

AIRBNB: THE HOUSEHOLD NAME BECOMING THE NEW KID ON THE TAX BLOCK

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I. INTRODUCTION

April 15th brings new questions for some taxpayers. The nearly indecipherable Internal Revenue Code already contributes to Tax Day troubles, but an emerging marketplace known as the “sharing economy” presents new tax issues for ordinary people.¹ The sharing economy refers to internet-based, peer-to-peer transactions involving unused or under-utilized assets and services.² These e-commerce platforms have transformed how people commute, vacation, and obtain services.³

One sharing economy sector enables people to rent their homes to people looking for a place to stay. Known as “short-term rental” or “peer-to-peer accommodation” businesses, companies like Airbnb offer handheld rental platforms.⁴ Using varying pricing schemes, searchable databases, and reputational reviews, these companies facilitate temporary lodging transactions and generate revenue through fees.⁵

Airbnb’s has generated a strong customer base and sizable profits. But the company’s business model has also stirred controversy concerning privacy,⁶ regulatory schemes,⁷ and tax compliance.⁸ Across the country, Airbnb has clashed with its operating markets regarding tax regulations

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¹ See generally Mitch Lipka, *How the Sharing Economy Makes Tax Filing Tougher*, TIME (Apr. 15, 2015), <http://www.time.com/3822148/sharing-economy-taxes-uber-lyft>.

² *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

³ *Id.*

⁴ *Id.*

⁵ *All Eyes on the Sharing Economy*, ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/technology-quarterly/21572914-collaborative-consumption-technology-makes-it-easier-people-rent-items>.

⁶ Rishi Iyengar, *Airbnb Sued by Group of Users in New York City for Breach of Privacy*, TIME (Sept. 2, 2014), <http://time.com/3260313/airbnb-sued-by-group-of-users-in-new-york-city-for-breach-of-privacy>.

⁷ See generally Stephen Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147 (2016) (positing ten first principles on which a regulatory response to the sharing economy must rest).

⁸ *All Eyes on the Sharing Economy*, *supra* note 5.

previously reserved for the hotel industry. Due to Airbnb's relatively recent expansion, the "hotel tax" issue remains unresolved. The ambiguity surrounding Airbnb and the hotel tax has stifled enforcement for collection agencies and led unsuspecting hosts into unintentional violations.⁹

This Note argues that the most effective way to ensure compliance with jurisdictional hotel taxes levied against Airbnb is for the company to collect and remit the tax on hosts' behalf. Part II describes the sharing economy and tax issues facing Airbnb. Part III examines different methods used to collect and remit hotel taxes levied against Airbnb. Part IV proposes that Airbnb should collect and remit hotel taxes within its operating areas. Part V concludes.

II. HISTORY

A. *The Sharing Economy*

Recently, e-commerce pioneers like Airbnb, Uber, and many others have disrupted traditional industries. These companies offer new ways to connect suppliers and consumers of lodging, transportation, and other services.¹⁰ These startups have become prolific, earning their own collective status as the "sharing economy."¹¹ Today, the sharing economy enables millions of people to share personal resources like cars, boats, housing, and clothing. Commentators have specifically noted the sharing economy's potential to revolutionize the rental car and hotel industries.¹² For example, ride-sharing giant Uber has been valued higher than the car rental company Hertz, and Airbnb's home-sharing platform is currently valued above the Hyatt hotel chain.¹³

Valued in the billions globally, the sharing economy operates outside conventional business models.¹⁴ The sharing economy business model is

⁹ See Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989, 994–95 (2016).

¹⁰ *All Eyes on the Sharing Economy*, *supra* note 5 (highlighting Airbnb, Roomorama, Lyft, Uber, and DogVacay as sharing economy innovators); see generally Miller, *supra* note 7, at 150–84 (offering ten "first principles" that "define the ways that the sharing economy is transforming commerce" and "on which any future regulation must rest").

¹¹ *The Rise of the Sharing Economy*, *supra* note 2.

¹² Sarah Cannon & Lawrence H. Summers, *How Uber and the Sharing Economy Can Win Over Regulators*, HARV. BUS. REV. (Oct. 13, 2014), <https://hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators>.

¹³ *Id.*; Colin Strong, *Airbnb and Hotels: What to Do About the Sharing Economy?*, WIRED, <https://www.wired.com/insights/2014/11/hotels-sharing-economy> (last visited June 23, 2017).

¹⁴ *The Sharing Economy: How Will It Disrupt Your Business?*, PRICEWATERHOUSECOOPERS (Aug. 10, 2014), http://pwc.blogs.com/files/sharing-economy-final_0814.pdf (estimating that the sharing

based on collaborative consumption.¹⁵ Transactions are carried out under online, contractual arrangements.¹⁶ This system capitalizes on underused personal resources by facilitating an online marketplace of untapped economic potential.¹⁷ Businesses operating in this economic sphere generate revenue by renting goods or services to customers or facilitating a platform for peer-to-peer transactions.¹⁸ These peer-to-peer transactions can include exchanging assets, services, or a combination of both.¹⁹

While informal peer-to-peer sharing is not a new idea, the sharing economy has grown from a combination of factors and trends.²⁰ Higher unemployment levels resulting from the recent economic recession created a large group of workers seeking immediate but temporary employment.²¹ Most importantly, technological advances like smartphones provide widespread access to these platforms.²² The sharing economy's mobile applications connect consumers and producers at the touch of a button, which allow people to interact with unparalleled ease. On the demand side, young consumers have become accustomed to quickly accessing goods and services on a phone or tablet.²³ Together, these transformations have created a previously unimaginable marketplace and allowed new businesses to become dominant members of traditionally isolated industries.²⁴

B. Airbnb

As living costs rise, people have begun using their home as a resource to generate extra income. Short-term rental platforms offer a viable substitute to conventional hotel accommodations by connecting ordinary property owners with people looking for short-term lodging. While many short-term

sectors can increase global revenues from approximately \$15 billion now to nearly \$335 billion by 2025).

¹⁵ See *Id.*

¹⁶ *Id.*

¹⁷ *The Rise of the Sharing Economy*, *supra* note 2.

¹⁸ *All Eyes on the Sharing Economy*, *supra* note 5.

¹⁹ *Id.*

²⁰ Arun Sundararajan, *From Zipcar to the Sharing Economy*, HARV. BUS. REV. (Jan. 3, 2013), <https://hbr.org/2013/01/from-zipcar-to-the-sharing-eco>; John Burbank, *The Rise of the "Sharing" Economy*, HUFFINGTON POST (Aug. 5, 2014), http://www.huffingtonpost.com/john-burbank/the-rise-of-the-sharing-e_b_5454710.html.

²¹ See David Brooks, *The Evolution of Trust*, N.Y. TIMES (June 30, 2014), <https://www.nytimes.com/2014/07/01/opinion/david-brooks-the-evolution-of-trust.html> (discussing the recent economic recession's impact on the rise of Airbnb).

²² *The Rise of the Sharing Economy*, *supra* note 2 (comparing Airbnb to Amazon and eBay).

²³ Sundararajan, *supra* note 20.

²⁴ See *id.*

rental companies operate under similar business models, Airbnb has distinguished itself as a market leader in this global sharing economy sector.²⁵

Airbnb was founded in 2008 by friends looking to capitalize on overbooked hotels.²⁶ A decade later, the company is worth an estimated \$30 billion and has transformed the world of online accommodation.²⁷ Piloting a global, peer-to-peer, online marketplace, “Air Mattress Bed & Breakfast” allows homeowners to rent living space to customers seeking temporary lodging.²⁸

Airbnb’s business model offers many options to both “hosts” and “renters.”²⁹ Anyone willing to create an online profile and list a home for rent can be an Airbnb host. To list property on Airbnb, the host must describe the property, provide photos, and write a brief biography verifying his or her identity.³⁰ Site listings offer as much as an entire house to as little as a couch in a spare room.³¹ Hosts also control rental prices, guest policies, and determine availability based on local events and extended occupancies.³² Renters can browse listings on the internet and a mobile application and tailor their preferences based on price, location, and amenities. Along with a rating system, Airbnb provides unsatisfied guests with a refund policy.³³

Airbnb has millions of listings in 65,000 cities and 191 countries³⁴ but does not actually own the real property rented on its website.³⁵ Like other companies in the sharing economy, Airbnb collects transactional fees.³⁶

²⁵ See Stephanie Rosenbloom, *Giving Airbnb a Run for Its Money*, N.Y. TIMES (Feb. 10, 2015), <https://www.nytimes.com/2015/02/15/travel/giving-airbnb-a-run-for-its-money.html?ref>.

²⁶ Jessica Salter, *Airbnb: The Story Behind the \$ 1.3bn Room-Letting Website*, TELEGRAPH (Sept. 7, 2012, 7:00 AM), <http://www.telegraph.co.uk/technology/news/9525267/Airbnb-The-story-behind-the-1.3bn-room-letting-website.html> (explaining that Airbnb started when an event in San Francisco resulted in all the city’s hotels being booked. Two friends rented three air mattresses to people in town for the event and cooked them breakfast in the morning.)

²⁷ Matt Rosoff, *Airbnb is Now Worth \$30 Billion*, BUS. INSIDER (Aug. 6, 2016, 4:31 PM), <http://www.businessinsider.com/airbnb-raises-850-million-at-30-billion-valuation-2016-8>; Salter,

²⁸ Salter, *supra* note 26.

²⁹ *What Does the Room Type of a Listing Mean?*, AIRBNB, <https://www.airbnb.com/help/article/5/what-does-the-room-type-of-a-listing-mean> (last visited Aug. 8, 2017).

³⁰ Sara Muchnick, *A Step-by-Step Guide on How To List on Airbnb*, GUESTY (Apr. 26, 2015), <https://www.guesty.com/blog/step-by-step-guide-how-to-list-on-airbnb>.

³¹ *What Does the Room Type of a Listing Mean?*, *supra* note 29.

³² *How to Host*, AIRBNB, <https://www.airbnb.com/help/getting-started/how-to-host> (last visited Aug. 8, 2017).

³³ *Guest Refund Policy*, AIRBNB, <https://www.airbnb.com/help/article/324> (last visited Aug. 8, 2017).

³⁴ *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Aug. 8, 2017).

³⁵ Zainab Mudallal, *Airbnb Will Soon Be Booking More Rooms Than the World’s Largest Hotel Chains*, QUARTZ (Jan. 20, 2015), <https://qz.com/329735/airbnb-will-soon-be-booking-more-rooms-than-the-worlds-largest-hotel-chains>.

³⁶ *What Are Host Service Fees?*, AIRBNB, <https://www.airbnb.com/help/article/63/what-are-host>

Airbnb's fee percentage depends on the listing price (before taxes) and decreases as the listing price increases.³⁷

Along with its corporate success, Airbnb also benefits local communities. In addition to Airbnb's potential to generate millions of tax dollars annually, the company increases economic activity within its operating areas.³⁸ Studies show that Airbnb guests often stay in local neighborhoods and frequent local establishments.³⁹ Moreover, Airbnb guests tend to stay longer and spend twice as much as traditional travelers.⁴⁰

C. *Airbnb and Tax Law*

The Internal Revenue Service and municipalities alike have taken notice of the sharing economy's ability to generate revenue. Although the sharing economy presents a host of regulatory questions,⁴¹ tax collection agencies have taken a keen interest in its financial impact.⁴² Legal commentators suggest that current tax laws provide sufficient guidance on certain tax issues applicable to short-term rental companies like Airbnb.⁴³ The two main tax issues facing Airbnb involve income and hotel taxes.⁴⁴

1. Income Tax

In the United States, income is taxed at the federal, state, and local level.⁴⁵ It is well-established that income includes all "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."⁴⁶ While income is defined broadly, calculating net taxable

service-fees (last visited Aug. 8, 2017).

³⁷ *Id.*; *How is the Price Determined for My Reservation?*, AIRBNB, <https://www.airbnb.com/help/article/125/how-is-the-price-determined-for-my-reservation> (last visited Aug. 8, 2017).

³⁸ *Airbnb Economic Impact Around the World*, AIRBNB (Mar. 25, 2014), <https://www.airbnbcitizen.com/airbnb-economic-impact-around-the-world>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See generally Miller, *supra* note 7.

⁴² See generally Martin A. Sullivan, *10 Tax Challenges for the Sharing Economy*, 148 TAX NOTES 136 (2015) (discussing tax issues raised by the sharing economy).

⁴³ Oei & Ring, *supra* note 9, at 994 ("[T]he application of substantive and doctrinal tax laws to sharing is generally (though not completely) clear and not particularly novel.").

⁴⁴ *Id.* at 1013.

⁴⁵ Joseph Bishop-Henchman & Jason Sapia, *Local Income Taxes: City- and County-Level Income and Wage Taxes Continue to Wane*, TAX FOUND. (Aug. 31, 2011), <https://taxfoundation.org/local-income-taxes-city-and-county-level-income-and-wage-taxes-continue-wane>.

⁴⁶ *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

income requires considering several factors.⁴⁷ Rental profit is typically considered income, but its taxability for Airbnb's purposes depends on the individual host's circumstances.⁴⁸

The most important tax regulation for Airbnb hosts is commonly known as the 14-Day Rule.⁴⁹ This rule allows Airbnb hosts to rent their personal residence for two weeks or less per year without reporting rental income.⁵⁰ If Airbnb hosts rent property for fifteen days or more per year, rental income must be reported in the year in which it is received.⁵¹ But even when an Airbnb host does not qualify for the 14-Day Rule, established tax principles allow for certain deductions that may ultimately reduce the amount of Airbnb rental income subject to taxation.⁵²

Generally, business expenses are deductible but personal living expenses are not.⁵³ Moreover, tax law limits deductions for expenses relating to residences used for both business and personal purposes.⁵⁴ For example, landlords who do not live in their rental property incur purely business expenses related to the property and may deduct these expenses from their taxable income.⁵⁵ But this general rule is complicated for Airbnb users. Many Airbnb hosts mix business and personal expenses while deriving rental income from their personal residence.⁵⁶ Thus, the typical Airbnb host profiting from a personal residence that is not subject to the 14-Day Rule must designate Airbnb expenses as either business or personal.⁵⁷ Although current income tax principles offer guidance to Airbnb users, taxpayer compliance may present future issues as Airbnb expands into demographics unfamiliar with income reporting.

⁴⁷ See I.R.C. § 63 (2014).

⁴⁸ *Topic Number 415 - Renting Residential and Vacation Property*, IRS (Dec. 30, 2016), <https://www.irs.gov/taxtopics/tc415.html>.

⁴⁹ See I.R.C. § 280A(d)(1)(A) (2014); see also *10 Tax Tips for Airbnb, HomeAway & VRBO Vacation Rentals*, TURBOTAX (2016), <https://turbotax.intuit.com/tax-tools/tax-tips/Self-Employment-Taxes/10-Tax-Tips-for-Airbnb--HomeAway--VRBO-Vacation-Rentals/INF29184.html>.

⁵⁰ See I.R.C. § 280A(d)(1)(A) (1997).

⁵¹ See *id.*

⁵² I.R.C. § 63(a) (2017); I.R.C. § 280A(a) (1997).

⁵³ I.R.C. § 162 (2017); I.R.C. § 262 (1988).

⁵⁴ See Jeffery T. Lawyer, Note, *Vacation Homes, Section 280A and Bolton v. Commissioner: The Right Result for the Wrong Reasons*, 1985 DUKE L.J. 793, 793–94 (1985) (“Congress sought to limit the deductibility of vacation home expenses when a vacation home is used for both rental and personal purposes by requiring taxpayers to allocate expenses associated with the vacation home between personal and rental use.”).

⁵⁵ *Topic Number 415*, *supra* note 48.

⁵⁶ Oei & Ring, *supra* note 9, at 1062.

⁵⁷ I.R.C. § 280A(a). Generally, § 280A regulates tax deductions regarding the rental of a “dwelling unit which is used by the taxpayer during the taxable year as a residence.” *Id.*

2. Hotel Taxes

While Airbnb income tax rules apply uniformly and remain largely uncontested,⁵⁸ the localized variance of “hotel taxes” presents difficult questions for the short-term rental marketplace.⁵⁹ Hotel taxes, sometimes called “transient occupancy taxes” or “lodging taxes,” are financial charges imposed upon temporary stays at hotels, motels, and traditional bed and breakfast establishments.⁶⁰ These taxes are independent from any income tax applicable to Airbnb.⁶¹

Over twenty states have hotel taxes that apply statewide, but states without statewide hotel taxes allow for them at the local level.⁶² For example, a state of California’s size does not impose a statewide hotel tax, but state law delegates this taxing authority to cities and counties.⁶³ The specific jurisdictional statute imposing hotel taxes ordinarily defines the rate and occupancy length subject to the tax.⁶⁴ In most jurisdictions, hotel taxes apply to rental periods lasting less than a month.⁶⁵ But the rate varies greatly and can reach as high as seventeen percent in cities like Houston and Indianapolis.⁶⁶ This tax is ordinarily included with payment for the accommodation.⁶⁷ In many cases, these taxes fund local tourist attractions and public works projects.⁶⁸

⁵⁸ Oei & Ring, *supra* note 9, at 1013–14 (arguing that although business and personal classifications may be complex for the short-term rental sector, substantive income tax law provides sufficient clarity on the subject).

⁵⁹ See Ann Carrns, *Lodging Taxes and Airbnb Hosts: Who Pays, and How*, N.Y. TIMES: YOUR MONEY (June 16, 2015), https://www.nytimes.com/2015/06/17/your-money/lodging-taxes-and-airbnb-hosts-who-pays-and-how.html?_r=0.

⁶⁰ *Who Pays the Transient Occupancy Tax?*, TURBOTAX (2016), <https://turbotax.intuit.com/tax-tools/tax-tips/Taxes-101/Who-Pays-the-Transient-Occupancy-Tax-/INF28769.html>.

⁶¹ Carrns, *supra* note 59.

⁶² *Who Pays the Transient Occupancy Tax?*, *supra* note 60.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Carrns, *supra* note 59.

⁶⁶ Tod Marks, *Cities with the Highest Hotel Taxes*, CONSUMER REP. (June 4, 2014, 11:30 AM), <http://www.consumerreports.org/cro/news/2014/06/booking-a-hotel-these-cities-have-the-highest-hotel-taxes/index.htm>.

⁶⁷ *Who Pays the Transient Occupancy Tax?*, *supra* note 60.

⁶⁸ E.g., *Hotel Occupancy Taxes*, AUSTINTEXAS.GOV, <http://austintexas.gov/department/hotel-occupancy-taxes> (last visited Aug. 7, 2017) (explaining that “revenue derived from the Hotel Occupancy Tax is used to promote tourism and the convention and hotel industry in Austin”).

3. Airbnb and Hotel Taxes

In response to the meteoric rise in of Airbnb, local policymakers have become increasingly concerned about whether the home-sharing company should face the same regulations as its traditional hotel industry competitors.⁶⁹ Many states and cities have considered legislation to better regulate the short-term rental marketplace.⁷⁰ Some of these regulations have led to extensive legal and political battles over balancing the interests of Airbnb with local communities.⁷¹ The issue of hotel taxes remains at the forefront of the regulatory battle between Airbnb and its operating locations.⁷²

Hotel taxes present two main issues in the short-term rental marketplace⁷³: whether platforms such as Airbnb should even be subject to hotel taxes, and if so, how the tax should be collected.⁷⁴ Much commentary exists discussing the applicability of hotel taxes to Airbnb.⁷⁵ Taxation typically depends on classifications, so the conversation centers around the proper classification of Airbnb rentals—Are they hotel rooms, or a distinct internet platform which is exempt from the longstanding regulations of the hotel industry? Because Airbnb does not fit within the original definition of “hotel,” it remains unclear whether Airbnb and its users should be liable for taxes traditionally levied against the hotel industry.⁷⁶ Without a clear answer, conflict has arisen between Airbnb and lawmakers.⁷⁷ Airbnb’s hotel status remains debated; some commentators have proposed legislative action, and state and local lawmakers have come up with different answers.⁷⁸

Although regulatory approaches to this question differ by locality, the growing trend and Airbnb’s recent actions indicate that the home-sharing

⁶⁹ Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 124 (2016).

⁷⁰ *Id.*

⁷¹ See Katie Benner, *Airbnb in Disputes with New York and San Francisco*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/06/29/technology/airbnb-sues-san-francisco-over-a-law-it-had-helped-pass.html>; see also Chabeli Herrera, *Airbnb and Hoteliers Battle Over Role, Regulations for Home-Sharing in Miami*, MIAMI HERALD (May 15, 2016, 7:00 AM), <http://www.miamiherald.com/news/business/tourism-cruises/article79673612.html>.

⁷² Lobel, *supra* note 69.

⁷³ See Oei & Ring, *supra* note 9, at 1023.

⁷⁴ *Id.*

⁷⁵ See Alamea Bitran, Comment, *The Uber Innovation that Lysted Our Standards Out of Thin Air[bnb], Because Now, There’s an App for That*, 8 ELON L. REV. 503, 531 (2016) (arguing that legislative action is critical in solidifying Airbnb’s proper entity classification).

⁷⁶ *But see supra* note 43 and accompanying text.

⁷⁷ Bitran, *supra* note 75; see also *Airbnb, Inc. v. Schneiderman*, 989 N.Y.S.2d 786, 789 (App. Div. 2014).

⁷⁸ See Oei & Ring, *supra* note 9, at 1023–24.

company will be more receptive to incorporating hotel taxes into its business model.⁷⁹ For the purposes of this Note, the procedural issues pertaining to hotel tax collection are separate from classification issues. Although legal analysis of the applicability of hotel taxes to Airbnb is beyond the scope of this Note, Airbnb's evolving stance toward hotel taxes helps explain the regulatory environment in which the company is currently situated.

a. Airbnb's Initial Position of Avoidance

One reason for Airbnb's success in the renting marketplace stems from offering a simple alternative to the traditional hotel experience.⁸⁰ But Airbnb has also benefited from having the flexibility to pursue its business model because some of the regulations and taxes controlling the hotel industry do not always affect Airbnb transactions.⁸¹ For example, individuals offering a residence for rent on Airbnb do not have to invest in the costly licensing, advertising, and insurance typically associated with operating a traditional "bed and breakfast."⁸² And although hotel taxes apply broadly to the hotel industry, their application to Airbnb rentals is less clear.⁸³ The rules of Airbnb hotel taxes vary widely from one jurisdiction to the next. Some state and local governments impose hotel taxes on short-term rentals, but many Airbnb users are not required to pay hotel taxes.⁸⁴ As a result, Airbnb rentals are often less expensive than hotel rooms.

But Airbnb's financial success was not welcomed by incumbent market competitors.⁸⁵ The non-regulation that contributed to Airbnb's expansion also created tension with the established and heavily regulated hotel industry.⁸⁶ The hotel industry contended that Airbnb violated leases, disregarded zoning ordinances, endangered local residents, and evaded

⁷⁹ *Id.* at 1024–26.

⁸⁰ See *The Rise of the Sharing Economy*, *supra* note 2.

⁸¹ Dean Chambers, *Airbnb Facilitates the Operation of Illegal, Unregulated and Untaxed Hotels?*, INSIDESOURCES (Nov. 3, 2016), <http://www.insidesources.com/airbnb-facilitates-the-operation-of-illegal-unregulated-and-untaxed-hotels>.

⁸² Dean Baker, *Don't Buy the 'Sharing Economy' Hype: Airbnb and Uber are Facilitating Rip-Offs*, GUARDIAN (May 27, 2014), <https://www.theguardian.com/commentisfree/2014/may/27/airbnb-uber-taxes-regulation>; see also *Airbnb vs. Hotels: A Price Comparison*, PRICEONOMICS (June 17, 2013), <https://priceonomics.com/hotels> (comparing the cost of a hotel with renting an apartment on Airbnb).

⁸³ Oei & Ring, *supra* note 9, at 1026.

⁸⁴ *Id.* at 1024–25.

⁸⁵ See generally Daniel Rauch & Davis Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901 (2015) (describing the pushback sharing economy companies like Uber and Airbnb have faced from their "real economy" competitors).

⁸⁶ *Id.*

taxes.⁸⁷ Hotel industry leaders aggressively resisted Airbnb's presence as a new market competitor and called for stricter regulations against Airbnb to eliminate any unfair competitive advantage.⁸⁸ Moreover, many jurisdictions that tax Airbnb like hotels have been frustrated by the difficulty of getting Airbnb users to comply with these laws.⁸⁹

In response to these concerns, several countries, states, and municipalities attempted to resolve the conflict by treating Airbnb rentals like traditional hotel rooms.⁹⁰ For example, in Santa Monica, the city council passed an ordinance conditioning Airbnb's legality on hosts paying a fourteen percent hotel tax.⁹¹ And San Francisco, Airbnb's birthplace, recently enacted an ordinance applying hotel taxes to Airbnb.⁹²

But Airbnb initially opposed the classification of its rental units as hotel rooms subject to hotel taxes on several grounds.⁹³ First, Airbnb believed that traditional hotel regulations did not apply to its new economic model.⁹⁴ Airbnb's chief executive referred to his customers as "microentrepreneurs," and publically stated that "there are laws for people and there are laws for business," but that Airbnb users created "a third category, people as businesses."⁹⁵

Second, Airbnb contended that it should not be subject to hotel taxes because it does not actually own the rented spaces and existed simply as an intermediary serving as a pure broker of information.⁹⁶ Airbnb initially argued that if hosts were being taxed locally, hosts should be responsible for meeting their own tax reporting obligations.⁹⁷ Finally, Airbnb claimed that it

⁸⁷ *Id.* at 904 (citing Bruce Watson, *Airbnb's Legal Troubles: The Tip of the Iceberg for the Sharing Economy?*, GUARDIAN (Nov. 20, 2013), <https://www.theguardian.com/sustainable-business/airbnb-legal-trouble-sharing-economy>).

⁸⁸ See Miller, *supra* note 7, at 176.

⁸⁹ See generally Oei & Ring, *supra* note 9.

⁹⁰ *Id.* at 1025.

⁹¹ Tim Logan, *Q&A: How New Santa Monica Law Effects Rentals, Airbnb*, L.A. TIMES (May 13, 2015, 11:37 AM), <http://www.latimes.com/business/la-fi-santa-monica-airbnb-rental-law-20150513-story.html>.

⁹² Kim-Mai Cutler, *San Francisco Legalizes, Regulates Airbnb With 7-4 Vote, Lots of Amendments*, TECHCRUNCH (Oct. 7, 2014), <http://techcrunch.com/2014/10/07/san-francisco-airbnb>.

⁹³ See Verne Kopytoff, *Airbnb's Woes Show How Far the Sharing Economy Has Come*, TIME (Oct. 7, 2013), <http://business.time.com/2013/10/07/airbnbs-woes-show-how-far-the-sharing-economy-has-come>.

⁹⁴ *Id.*

⁹⁵ David Steitfeld, *Companies Built on Sharing Balk When It Comes to Regulators*, N.Y. TIMES (Apr. 21, 2014), <https://www.nytimes.com/2014/04/22/business/companies-built-on-sharing-balk-when-it-comes-to-regulators.html>.

⁹⁶ Oei & Ring, *supra* note 9, at 1044.

⁹⁷ *Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> (last visited Feb. 4, 2017).

lacked the authority to collect hotel taxes and that even the hosts were ignoring the hotel tax regulations.⁹⁸

Some commentators suggest Airbnb's decision to take a certain position regarding local hotel taxes is an example of "tax opportunism" arising out of the ambiguity surrounding its new business platform rather than deceitful evasion.⁹⁹ By not holding itself out as responsible for collecting and remitting hotel taxes, Airbnb initially maintained two financial advantages over its competitors in the traditional hotel industry.¹⁰⁰

First, by not collecting and remitting hotel taxes, Airbnb avoided costly administrative expenses associated with acting as a collection agency.¹⁰¹ And by placing local tax determinations on its users, Airbnb distanced itself from legal fees resulting from violations pertaining to local regulations.¹⁰² Second, by failing to recognize occupancy taxes, Airbnb delegitimized the taxes in the minds of Airbnb hosts and made it less likely that hosts would feel obligated to collect and remit the tax.¹⁰³ This second point is amplified by the circumstances under which Airbnb hosts enter the short-term rental sector as many may be new and irregular users who are unfamiliar with hotel taxes. Not collecting and remitting hotel taxes benefited Airbnb as the company could sustain a competitive pricing advantage over the traditional hotel market which presented lodgers with higher transaction costs.¹⁰⁴ Regardless of the legitimacy of Airbnb's original approach to occupancy taxes, this clouded and contentious environment stifled compliance and enforcement as potential hotel tax revenue went uncollected.

b. Airbnb Begins Welcoming Hotel Taxes

Fed up with Airbnb's stance, many more governmental bodies began applying pressure to Airbnb to combat the loss of short-term rental tax revenue.¹⁰⁵ Although several locations have banned Airbnb altogether, others have used legislative action requiring Airbnb's compliance before allowing the company into its market.¹⁰⁶ Airbnb has withstood an onslaught of

⁹⁸ See Steven Jones, *Airbnb Isn't Sharing*, 48HILLS (Mar. 19, 2013), <http://48hills.org/sfbgarchive/2013/03/19/airbnb-isnt-sharing>.

⁹⁹ See Oei & Ring, *supra* note 9, at 1028–30, 1042–45. Airbnb and certain ridesharing businesses have taken the position that they are "third party settlement organizations." *Id.*

¹⁰⁰ *Id.* at 1045.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1045–46.

¹⁰⁵ E.g., Cutler, *supra* note 92.

¹⁰⁶ See Julie Bort, *Airbnb: 124 New York Airbnb Hosts 'May Be Flagrantly Misusing Our Platform'*,

legislation aimed at curbing short-term rentals.¹⁰⁷ But, confronted with potentially hostile regulatory environments and embroiled in a public relations battle, Airbnb changed its philosophy.¹⁰⁸ Airbnb has taken the stance that even though it is not liable for hotel taxes, it wants to pay its fair share. Airbnb began welcoming legislation aimed at applying hotel taxes to the company.¹⁰⁹ Airbnb has characterized such legislation as “innovative” and publicly supported such measures declaring that “residents and working families will now be able to reap the full financial benefits of the sharing economy.”¹¹⁰

c. Collecting and Remitting Hotel Taxes

As mentioned above, cities like San Francisco have used tax agreements as leverage to negotiate with Airbnb’s presence. San Francisco enacted regulations conditioning Airbnb’s presence in the city on the company’s compliance with various tax and registration conditions.¹¹¹ Under San Francisco’s “Airbnb law,” hosts have the responsibility to add a fourteen percent tax to their bills and remit the hotel taxes to Airbnb.¹¹² If this is not followed, the Airbnb transaction is considered illegal. But in demonstrating its above-mentioned change of thinking, Airbnb publically announced that it would remit the tax to the city on behalf of the hosts.¹¹³

Furthermore, to appease local governments, over the last two years, Airbnb has worked with many jurisdictions to improve the tax collection process for all parties involved. In some instances, Airbnb has gone as far as paying back taxes in cities which, until then, had not attached any tax liability to the home-sharing service.¹¹⁴ Airbnb began engaging with many state and

BUS. INSIDER (Aug. 22, 2014), <http://www.businessinsider.com/airbnb-gives-ag-info-on-124-ny-hosts-2014-8>; Logan, *supra* note 91.

¹⁰⁷ *All Eyes on the Sharing Economy*, *supra* note 5 (describing Airbnb’s battles with local city regulators).

¹⁰⁸ Oei & Ring, *supra* note 9, at 1024–25.

¹⁰⁹ See Alison Griswold, *Why Airbnb Desperately Wants to Pay Hotel Taxes*, SLATE (Feb. 13, 2015, 7:00 PM), http://www.slate.com/articles/business/moneybox/2015/02/airbnb_hotel_taxes_why_does_the_sharing_economy_startup_want_to_pay_them.html.

¹¹⁰ Curt Woodward, *Airbnb Stays Would Be Taxed Like Hotels Under Mass. Bill*, BOS. GLOBE (July 12, 2016), <https://www.bostonglobe.com/business/2016/07/12/lawmakers-weigh-airbnb-taxes/mqVO5kOnDAHhECTuq6qkuO/story.html>.

¹¹¹ Katy Steinmetz, *San Francisco Cracks Down on Airbnb ‘Abuses’*, TIME (Apr. 15, 2014), <http://time.com/63810/san-francisco-airbnb-crackdown>. Before the ordinance took effect, Airbnb announced that it would pay the tax to the city on behalf of hosts. *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Nina Golgowski, *Airbnb Pays ‘Tens of Millions’ in Back Hotel Taxes, Penalties to San Francisco*

local governments and offering “voluntary collection agreements” to facilitate collection and remittance of taxes on behalf of Airbnb hosts and guests.¹¹⁵ As indicated by San Francisco’s approach, which legalized Airbnb shortly after it accepted hotel tax liability, these agreements often resulted from approaching legal reforms.¹¹⁶

In a show of solidarity with cities unreceptive to its previous tax avoidance, in 2015, Airbnb announced “The Airbnb Community Compact.”¹¹⁷ In creating the Compact, Airbnb pledged to “ensure the efficient collection” of local city taxes and “work to implement this initiative in as many communities as possible.”¹¹⁸ As a result, some jurisdictions are now able to utilize the tax benefits from Airbnb’s short-term renters while also allowing Airbnb to continue to offer its unique platform.¹¹⁹ There are now about 220 jurisdictions globally where Airbnb is collecting and remitting hotel taxes on behalf of their hosts and guests.¹²⁰

But not all jurisdictions have been receptive to Airbnb even when the company has offered to pay taxes.¹²¹ New York City requires “hotel operators” to remit a 14.75 percent tax on hotel rooms.¹²² But New York does not classify Airbnb as a hotel and views its users as illegal hotel operators. Therefore, the company cannot pay hotel taxes.¹²³ Airbnb and other lawmakers have unsuccessfully tried to reorganize New York’s existing legislation to include Airbnb as a hotel.¹²⁴ In addition to offering to pay hotel

After Three-Year Feud, N.Y. DAILY NEWS (Feb. 18, 2015, 9:14 PM), <http://www.nydailynews.com/news/politics/airbnb-pays-millions-back-taxes-san-francisco-article-1.2120772>.

¹¹⁵ E.g., Emily Badger, *Airbnb Is About to Start Collecting Hotel Taxes in More Major Cities, Including Washington*, WASH. POST (Jan. 29, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/01/29/airbnb-is-about-to-start-collecting-hotel-taxes-in-more-major-cities-including-washington/?utm_term=.87f51a31981d.

¹¹⁶ Matthew Mershon, *Airbnb Begins Collecting, Remitting State and Local Taxes on Behalf of Hosts in Arkansas*, KATV (Feb. 2, 2017), <http://katv.com/news/local/airbnb-begins-collecting-remitting-state-and-local-taxes-on-behalf-of-hosts-in-arkansas>.

¹¹⁷ See Airbnb, *The Airbnb Community Compact 1* (2015), <https://www.airbnbaction.com/wp-content/uploads/2015/11/Airbnb-Community-Compact.pdf>.

¹¹⁸ *Id.* at 2.

¹¹⁹ See *In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, AIRBNB, <https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available> (last visited Aug. 8, 2017).

¹²⁰ Mershon, *supra* note 116.

¹²¹ E.g., Dara Kerr, *Airbnb: Let Us Pay Hotel Taxes in New York*, CNET (Apr. 15, 2015, 2:19 PM), <http://www.cnet.com/news/airbnb-let-us-pay-hotel-taxes-in-new-york>.

¹²² *Airbnb, Inc. v. Schneiderman*, 989 N.Y.S.2d 786, 790 (Sup. Ct. 2014).

¹²³ Letter from Beth Goldman, Gen. Counsel, N.Y.C. Dep’t of Fin. (Aug. 21, 2013) (on file with the New York City Department of Finance), http://www1.nyc.gov/assets/finance/downloads/pdf/redacted-letter-rulings/hotel/lr13_4939.pdf.

¹²⁴ See *id.*

taxes, Airbnb launched several campaigns to demonstrate its benefits by describing how it helps financially-strained homeowners and revitalizes communities lacking traditional hotels.¹²⁵ Because New York considers Airbnb hosts to be illegal hotel operators, it continues to miss out on potential annual tax revenue.¹²⁶

III. ANALYSIS

A. Current Attempts to Resolve Airbnb's Hotel Tax Issues

Whenever governmental agencies encounter new commercial activity, one of the challenges is figuring out how best to regulate it. Nearly a decade after Airbnb's inception, lawmakers are still determining the best ways to regulate the company's tax effects. While jurisdictions are clarifying Airbnb's business classification, legislation to tax Airbnb as a hotel is still evolving and likely to vary in the future. Regardless of how Airbnb transactions are classified, compliance will still be an issue.¹²⁷ Using concepts and classifications already in place to define short-term rental tax liability for hotel taxes, the next question becomes the best way to achieve enforcement and compliance.¹²⁸ Both third parties and Airbnb have provided taxpayer education regarding the short-term rental market and hotel taxes.¹²⁹

1. Third Party Guidance

In response to the new tax questions presented by the sharing economy, many tax advising services have offered guidance to assist sharing economy earners with their tax obligations.¹³⁰ After a study submitted to Congress revealed how slowly the Internal Revenue Service (IRS) had adapted to the sharing economy, the IRS provided taxpayers with additional information to meet their tax obligations considering the new challenges presented by the sharing economy's evolving platforms.¹³¹ In an online initiative, the IRS

¹²⁵ E.g., Dana Rubinstein, *Airbnb Launches Big-Dollar Ad Campaign Pushing for Cuomo Veto*, POLITICO (Sept. 7, 2016, 5:27 AM), <http://www.politico.com/states/new-york/albany/story/2016/09/in-effort-to-persuade-cuomo-airbnb-launches-big-dollar-ad-campaign-105225>.

¹²⁶ See Jennifer Fermino, *Websites Like Airbnb Blamed for Drop in Revenue from NYC Hotel Tax*, N.Y. DAILY NEWS (May 16, 2016, 7:11 PM), <http://www.nydailynews.com/new-york/revenue-nyc-hotel-tax-drops-websites-airbnb-blamed-article-1.2638998>.

¹²⁷ See Oei & Ring, *supra* note 9, at 994–95, 1052–54.

¹²⁸ *Id.* at 1045–46, 1056.

¹²⁹ See, e.g., ERNST & YOUNG, AIRBNB: GENERAL GUIDANCE ON THE TAXATION OF RENTAL INCOME (2017), <http://assets.airbnb.com/eyguidance/us.pdf>.

¹³⁰ *Id.*

¹³¹ Daniela Altimari, *Airbnb Agrees to Have Hosts Collect State Taxes*, HARTFORD COURANT (June 8,

launched its “Sharing Economy Tax Center.”¹³² The webpage provides tips and resources on topics such as: what constitutes generally taxable income, cash payments, part-time business factors, deductions, residences used for both personal and business purposes, the 14-Day Rule, and potential penalties.¹³³ With this program, the IRS wants to encourage sharing economy taxpayers to understand the potential tax issues that might affect them.

2. Airbnb’s Guidance

Airbnb’s website offers its users guidance on several tax issues.¹³⁴ With Airbnb now recognizing that transactions on its platform may be subject to hotel taxes, it has updated its website with a tax help center with information regarding compliance. The help center generally instructs Airbnb users to “familiarize themselves with and follow their local laws and regulations.”¹³⁵

Assuming Airbnb is not banned from operating in a market, there are two ways that hotel taxes on Airbnb are transferred to a governmental collection agency. One approach makes Airbnb hosts directly responsible for collecting and delivering taxes to the appropriate authority. A second approach allows Airbnb to manage the collection and remittance process on hosts’ behalf.

Airbnb’s website further defines hotel taxes and offers information about the two remittance and collection approaches.¹³⁶ The help center explains that hotel taxes are incurred by the guest, but that “the obligation to remit the taxes to the government usually falls on the host.”¹³⁷ Airbnb tells its users that if they determine that they need to collect tax, they must inform guests of the exact tax amount before the booking takes place and can “usually either add it within a ‘Special Offer’ or ask guests to pay it in person.”¹³⁸

Airbnb warns hosts with listings in areas where Airbnb voluntarily facilitates hotel tax collection to become familiar with hotel tax provisions authorizing the company to collect and remit the tax.¹³⁹ Those provisions

2016), <http://www.courant.com/politics/hc-airbnb-taxes-0609-20160608-story.html>.

¹³² *Sharing Economy Tax Center*, IRS <https://www.irs.gov/businesses/small-businesses-self-employed/sharing-economy-tax-center> (last visited Jan. 12, 2017).

¹³³ *Id.*

¹³⁴ *See generally How Do Taxes Work for Hosts?*, AIRBNB, <https://www.airbnb.com/help/article/481/how-do-taxes-work-for-hosts?topic=247> (last visited Aug. 8, 2017).

¹³⁵ *What is Occupancy Tax? Do I Need to Collect or Pay It?*, AIRBNB, <https://www.airbnb.com/help/article/654/what-is-occupancy-tax--do-i-need-to-collect-or-pay-it> (last visited Aug. 8, 2017).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

require the host to instruct and authorize Airbnb to handle any hotel taxes before Airbnb does so.¹⁴⁰ Airbnb's help center also mentions that in some markets a "collect and remit feature" may be available to handle hotel taxes and instructs hosts not to collect hotel taxes independently in those jurisdictions.¹⁴¹

Airbnb maintains that it is not required to collect hotel taxes on behalf of hosts, but explains that where Airbnb has hotel tax agreements with governments, the company calculates hotel taxes and "collects those taxes from guests at the time of booking" before "remitting collected taxes to the applicable authority on the hosts' behalf."¹⁴² Airbnb explains that any hotel tax will appear as a charge on the rental listing's page and on the transaction receipt.¹⁴³ A final disclaimer states that if "applicable laws exempt the host from collecting a tax that Airbnb collects and remits on the host's behalf, the host has agreed that, by accepting the reservation, the host is waiving that exemption."¹⁴⁴

Airbnb encourages hosts to comply with applicable laws, and understands that the rules for hotel taxes are complicated and hard to follow.¹⁴⁵ But the website also notes that the company is "continuing to work with governments across the world to explore ways to help facilitate hotel tax collection in as many locations as possible."¹⁴⁶ Finally, Airbnb suggests that "automating the process makes tax collection easier for all parties involved."¹⁴⁷

While Airbnb's help center provides basic hotel tax information on its website, it does not claim liability for any unpaid taxes. Instead, it notifies hosts that by using Airbnb, they agree to be "solely responsible for determining . . . applicable Tax reporting requirements, and . . . for remitting to the relevant authority any Taxes included or received"¹⁴⁸ Consequently, many local governments do not hold Airbnb responsible for making sure that hosts comply with tax laws.

¹⁴⁰ *In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, *supra* note 119.

¹⁴¹ *How Do Taxes Work for Hosts?*, *supra* note 134.

¹⁴² *How Does Occupancy Tax Collection and Remittance by Airbnb Work?*, AIRBNB, <https://www.airbnb.com/help/article/1036/how-does-occupancy-tax-collection-and-remittance-by-airbnb-work> (last visited Aug. 8, 2017).

¹⁴³ *Id.*

¹⁴⁴ *In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, *supra* note 119.

¹⁴⁵ *Id.*

¹⁴⁶ *What is Occupancy Tax? Do I Need to Collect or Pay It?*, *supra* note 135.

¹⁴⁷ *How Does Occupancy Tax Collection and Remittance by Airbnb Work?*, *supra* note 142.

¹⁴⁸ *Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> (last visited June 4, 2017).

*B. Current Approaches to the Problem of Collecting and Remitting
Airbnb's Hotel Tax*

This section focuses on the procedural issues regarding hotel taxes. As mentioned above, one resolution to the issue presented by hotel taxes has been to ban the platform entirely. After determining that outright regulatory bans are not a viable approach, this section analyzes the two remaining options: 1) host collection and remittance; and 2) Airbnb collection and remittance. Specifically, it examines which mechanism of collecting and remitting Airbnb's hotel taxes best allows Airbnb and its operating markets to maintain a mutually beneficial relationship.

1. Banning Airbnb

Despite negotiations, the hotel tax issue has proved to be a deal breaker between Airbnb and some of its operating locations. This disagreement has led to some municipalities banning Airbnb altogether.¹⁴⁹ Although banning Airbnb may cause the company to concede its position, this drastic approach presents several issues. First, an outright regulatory ban on Airbnb is unlikely to prevent the company's presence entirely. Instead, Airbnb's operations would likely be relegated to underground transactions.¹⁵⁰ Second, enforcing a sweeping ban would require government intervention too excessive for most violations committed.¹⁵¹ Imposing an ineffective ban would strip municipalities of future bargaining power.¹⁵² Finally and most importantly, this approach will likely be unsustainable as Airbnb's popularity suggests it can survive hostile regulatory environments, and municipalities cannot afford to miss out on potential tax revenue.¹⁵³

¹⁴⁹ Kerr, *supra* note 121.

¹⁵⁰ See Miller, *supra* note 7, at 184–85.

¹⁵¹ *Id.* But see Zach Weissmueller, *Santa Monica Evicts Airbnb: The War on Homesharing*, REASON (Feb. 8, 2017), <http://reason.com/reasontv/2017/02/08/airbnb-vs-the-world-the-battle-for-the-r> (describing “California’s newly formed Vacation Rental Enforcement Task Force”).

¹⁵² Miller, *supra* note 7, at 185 (citing Nina Feldman, *Short-Term Rental Stakeholders All Agree on One Thing: Current Law Inadequate*, WWNO (July 18, 2014), <http://wwno.org/post/short-term-rental-stakeholders-all-agree-one-thing-current-law-inadequate>).

¹⁵³ *Id.*; Ben Bergman, *In Just 5 Months, LA Collected \$13 Million in Airbnb Taxes*, KPCC (Jan. 20, 2017), <http://www.scpr.org/news/2017/01/20/68312/in-just-5-months-la-collected-13-million-in-airbnb> (“[T]he 50 largest U.S. cities could have brought in \$250 million in tax revenue in 2016 if they had signed tax collecting agreements with Airbnb.”).

regular bill.¹⁵⁶ As a result, this may lead hosts into improperly or underreporting hotel taxes.¹⁵⁷

In combination, these features of the sharing economy muddle compliance and burden tax collection agencies. Because of the difficulty of enforcing existing tax laws on the many Airbnb users unfamiliar with these laws and the confusion about who is taxed for what, leaving the responsibility of paying hotel taxes with the individual users of Airbnb is sometimes too unreliable to assure effective tax payment.

3. Airbnb Collection and Remittance on Hosts' Behalf

In many cases, the host is required to collect the hotel tax directly from renters and submit the money to the tax authority. But in some locations, Airbnb has agreements with local tax authorities to automatically collect and remit hotel taxes on the hosts' behalf.¹⁵⁸ The agreements are primarily used by Airbnb to win over hostile regulators.

Under this approach, Airbnb handles the entire process of calculating taxes arising from transactions within a jurisdiction and directly remits the tax to the applicable collection agency.¹⁵⁹ The hotel tax appears as a line item charge on the transaction bill.¹⁶⁰

Currently, Airbnb collects and remits taxes on behalf of hosts in many countries, states, and municipalities.¹⁶¹ In San Francisco, Airbnb collects the city's fourteen percent hotel tax.¹⁶² In Portland, Airbnb pays Oregon's one percent hotel tax, the county's 11.5 percent hotel tax, and the city's six percent hotel tax.¹⁶³ Airbnb also collects hotel taxes in other countries like the Netherlands and France.¹⁶⁴

Although these collection agreements provide a starting point for Airbnb to win over local regulators, much skepticism remains regarding just how effective they will be.¹⁶⁵ Three reasons suggest that Airbnb's voluntary collection agreements and its "Community Compact" may not provide a

¹⁵⁶ See Danika Worthington, *Airbnb to Collect State Sales Tax, Easing Burden on Hosts*, DENVER POST (Jan. 31, 2017), <http://www.denverpost.com/2017/01/31/airbnb-state-sales-tax-hosts>.

¹⁵⁷ See *id.*

¹⁵⁸ See *supra* note 115 and accompanying text.

¹⁵⁹ *How Does Occupancy Tax Collection and Remittance by Airbnb Work?*, *supra* note 142.

¹⁶⁰ *Id.*

¹⁶¹ *In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, *supra* note 119.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See generally *Why Airbnb's "Voluntary Collection Agreements" Deserve Careful Scrutiny*, AIRBNB WATCH, <http://airbnbwatch.org/wp-content/uploads/2014/08/Voluntary-Collection-Agreements-7.19.16-.pdf> (last visited Feb. 10, 2017).

sufficient approach to the company's hotel tax issue. First, because Airbnb is the ultimate collection agent, these agreements tend to lack the transparency government agencies need to ensure the enforcement of accurate payments.¹⁶⁶ For example, Airbnb may turn over an annual lump sum payment constituting its hotel tax liability without documenting the transactions accounting for the payment. Also, although Airbnb reached an agreement with San Francisco to collect and remit hotel taxes following a city ordinance, only about twenty percent of San Francisco Airbnb hosts have complied with the city's regulations, and the city still places liability on hosts if Airbnb fails to collect and remit the taxes.¹⁶⁷

Second, the price-conscious nature of the short-term rental market suggests that these agreements may not have the power to bind Airbnb to its promise.¹⁶⁸ Competition incentivizes Airbnb to minimize unnecessary expenses. As the only member of the short-term rental market currently paying hotel taxes, Airbnb faces a disadvantage over its lower priced competition.¹⁶⁹ Although Airbnb may be its current market leader, an emerging competitor could alter the business landscape and force the company to abandon its promise to pay hotel taxes.¹⁷⁰

Finally, as discussed above, one of Airbnb's strongest arguments against its being liable for local hotel taxes rests in the defining characteristics of its unique business model. What differentiates Airbnb from the conventional hotel industry—privatized, electronic peer-to-peer rental transactions—makes a compelling argument that the two industries should not be treated the same for tax purposes. But while it may be argued that Airbnb should resist paying any hotel taxes and reengage its challenge to the tax's applicability to home-sharing, this approach would be short-sighted and likely fail in the long run.¹⁷¹

IV. RESOLUTION

Although state and local governments are often eager to restrain Airbnb, the company's presence and growth within jurisdictions boosts economic activity. Analyzing the sharing economy trend, it makes more sense for

¹⁶⁶ *Id.*

¹⁶⁷ See S.F., CAL., ADMIN. CODE § 41A.5(g)(4)(B) (2015); see also Benner, *supra* note 71.

¹⁶⁸ Miller, *supra* note 7, at 180 (citing Carolyn Said, *Airbnb Spawns Array of Companies to Aid Hosts*, S.F. GATE (Mar. 2, 2014, 4:58 PM), <http://www.sfgate.com/business/article/Airbnb-spawns-array-of-companies-to-aid-hosts-5282838.php>).

¹⁶⁹ *Id.*

¹⁷⁰ See *id.*

¹⁷¹ See Oei & Ring, *supra* note 9, at 1068–69.

municipalities and Airbnb to compromise on the issue of tax collection rather than allow their disagreements to sway regulation too far in either direction and ban the platform entirely.¹⁷² With Airbnb and other short-term rental platforms becoming part of the new normal, cities should realize that failing to provide efficient tax collection programs will result in the loss of money.¹⁷³ Therefore, lawmakers should develop a scheme broad enough to anticipate the inevitable growth of the sharing economy, and Airbnb must be willing to compromise. Through shared responsibility and collaboration, local governments and Airbnb can achieve the best result for all parties.

A. Hotel Taxes Must Be Applied Uniformly to Airbnb

As noted above, regulatory responses to Airbnb have been inconsistent. Without well-defined regulation, enforcement remains inconsistent and confusion will persist among Airbnb users. Due to the uncertain and evolving regulations currently applied to Airbnb, a preventative approach will help clarify the future relationship between the company and host locations. Drawing upon existing measures and mutual interests, local governments can implement an effective, standardized solution. Resolving this issue uniformly would likely minimize future litigation expenses for taxpayers and Airbnb alike.

Each jurisdiction serving as an Airbnb host location should clarify tax laws applicable to Airbnb by crafting legislation that clearly applies hotel taxes to Airbnb. Legislation could either include Airbnb within the hotel industry or create a new classification for short-term rentals in the sharing economy. Even if future case law holds short-term rental platforms like Airbnb not liable for hotels taxes, clarifying Airbnb's specific liability now would provide some guidance moving forward. To ensure Airbnb's cooperation in this new regulatory landscape, lawmakers should consider the possibility of lowering the hotel tax for Airbnb. This will benefit both Airbnb and its markets as Airbnb will not have to be concerned with unknown outcomes as it expands its reach, and collection agencies can safeguard against Airbnb withdrawing from its voluntary collection agreements.

¹⁷² See Josh Krauss, Note, *The Sharing Economy: How State and Local Governments are Failing and Why We Need Congress to Get Involved*, 44 SW. L. REV. 365, 365–66 (2014) (“[I]ncumbent companies fight tirelessly to protect themselves from future innovation, deathly afraid of a new product or service that will threaten their market share.” But “[t]he sharing economy is the next wave of economic growth.”).

¹⁷³ Leo Markus, *Airbnb Invests Over \$ 8 Million To Combat Proposition F's Short-Term Rental Regulation*, IMMORTAL NEWS (Nov. 1, 2015), <http://www.immortal.org/19653/airbnb-invests-8-million-combat-proposition-fs-short-term-rental-regulation>. A “tax memo” estimates that “San Francisco would lose \$58 million in tax revenue” if Airbnb rentals in the city were limited to seventy-five nights per year. *Id.*

Because businesses thrive within stable regulations, Airbnb will have assurance that its platform will follow local regulations.

B. Airbnb Must Be Responsible for Collecting and Remitting Hotel Taxes

Once laws applying hotel taxes to Airbnb are implemented, cities should follow the most successful approaches of locations that have working tax collection and remittance programs with Airbnb. These recent steps by Airbnb provide a good starting point from which it could continue to foster relationships with other host locations. In areas implementing future hotel taxes, lawmakers should avoid the compliance issues associated with “microbusinesses” by drafting legislation that places the hotel tax collection and remittance duty on Airbnb.

1. Collection

Airbnb should collect hotel taxes as it is uniquely positioned to analyze its own processes. As an established company, Airbnb’s resources make it better equipped to control hotel taxes than its hosts. Moreover, the fact that Airbnb is currently providing a collection mechanism for some hotel taxes indicates that it has the technological capabilities to effectively ensure user compliance.

Upon the enactment of the above suggested legislation, Airbnb should use its capabilities to clarify its new role. This would require the company to update its website with information making it clear that users do not have to be concerned about the procedural aspects of hotel tax compliance. On transactions, Airbnb could include any hotel taxes as a line item on each receipt. That way, Airbnb users will be able to see that they are being charged for the tax but not have the duty to collect themselves. This would greatly reduce collection under compliance by centralizing the point of collection, and thereby eliminate individual taxpayer liability. With a consolidated point of collection, Airbnb’s operating areas will likely receive more tax revenue because they will not have to rely on individual compliance.

2. Remittance

Once taxes are collected by Airbnb, two approaches could be used to remit the tax revenue to the tax levying agency. One approach could require Airbnb to remit the taxes to one centralized collection agency at the state level. From there, that state agency would be responsible for remitting the taxes to the local-level government agency. While this solution would

simplify compliance for Airbnb, it is not without problems—it would likely create new responsibilities for states as they distributed the tax revenue.

A second and better remittance approach following Airbnb's assumed tax collection could be for Airbnb to remit the local hotel taxes directly to the local agency. Although this proposal would place a larger burden on Airbnb, it would likely be one that the rental company would entertain due to Airbnb's dependence on local communities. Airbnb greatly benefits from local resources already in place and operates on minimal overhead costs. Remittance directly to local governments would be applied toward these resources and likely promote better relationships with communities. At the same time, Airbnb would benefit from its ability to remain in more communities.

Compliance would not be a significant issue once Airbnb controlled its users' hotel taxes. Although Airbnb exists in an environment of decentralized peer-to-peer transactions, platform companies like Airbnb can become tax facilitators using their technological capacities to remit.¹⁷⁴

C. This Solution Aligns with Airbnb's Stated Goals

Some of Airbnb's recent actions suggest that it would be willing to accept this proposal. This approach best serves Airbnb's stated interests as it fits the company's goal to gain further legitimacy and eliminate any appearance of deliberate non-compliance. This idea can be seen in Airbnb's recent move toward assuming some of the liability associated with short-term home rentals.¹⁷⁵ Airbnb has shown its willingness to work with local governments on tax issues and repeatedly acknowledged that tax agreements are a positive movement toward further collaboration with cities.¹⁷⁶ Airbnb's willingness to engage with cities stems from the desire to protect its users from the uncertainty and trouble of circumnavigating local laws alone.

The benefits of Airbnb's self-regulation toward hotel taxes will likely outweigh its costs because the company's goal to avoid further conflict with local governments will be met. Any loss of price advantage with competitors would be made up for in goodwill from local policymakers. As a proactive measure, Airbnb can offer this solution as bargaining power in obtaining

¹⁷⁴ See Lobel, *supra* note 69, at 125.

¹⁷⁵ See Steve Manville, *Airbnb and Home-Sharing Insurance: What You Should Know*, A-WIN INS. (Feb. 2, 2017), <https://www.awinins.ca/blog/airbnb-and-home-sharing-insurance-what-you-should-know>.

¹⁷⁶ Mae Ryan, *LA Councilmembers Push to Regulate Airbnb*, KPCC (June 2, 2015), <http://www.scpr.org/news/2015/06/02/52144/la-officials-push-to-regulate-airbnb>. David Owen, Airbnb's "regional head of public policy," stated, "We're hopeful that folks move forward with clear and fair rules that make it simple for people to share their homes." *Id.*

legitimacy and solidify operational rights. By knowing upfront that Airbnb will be collecting the tax, municipalities will be more receptive to the company as the appearance of risk of uncollected taxes will be minimized through collaborative transparency.

V. CONCLUSION

The sharing economy presents important legal, political, and ethical questions. As Airbnb establishes itself in the hotel industry, local governments should create policies that achieve regulatory goals, encourage innovation, and satisfy consumers. This will require policy makers to examine Airbnb's tax issues from both the company's and host location's perspective.

To reach a solution for Airbnb's hotel taxes, tax authorities should clarify whether hotel taxes apply to Airbnb, and the company must be open to change. Analysis of Airbnb's hotel tax issues suggests the most productive approach to remedy this issue will require local governments to explicitly require Airbnb to collect and remit hotel taxes. Standardizing Airbnb's duty to collect and remit hotel taxes will protect Airbnb, its users, and host locations as it would curb potential litigation and fines. This would remove the burden of determining how to apply hotel taxes to Airbnb, and local governments would receive further tax revenue.

This approach encourages Airbnb's expansion so that it may continue to produce income while minimizing the need for excessive regulation of the short-term rental marketplace. Through collaboration, Airbnb and local governments can harness Airbnb's economic benefits while allowing the company to grow.