

Statement of
Harvey Kellman
Vice President & Senior Counsel – Information Resources & eBusiness
Marriott International, Inc.
Presented before the
Pennsylvania House of Representatives
Tourism and Recreational Development Committee
April 26, 2010

My name is Harvey Kellman, and I am Vice President and Senior Counsel for Information Resources and eBusiness at Marriott International, Inc, a worldwide operator and franchisor of over 3,400 properties operating under our 18 brands. There are currently 97 Marriott managed and franchised properties located in the Commonwealth of Pennsylvania that employ over 5,000 individuals. I appreciate the opportunity to provide Marriott's views concerning House Bill 1651 and the broader issue of applying hotel occupancy taxes to hotel rooms that customers book and pay for through online travel companies, or OTCs, such as Expedia, Travelocity and Orbitz.

By way of background, Marriott makes its hotel rooms available for booking through a variety of e-Commerce channels, including Marriott.com, our premier website for Marriott properties, as well as third party booking channels, including the OTCs. The way in which we contract with the OTCs for the sale of our rooms is relatively straightforward. Marriott provides the OTCs automated access to our hotel inventory at a discounted or "wholesale" rate, which the OTCs in turn sell to their customers. Marriott, like many other major hotel companies, does not allow the OTCs to undercut our published room rates, so the room rate for a Marriott hotel room on an OTC site will not be any lower than the rate that is listed on Marriott.com. The OTCs do not take title to the hotel room inventory, nor do they bear any risk of loss for unsold rooms. Under what has become known as the "merchant" or "net rate" model, when a customer books a hotel room through an OTC site,

the guest's credit card is charged for the cost of the room, plus an additional amount that covers applicable taxes and fees.

After the guest checks out of the hotel, the OTC remits to the hotel an amount that is equal to the wholesale rate of the room, plus occupancy taxes on the wholesale rate, which the hotel in turn remits to the applicable taxing authority. In contrast, when a customer books a room through a hotel company website such as Marriott.com, the hotel collects and remits occupancy taxes on the retail rate paid by the guest.

The difference in approach with respect to the handling of occupancy taxes by the OTCs and hotel websites is best demonstrated by the following example:

The customer books on Marriott.com a \$100 hotel room that is subject to a 10% occupancy tax.

The guest pays \$110 to the hotel upon checkout, \$10 of which is remitted to the taxing authority. In contrast, if the customer books the same room through an OTC site, the customer pays \$100 for the room, plus the taxes and fees charge. However, assuming the wholesale room rate paid by the OTC to the hotel is \$80, the OTC applies the 10% occupancy tax rate to the wholesale room rate, and thus remits only \$8 to the hotel for payment to the taxing authority. Thus, for the same \$100 room, taxing authorities receive \$2 less per booking when the customer books through the OTC sites versus the hotel websites. This disparity has been the source of numerous lawsuits, investigations and audits across the country, with many jurisdictions taking the position that hotel occupancy taxes should be paid on the full retail rate paid by the guest regardless of the channel the guest utilized to book the room.

Courts primarily are deciding these cases on the basis of whether the literal language of the occupancy tax statute or ordinance—which typically applies to “hotel operators” or similar

references—applies to OTCs. In none of these cases have broader constitutional or other principles been found to limit the application of occupancy taxes to hotel booking transactions through OTCs. Nevertheless, given our business relationships with the OTCs, Marriott has not taken a position on the merits of these cases. Our view has always been that the right to impose occupancy taxes on sale of hotel rooms through OTC sites, as with any other tax imposed on the sale of goods or services, is a matter of local law, and is solely a matter between the applicable taxing authorities and the OTCs.

However, Marriott understands the importance of hotel occupancy tax revenues to the budgets of many state and local governments, especially in these difficult economic conditions. We also recognize that occupancy taxes often are used to fund local tourism and travel promotion activities, which are important to the economic health of hotels and other segments of the tourism and travel industry. Thus, we have been closely following the legislative initiatives at both the state and federal levels that attempt to resolve the legal uncertainty surrounding the applicability of occupancy taxes to hotel booking transactions through OTCs.

From what we have seen, it can be expected that the OTCs will vigorously oppose the approach being taken under House Bill 1651, as they continue to push for legislation at the federal and state levels that would preempt the right of local municipalities from applying their occupancy taxes as they see fit with regard to OTC bookings. Recognizing that House Bill 1651 merely clarifies the application of the Commonwealth's occupancy tax to transactions involving OTCs and would not preempt the imposition of local occupancy taxes, we nevertheless wish to make clear that we oppose any form of preemption of the autonomy of state and local governments to decide for themselves how to constitutionally design their tax laws, including whether to apply their

occupancy taxes to the retail rate paid by the guest regardless of whether the guest books directly with hotels or through OTCs.

We would also like to offer some guiding principles that we believe should be followed as House Bill 1651 and any other legislation pertaining to this issue makes its way through the Pennsylvania legislature:

1. As indicated above, no legislation should be enacted at any level of government that would preempt the ability of any other level of government to determine in a constitutionally permissible way the application of occupancy taxes to hotel rooms that are booked through OTCs. This is our view, regardless of whether it is the U.S. Congress preempting state and local governments or state governments preempting local governments.
2. Legislation such as House Bill 1651 should clearly articulate the mechanism for collecting and remitting taxes on the OTC markup. To this end, we strongly support the “dual remittance” approach whereby the hotel remits occupancy taxes on the wholesale rate it receives from the OTC, and the OTC separately remits directly to the taxing authority the occupancy taxes on the wholesale-to-retail markup, which is the OTC’s income. We are interested in clarity on this point because various municipalities have taken, in Marriott’s view, the wrong approach of requiring hotels to remit taxes on the OTC mark-up under a joint and several liability construct. Hotels should never be liable for collecting and remitting taxes on OTC income, as hotels never receive this income.
3. Finally, where hotel rooms are subject to both state and local occupancy taxes, it is important for there to be a consistent framework with respect to the collection and remittance of all occupancy taxes for OTC bookings. A patchwork of tax legislation within a single state that in certain cases would require the OTCs to collect and remit taxes on their

markup, but in other cases would hold hotels liable for these taxes would be untenable, and create even more uncertainty than exists today.

Marriott very much appreciates the interest of this Committee in addressing the challenging questions that surround the application of hotel occupancy taxes to OTC booking transactions.

Resolution of this issue will have important and lasting implications for everyone involved—OTCs, hotel companies, and state and local governments—both here in Pennsylvania and across the country.