fund (“Fund”).^[15] Currently, all Barnstable County cities and towns are members of the Fund. Cities and towns in Nantucket and Dukes County are not currently members of the Fund. Membership in the Fund is administered by the Department of Environmental Protection. For short-term rentals this excise is effective for occupancies beginning on or after July 1, 2019 if a rental agreement is entered into on or after January 1, 2019.^[16] The excise is effective March 28, 2019 for all other types of accommodations.

The Act also provides for a new community impact fee that cities and towns may choose to impose on certain short-term rentals if the community has adopted the local option room occupancy excise.^[17] Operators may be subject to a community impact fee of up to 3% of the amount of rent for each rental if the property is located in a city or town that adopts such a fee and the property is either 1) a professionally managed unit, as defined in the Act, or, by separate adoption vote of the community, 2) located in a two-family or three-family dwelling that includes the operator’s primary residence.^[18] Pursuant to the Act, any community impact fee imposed on an occupancy must be paid directly to the applicable city or town.

If the total amount of the rent charged is less than \$15 per day, none of the excises or fees described in G.L. c. 64G apply.^[19]

The rate of tax required to be collected will depend on where the rental is located. Below is a list of the state and local excises that may apply:

- State excise of 5.7%^[20]
- Local option excise of 0-6.5%, if adopted by a city or town^[21]
- Convention center finance fee of 2.75% (only for Boston, Worcester, Cambridge, Springfield, West Springfield, and Chicopee)
- Cape Cod and Islands Water Protection Fund excise of 2.75% (only for those cities and towns that are members of the Fund)
- Community impact fee of 0-3%, if adopted by a city or town

E. Intermediaries Acting on Behalf of Operators

Generally, the room occupancy excise is collected by the operator from the occupant and the operator then remits the excise to the Department. However, the Act authorizes, and in some cases requires, an intermediary to collect and remit tax on an operator's behalf.^[22] An intermediary is anyone other than an operator who facilitates a transfer of occupancy and who also charges rent on behalf of the operator. An intermediary includes a broker, hosting platform, or operator's agent.^[23]

An intermediary that enters into an agreement to collect rent or facilitate the collection of rent on behalf of an operator is required by the statute to:

- register with the Department on behalf of the operator;
- assess, collect, report and remit the excises to the Department;
- assess, collect and remit the community impact fee, if any, to the applicable city or town;
- maintain records of any excises collected that have been remitted to the Department and provide those records to the Department upon request;
- ensure that the operator is registered with the Department; and
- notify the operator of its responsibility to comply with all applicable municipal, state and federal laws including, but not limited to, the collection and remittance of required excises.^[24]

Intermediaries must register with the Department through an annual filing and will be required to provide the Department with certain information at that time, such as the amounts they have collected and remitted on behalf of each operator.^[25] The Department intends to issue further guidance to further explain the registration process and any reporting requirements.

An intermediary acting on behalf of an operator is also required to give notice to the operator within a reasonable time that any excises due have been collected and remitted to the Department. An intermediary will not be liable for excises not properly collected and remitted as long as the intermediary's failure to properly collect and remit is due to the intermediary's reasonable reliance on information provided by the operator about the nature of the property being rented, the duration of the

occupancy, or other similar representations. If any information relied on by intermediary from the operator was misrepresented, the operator will be liable for any unpaid excise resulting from any such misrepresentation. Any monetary damages to the occupant resulting from any such misrepresentations shall be repaid to the occupant by the operator.[26]

F. New State-Wide Registry

The Act directs the Executive Office of Housing and Economic Development, in consultation with the Department and the Executive Office of Technology Services and Security, to establish and maintain a registry of all operators who are registered with the Department and offer accommodations for rent in Massachusetts.[27] Regulations implementing the Registry are to be issued by the Executive Office of Housing and Economic Development.[28]

III. Provisions Specific to Short-Term Rental Operators

As stated above, the Act expands the types of accommodations subject to the room occupancy excise to include short-term rentals. For transfers of occupancy in a short-term rental that begin on or after July 1, 2019, where a rental contract was entered into on or after January 1, 2019, a room occupancy excise is imposed if the rental is for a period of not more than 31 consecutive calendar days.

A. Registration, Return and Recordkeeping Requirements

All operators of short-term rentals must register annually with the Department. Room occupancy returns are due monthly, on or before the 20th day of the month, reporting the tax due on occupancies in the previous month. G.L. c. 62C, § 16(g). For example, for short-term rentals in July 2019, the return and payment with respect to those rentals is due on August 20, 2019. The state excise and any local option excise collected by the Department, including the Convention Center Financing fee and the Cape Cod and Islands Water Protection Fund excise, are to be paid with the

return. As of July 1, 2019, all room occupancy returns and payments are required to be filed and paid electronically.[\[29\]](#)

Generally, an operator of a short-term rental will be required to file a return for a given month only when there are rentals to report for that month. The Department will be issuing regulations intended to reduce the filing burden on operators who offer their accommodations to the public for not less than 1 day in 5 separate months, or fewer, in the taxable year. If an operator enters into an agreement with an intermediary for the collection of rent, the intermediary will be required to collect and remit the excises to the Department. *See* Section II.E., above.

Like all other operators, an operator of a short-term rental will be required to keep records relating to charges and receipts for all transfers of occupancy, as well as copies of all returns filed.[\[30\]](#) If an operator enters into an agreement with an intermediary, the intermediary will be required to provide certain records to such operator. *See* Section II.E., above.

B. 14-Day Exemption for Short-Term Rentals

Although all operators of short-term rentals must register with the Department, the room occupancy excise is not imposed on a short-term rental if the operator registers with the Department and files a declaration setting forth the intention to rent out the short-term rental for not more than 14 days in a calendar year.[\[31\]](#) If an operator of a short-term rental either 1) fails to register with the Department; 2) fails to make such a declaration; or 3) registers with the Department and makes such a declaration and then rents the accommodation for more than 14 days in the calendar year, such operator will be responsible for paying the room occupancy excise for all rentals, including rentals for the first 14 days.[\[32\]](#)

IV. Transition Rules for Intermediaries and Operators for 2019

In order to ease compliance with the new intermediary rules, the following transition rules shall apply:

- For room occupancy returns due on or after April 20, 2019 but before August 20, 2019 (i.e., in connection with transfers of occupancy between March 28, 2019 and July 30, 2019), all operators must remit tax on the rent amounts collected by them, even if that obligation technically applies to an intermediary. During these periods, an intermediary required under the Act to collect and remit tax must: (1) collect rent and the total tax due from occupants; (2) remit to each operator any rent owed to them along with the tax associated with such amount. Any tax not remitted to an operator will be reported and remitted by the intermediary on its August 20, 2019 return, as described below.
- For room occupancy returns due on or after August 20, 2019 (i.e., in connection with transfers of occupancy after July 30, 2019), intermediaries required under the Act to collect and remit must file returns and remit the tax collected to the Department. As part of the return, intermediaries must submit a schedule reporting total accommodations rented in each city or town. An intermediary also must remit to the Department any tax amounts not previously remitted by the intermediary to an operator on their August 20, 2019 return. Operators are not to collect or remit the excise to the extent that such excise has already been collected and remitted by an intermediary on the operator's behalf, as described above.

Example:

Intermediary accepts a booking for Hotel in Danvers on February 1, 2019 for a three night stay starting on April 14, 2019. The charge for the room is \$100 per night before taxes and fees. Intermediary charges a \$25 fee for booking the transaction. The local option in Danvers is 6%, for a total excise of 11.7%. The charges for the booking should be stated as follows:

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Room Charge	\$300.00
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Service Fee	\$ 25.00
Total Room Charge	\$325.00
Tax 11.7%	\$ 38.03
Total	\$363.03

If Intermediary remits \$300 to Hotel, Hotel will report the \$300 as rent on its April return and report and remit taxes of \$35.10 ($\$300 \times 11.7\%$).

Intermediary will remit to the Department all taxes that were not remitted to the hotel. Consequently, on the return that Intermediary files in August for its portion of the rent collected from March 28 through July 31, it will include the \$25 service fee on its schedule of rent, and will report and remit taxes of \$2.93 ($\$25 \times 11.7\%$).

The Department intends to issue further guidance regarding return reporting requirements.

Working Draft For Practitioner Comment - 2/4/19

Public comment period open until close of business Friday, February 22, 2019. Please e-mail comments to rulesandregs@dor.state.ma.us.

[1] St. 2018, c. 337.

[2] The Act does not specify an effective date for the amendments to G.L. c. 64G, except for G.L. 64G §§ 3, 3A, 3C, and 3D, as applied to short-term rentals. By operation of law, those changes without an effective date become effective 90 days after the date the Act was enacted, which means they will go into effect March 28, 2019.

[3] St. 2018, c. 337, §§ 4, 8.

[4] G.L. c. 64G, §§ 1, 3.

[5] St. 2018, c. 337, § 6.

[6] *Id.*

[7] *Id.*

[8] St. 2018, c. 337, § 8.

[9] St. 2018, c. 337, § 6.

[10] *Id.*; TIR 07-2.

[11] *Id.*

[12] See TIR 89-7, which is hereby revoked.

[13] St. 2018, c. 337, § 15. Local city and town local option rates can be located in the Division of Local Service's **Municipal Databank**.

[14] See TIR 05-1.

[15] St. 2018, c. 337, § 6.

[16] St. 2018, c. 337, §14.

[17] St. 2018, c. 337, § 6.

[18] *Id.*

[19] G.L. c. 64G, §§ 3, 3C.

[20] The Act provides for a 5% state room occupancy excise rate, but an additional tax, a surtax, in another provision of law outside of the Act and G.L. c. 64G adds .7% to the rate. See St. 1969, c. 546, § 22.

[21] St. 2018, c. 337, § 6.

[22] St. 2018, c. 337, § 8.

[23] An operator's agent is anyone who manages a property for rent or books reservations of a property for rent on behalf of an operator. An operator's agent includes a property manager, property management company, or real estate agent. St. 2018, c. 337, § 6; G.L. c. 64G, § 1.

[24] St. 2018, c. 337, § 8.

[25] An annual filing by an intermediary, in a manner as prescribed by the Department, shall fulfill the registration requirements under G.L. c. 62C, § 67 as required by the Act.

[26] St. 2018, c. 337, § 8.

[27] St. 2018, c. 337, § 1.

[28] St. 2018, c. 337, § 13.

[29] TIR 16-9, and all prior public written statements issued with regard to room occupancy excise electronic filing and payment requirements are superseded to the extent inconsistent with this TIR.

[30] See 830 CMR 62C.25.1.

[31] St. 2018, c. 337, § 6.

[32] *Id.*