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Letter and Report Re: Pending Home Sharing Ordinance

Dan Bucks

Jun 8, 2017 1:09 PM

Posted in group: **Clerk-PLUM-Committee**

Dear Councilmember Huizar,

Good Afternoon!

For your convenience and that of your staff, I am attaching an electronic copy of a letter and an accompanying report that your office will also receive in hard copy form. The letter encourages support for the "Home Sharing Ordinance" pending before the Los Angeles City Council.

By way of background, I am a veteran state tax official who has recently prepared a report evaluating several agreements between Airbnb and tax agencies around the nation. Subsequently, I also reviewed a similar agreement between Airbnb and the Los Angeles Office of Finance. Based on that work, I have concluded that the "Home Sharing Ordinance" pending before the Los Angeles Council would enact effective and equitable measures to ensure the proper and reliable collection of lodging taxes due to the City of Los Angeles on short-term rentals. The proposed ordinance also ensures that the administration of lodging taxes fully supports other laws and regulations that apply to short-term rentals. In contrast, the agreement between Airbnb and the Los Angeles Office of Finance does not reliably fulfill those objectives.

I am happy to answer any questions and provide additional information you may have concerning these matters.

Thank you.

Sincerely

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June 6, 2017

The Honorable José Huizar
Los Angeles City Councilmember
200 N. Spring Street, Room 465
Los Angeles, CA 90012

Re: Proposed Home Sharing Ordinance, Council File: 14-1635-S2

Dear Councilmember Huizar:

I am a veteran public official whose career was devoted primarily to state tax policy and administration. My work also extended to a range of other state and local subjects including economic, natural resource and land use policy.

As a consultant on public revenue issues, I recently completed a report (copy attached) analyzing several agreements that Airbnb has signed with tax agencies around the nation. Although I received lodging industry support for the report, the analysis and opinions expressed are entirely my own.

On July 15, 2016, the Los Angeles Office of Finance entered into the type of tax collection agreement with Airbnb that I critique in my report. The Los Angeles agreement, which I have reviewed, shares several defects with those agreements analyzed in the report. It fails to provide the city with authority to conduct a true and complete audit of Airbnb's remittances; shrouds Airbnb operator information in secrecy; grants Airbnb and related parties an unwarranted amnesty unavailable to other taxpayers for an ill-defined range of tax liabilities; and, more generally, places the goal of short-term revenue collection ahead of the formulation of sound long-term public policy with respect to short-term rentals.

I write today to comment on the proposed "Home Sharing Ordinance," Council File: 14-1635-S2, now pending with the Council. This ordinance would remedy the deficiencies created by the Los Angeles tax collection agreement with Airbnb, and for this reason I encourage you to act favorably on it.

Core Regulatory Elements and Transparency

The proposed ordinance establishes the core elements for reasonable and effective regulation of short-term rentals and ensures transparency through public registration by their operators. The proposal includes a key verification provision requiring home-sharing platforms to provide a monthly, electronic log of home-sharing sites, their location, usage and revenues.

Requiring public registration for business activities is a centuries-old practice that is essential to any effective local government regulation of commerce occurring within its jurisdiction. Local governments need to know the details of business operations to protect public health and safety and to ensure that they are being lawfully conducted in the public interest. Further, citizens have a right to know what businesses are being operated within their localities to communicate to local agencies and officials any concerns about the public impacts of private business activities.

While public registration of businesses should not be controversial, Airbnb has resisted disclosure to public authorities of the identity and location of its lodging operators. The agreements Airbnb has entered with tax agencies across the country, including the Los Angeles Office of Finance, allow Airbnb to keep secret the identity and location of lodging operators, even though their terms of service allow it to disclose that information to public authorities.¹ Troublingly, the Los Angeles Office of Finance has contracted away its ability to conduct a customary audit of Airbnb's tax remittances, agreeing that tax audits of Airbnb will be conducted using only anonymous data supplied by the company, without access to Airbnb's books and records.²

There are two noteworthy, adverse effects of the secrecy provisions of the Airbnb agreements. First, they prevent tax agencies from verifying the accuracy and completeness of any payments Airbnb makes. Second, the shroud of secrecy creates a regulatory tax haven that enables illegal lodging to operate in violation of zoning and housing ordinances. Through the agreements, Airbnb essentially "purchases" from public agencies a shield of secrecy that it "resells" to lodging operators to attract more owners, investors, or long-term lessees of residential property to conduct Airbnb lodging businesses.

¹ See pages 27-29 of the report, "Airbnb Agreements with State and Local Tax Agencies: A Formula for Undermining Tax Fairness, Transparency and the Rule of Law," for a description of the multiple layers of secrecy that Airbnb seeks for its lodging operators in various agreements with tax agencies.

² See pages 21-26 of the report for a detailed discussion of the how the audit limits in the Airbnb agreements prevent tax agencies from conducting true, independent audits of Airbnb's books and records and effectively allows Airbnb to determine the amount of any payments it will make to state or local governments, including the City of Los Angeles.

Media reports confirm this trend is occurring in Los Angeles, with unregulated commercial lodging operations taking root in residential neighborhoods. Continuously operating, multi-unit facilities—de facto hotels—are especially valuable to Airbnb as a source of earnings and growth. The regulatory tax haven Airbnb has secured under its July 2016 agreement with the city encourages the illegal conversion of ordinary residential property into commercial-style lodging operations.

The proposed ordinance before you would wisely put an end to the secrecy provided to Airbnb's lodging operators under the agreement with the Office of Finance. In doing so, the ordinance would restore integrity and equality to the enforcement of Los Angeles zoning and housing laws.

Dubious Fiscal Note Argument

My understanding is that, quite unfortunately, arguments are being made against the ordinance because it would supposedly result in a fiscal loss by prohibiting certain commercial-style lodging facilities now rented through Airbnb's platform. Because Airbnb is, at present, purportedly making payments to the city associated with the rental of certain facilities that would be prohibited by the ordinance, it is alleged the city would lose those revenues.

This argument is wrong on both fiscal and public integrity grounds. Fiscally, the argument is unsound because the Airbnb agreement does not guarantee the proper and complete payment of taxes on lodging. Because audits are limited to anonymous data, it is not possible to verify that the amounts being paid by Airbnb correspond to what is due or what was paid by the lodging renters. The amounts reported and paid could be either fact or fiction at any point in time. Further, Airbnb can cancel the payment agreement on 30 days' notice, making the agreement unstable and uncertain. Because Airbnb controls what it will pay and can readily cancel the agreement, it is wrong to consider it a guaranteed stream of revenue to the City of Los Angeles. For the same reasons, the revenues from the agreement really do not qualify as "taxes" and cannot be legitimately considered as such in a fiscal note.

In terms of eroding public integrity, the argument being made is that the Los Angeles City Council should agree to accept money from Airbnb and turn a blind eye to lodging operations that violate zoning and housing ordinances. If the Council were to accept this suspect rationale for selling indulgences, it would be agreeing to undermine the laws it has enacted to protect and preserve public health and safety, the character of residential neighborhoods, and the supply of affordable housing. Those laws were enacted for public purposes, and those purposes should not be abandoned for dubious and uncertain payments from a single company.³

³ See pages 31-33 of the report for a discussion of how secrecy advances Airbnb's business interests and pages 39-40 on how the secrecy in the Airbnb agreements undermines the rule of law.

Ordinance Provides Dependable Revenues

In contrast to the current Airbnb agreement, the proposed ordinance includes provisions that ensure verifiable and reliable revenues from short-term rentals. Lodging operators are required to collect and pay taxes or can assign that responsibility to short-term rental platforms that would be required to fulfill all taxpayer duties. Further, both the lodging operators and the platforms will maintain records and/or make reports that can be verified against each other, thus guaranteeing the accuracy of tax payments. Thus, the ordinance generates revenues the City of Los Angeles can depend on and can be legitimately accounted for in any fiscal note or analysis related to this proposal.

Thank you for your consideration of these observations. I would be glad to respond to questions or comment further on these matters.

Sincerely,

/s/

Dan R. Bucks

Attachment: Airbnb Agreements with State and Local Tax Agencies—A Formula for Undermining Tax Fairness, Transparency and the Rule of Law

Airbnb Agreements with State and Local Tax Agencies

A Formula for Undermining Tax Fairness, Transparency and the Rule of Law

Dan R. Bucks

March 2017

Note on the Author and This Report

Dan Bucks has served as Director of the Montana Department of Revenue (2005-2013) and as Executive Director of the Multistate Tax Commission (1988-2004). Prior to that he held executive positions in both Montana and South Dakota state governments back to 1971. He currently serves as a revenue policy and administration consultant and is a contributor to *State Tax Notes*.

This report represents his expert and independent evaluation of the Airbnb tax agreements with state and local agencies. The analysis, judgments and conclusions of this research document are entirely the work of the author.

Mr. Bucks has prepared this report with support from the American Hotel and Lodging Association.

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Glossary of Terms

Term	Definition
Airbnb agreements	An agreement between Airbnb and a state or local government, labeled “Voluntary Collection Agreement,” that pertains to lodging taxes among other matters. Because of the nature and extent of their content, they are referred to herein simply as “Airbnb agreements.”
Commercial-style short-term rental or lodging	A short-term residential rental or lodging facility in which the operator does <u>not</u> reside and (a) that is offered on a full-time basis year-round or during long seasons, or (b) is a multi-unit operation with two or more units.
Home-sharing	A short-term residential rental or lodging facility in which the operator does reside and that is typically offered on an occasional basis to occupants.
Lodging operator	An owner or long-term lessee who offers and rents a short-term residential rental or lodging facility to members of the public. Airbnb refers to lodging operators as “hosts” in their agreements, but “lodging operator” is the objective term in business and tax contexts.
Lodging operator identification service	A software based service that identifies and locates lodging operators to assist governments with lodging tax and regulatory compliance. At least one service exists, and others may emerge.
Occupant	A person who rents a short-term rental from a lodging operator. Airbnb refers to these persons as “guests” in their agreements, but “occupant” is the objective term in business and tax contexts.
Voluntary disclosure agreements	Agreements between a state and previously non-compliant taxpayers to bring them into compliance with tax laws. They typically involve the payment of some years of back taxes with interest, but no penalties and a commitment to pay taxes prospectively, subject to normal requirements that apply to all taxpayers. The Multistate Tax Commission (MTC) coordinates such agreements for multistate taxpayers working with several states at once. Individual states also offer agreements for residents, in-state businesses and multistate businesses preferring to work with the state directly.

Summary of Report

Subject

This report evaluates twelve publicly released agreements that Airbnb has entered with state or local governments that directly address lodging taxes, but have impacts on other state and local laws. The agreements are from across the nation and have effective dates ranging from 2014 into 2017. Because of their variations in geography and time, the report assumes that these 12 agreements are reasonably representative of the larger body of approximately 200 agreements that Airbnb has signed. The large majority of Airbnb agreements are being held secret from the public.

Methodology

The evaluation is conducted by examining the language of the Airbnb agreements in relation to voluntary disclosure tax agreements, standards of public administration and democratic governance, and compliance with the law. In one circumstance, the report evaluates a “side arrangement” described in an interview with a tax agency. Focusing on the language of the agreements provides a definite and concrete basis for evaluation. Critics may argue that this approach does not take account of verbal understandings or other variations from written language used to avoid problems created by the text of the agreements. If the agreements are administered differently from their text, that language should be amended accordingly.

Context

Airbnb, founded in 2008, provides lodging by supporting and marketing a network of lodging facilities. Airbnb states that it offers 3,000,000 listings in 65,000 cities in 191 countries. Airbnb began with and continues to cultivate an image of offering “home-sharing” rentals—lodging in people’s homes where the owners or long-term lessees reside. Increasingly, however, Airbnb’s growth is dependent on “commercial-style” operations where the holder of the property does not reside in it, but operates a lodging business based in a separate home or one or more apartments available for transient rental year-round. “Home-sharing” is often legal under local zoning and housing laws. “Commercial-style” transient residential rentals often violate zoning and housing laws.

Immediate Action Needed

The report details major problems that the Airbnb agreements create in terms of:

- Unjustified favoritism for Airbnb and its lodging operators,
- Improperly ceding tax authority to Airbnb,
- Granting huge benefits to third-parties who have not signed the agreements,
- Unfair treatment of other taxpayers, businesses and citizens,
- Violating standards of transparency and democratic governance,
- Undermining compliance with tax and regulatory laws, and
- Spreading undesirable precedents through state laws patterned after the agreements.

Because of the serious problems created by the agreements, the report recommends that tax agencies stop signing Airbnb agreements and oppose legislation that would incorporate those features in law. Agencies that have signed those agreements should reevaluate them and consider termination. As a better alternative, agencies should seek legislation updating lodging tax laws to ensure proper compliance and undertake a comprehensive lodging tax compliance program.

Findings and Impacts

Major findings in the report include:

- The Airbnb agreements are more than tax agreements. They are, in fact, wide-ranging special rules benefitting Airbnb and its lodging operators. There is no proprietary or confidential information in these agreements (or any comparable ones that have not been released) that justify withholding them from the public. The policies in these agreements should be treated as rules subject to public disclosure, scrutiny and participation.
- The structure of these agreements is perplexing and should be reviewed for legality. The agreements provide major benefits to third-parties, especially lodging operators, who are not signatories of the agreement and do not commit to any performance in exchange for benefits received.
- The Airbnb agreements do not guarantee accountability for the proper payment of lodging taxes because tax agencies cede substantial control of the payment and audit processes to Airbnb. The agreements provide a shield of secrecy for lodging operators that prevents their discovery by public agencies and creates a de facto tax and regulatory haven for those operators.
- The Airbnb agreements provide overly generous and unjustified benefits to Airbnb and its lodging operators and occupants as compared to the benefits provided taxpayers entering voluntary disclosure agreements. In accordance with observation that “bad practices drive out good ones,” the negative precedents in the Airbnb agreements threaten to undermine the use of voluntary disclosure agreements that have yielded large revenue, tax equity and compliance benefits.
- By agreeing to prospective lodging tax payments, the accuracy of which cannot be fully verified, Airbnb “purchases” from tax agencies a shield of secrecy that they “resell” to lodging operators to attract more owners or long-term lessees of residential property to conduct Airbnb lodging businesses. That secrecy is most valuable for the commercial-style lodging facilities that now fuel Airbnb’s growth, but that are also most likely to violate zoning and housing laws. Thus, the agreements facilitate unimpeded and often illegal conversions of residential property into commercial-style lodging facilities. Tax agencies signing these agreements enable this process.
- The Airbnb agreements, because of the unjustified benefits provided, are unfair to taxpayers who file and pay their taxes diligently. The agreements also allow Airbnb lodging to compete unfairly with traditional lodging facilities. Finally, the agreements provide unfair competition for community residents and citizens seeking a place to live.
- The Airbnb agreements conflict with standards of democratic governance designed to ensure integrity in public policy and civil society. They fail to conform to requirements of transparency and public participation in decision-making. The agreements also violate agency authority through favoritism offered Airbnb and its lodging operators and occupants.
- In terms of favoritism, tax agencies should be especially concerned about suspending exchange of information processes related to Airbnb and its lodging operators. Beyond questions of legality, agencies should consider the impact of withholding information from other agencies in terms of adversely affecting the cooperation they receive from other agencies in the future—cooperation that is important to proper tax administration and broader enforcement of other laws.

- The Airbnb agreements undermine the rule of law. The agreements create risks of reduced compliance with lodging tax laws, with state and local tax laws more generally, and with local land use, housing and building safety laws.
- The Airbnb agreements have produced legislation in Arizona and consideration of similar action in other states. The law undermines local land use and zoning regulations that might affect Airbnb by severely narrowing local regulatory authority. The law makes the negative tax precedents in the agreements visible and creates incentives for other taxpayers to lobby for those same benefits. The law codifies the anonymous data reporting that undermines Airbnb's tax accountability. It also blocks the exchange of Airbnb information with the IRS and tax agencies of other states. For the exchange of information that does remain, the law requires notification of Airbnb of potential exchanges and gives it the power to reach into the tax agency and block that exchange of information.
- Signing Airbnb agreements of the type covered here introduces harmful practices into the public life of states and communities. Legislation incorporating Airbnb's unjustified privileges into law only spreads the damage further. If these practices are expanded in law to other businesses, the consequences for states and localities become severe.

Recommendations

- As noted, the report recommends that agencies stop signing agreements like those covered by this report and oppose any legislation that would enact those provisions into law. Agencies with existing agreements should consider terminating them.
- Tax agencies should seek legislation updating lodging tax laws to require registration, reporting and collection and payment by online booking companies and lodging operators, with a single payment process coordinated as it is for sales taxes between wholesalers (here, lodging operators) and retailers (online booking companies). Given the community and neighborhood impacts of short-term rentals, the legislation should include a public registry of lodging facilities above specific thresholds. The legislation should strengthen, where necessary, exchange of information for lodging taxes given the significance of that information for regulatory enforcement.
- Alternatively, if nothing else is done, legislation should be enacted that requires online booking companies to provide the names and locations of lodging operators to tax agencies.
- Tax agencies should undertake a comprehensive compliance program under existing law with three elements: (a) joint, multistate audits of online booking companies for relevant taxes to determine whether the companies have a legal duty to file, collect and pay taxes, (b) joint or individual contracts with a lodging provider identification service, at least one of which currently exists (Host Compliance), and (c) a campaign to offer voluntary disclosure agreements to lodging providers to come into compliance with lodging tax laws.
- Tax agencies with existing agreements should publicly release the agreements to the extent that they include no confidential or proprietary information. If any such confidential information is present, that information should be redacted and the non-sensitive material constituting policies should be released and subject to a public rule-making process as a part of a reconsideration process.
- Legislatures should enact the legislation described above.
- Community and business organizations should undertake concerted and detailed open records requests for the release of Airbnb agreements, with redaction for any confidential information. The groups should be prepared to undertake follow-up legal action if requests are denied.

- When agreements are released, community and business groups should petition for any provisions that constitute rules to be subject to public rule-making processes. If rule-making does not proceed on such matters, follow-up legal action should be considered.
- The groups should actively support the legislative and administrative actions described above.

There is much detail in this report concerning extensive problems of the Airbnb agreements. However, the core problem with these agreements is simply too much secrecy. Secrecy allows lodging operators to run hotels that violate zoning laws, avoid public health and safety standards, and reduce the current housing supply for long-term residents. Secrecy allows Airbnb, if it decided to do so, to avoid accountability for taxes and even to make ill-gotten gains from tax collection. Airbnb first creates the secrecy problem by hiding lodging addresses on their website, making it difficult for state and local authorities to identify the facilities and their owners. Airbnb then offers agreements as a solution. But the agreements only make the problems worse. The Airbnb agreements extend secrecy further, giving it an unfair advantage in lodging markets by offering a tax and regulatory shield to affiliated lodging operators.

The solution to secrecy is to end it, not extend it, as too many states and localities are helping Airbnb do through these agreements. It is standard practice to require transparency for businesses operating in states and localities. Public registration to do business is a centuries-old staple of taxation, regulation and law enforcement. It is absurd to allow anyone to operate a lodging business in a neighborhood and not register that business in a public registry. It is worse to deny zoning officials, tax collectors, police officers and firefighters basic information they need to do their jobs regarding issues related to lodging facilities. It is also unacceptable that long-term residents will often not know they will be living next door to transient housing instead of having neighbors to whom they can relate and rely. All that needs to be done is to require lodging operators to register their businesses publicly—akin to requirements for other in-home businesses—and to require online booking companies like Airbnb to provide a list of its affiliated operators to state and local tax authorities.

The solution to tax secrecy for Airbnb is equally simple. Require Airbnb to file tax returns based on real data instead of anonymous numbers that could be fact or fiction. Reject audit rules that leave auditors staring at already filed returns, supporting schedules and unverifiable sheets of numbers. Require Airbnb to provide its real books and records for auditors to examine just the same as all other taxpayers are required to do. Anonymous data and locking up Airbnb's books and records invites tax abuses, even allowing the company, if it decided to do so, to make profits charging guests the full tax and paying state and local governments lesser amounts. All that is necessary is to ask Airbnb to play by the same rules for tax reporting, payment and auditing that apply to everyone else—and for states and localities to conduct efficient, effective and fair audits.

There is a third problem of secrecy. Too many governments are signing secret agreements with Airbnb that are, in truth, the equivalent of laws and rules. Agencies should release these agreements, and if not members of the public should challenge this secrecy and request their release. The rules should be brought into the open air and bright sunshine—as laws on public participation and state constitutions require—so the public can have a say on whether Airbnb gets special rules with special benefits or whether it will be asked to follow the same rules that apply to

everyone. The government secrecy needs to end as much as does the secrecy for Airbnb and its customers.

Section A.

Airbnb and Neighborhoods: An Introduction to the Report

We fancy ourselves outlaws while we shape laws and consider ourselves disruptive without sufficient consideration for the people and institutions we disrupt. We have to do better, and we will -- Anil Dash, a “technologist” commenting on the tech industry, quoted by Krista Tippett on the radio show, *On Being*, January 12, 2017.

Anil Dash’s words are a welcome correction to the technology industry’s continuous celebration of its “disruptive” capacity. Disrupting old industries that employed America’s once thriving middle class is the tech industry’s favored mode of operation. It proceeds by extracting, not all, but key elements of the craft knowledge previously spread widely among workers and managers in the old industries—craft knowledge that guided their operations and success. The tech industry extracts that craft knowledge, reformulates and concentrates it into computer code, and using that software deploys new enterprises to “disrupt” old industries. “Displace” is another word for the process. The knowledge first developed in the old industries is turned against them in a new form.

The process of disruption through technology has concentrated enormous wealth with the tech elite. It has also created new jobs, but typically fewer than those lost and often clustered in a few metropolitan areas. The process has been less kind to the old industries’ former workers whose jobs have been disrupted away. To be fair, the workers’ problems do not come solely from technological disruption—globalization (another tech favorite) and tax and labor market policies have also played a role. But technological disruption is a big part of the story. The results can be seen, in part, in the forty years of stagnant or even declining real incomes for middle class households. The results can also be seen in the “populist” anger arising in the past year from communities spread across the nation—notably a far distance from tech centers.

Airbnb, a company founded only eight years ago, and other online companies offering peer-to-peer marketplaces for short-term rental companies are in the business of disrupting the lodging industry. Airbnb is the peer-to-peer leader with 3,000,000 listings in 65,000 cities and 191 countries.¹ Somewhat ironically, the company publicizes itself as helping hard-pressed members of the middle class earn extra income by renting spare space in their homes on an occasional basis to travelers. In its early years, Airbnb’s image was likely consistent with its reality. Recent data, though, suggests that image is blurring into myth as a rising share of its revenue comes from commercial-style operations instead of occasional home-sharing. One study of Airbnb bookings in 14 major cities indicates that full-time and multi-unit operations accounted for 40% of Airbnb’s revenue from October 2014 through September 2015.²

It is understandable that at some point Airbnb and similar companies would reach the outer limits of the number of people whose personal circumstances are such that they would engage in home-sharing. To achieve further growth and market share, Airbnb is moving beyond home-sharing to listings of houses and apartments operated as commercial lodging businesses.

¹ “About Us-Airbnb,” *Airbnb.com*. Retrieved January 16, 2017.

² John W. O’Neill and Yuxia Ouyang, “From Air Mattresses to Unregulated Business: An Analysis of the Other Side of Airbnb,” Penn State University, School of Hospitality Management, January 2016.

The conversion of houses and apartments not occupied by their owners or long-term lessees into short-term lodging facilities creates major community controversies.³ Charges arise over “illegal hotels”—charges that are true if the facilities violate zoning ordinances, occupancy standards, building and fire codes and other housing laws. Critics claim this conversion of residential property into short-term rentals reduces the supply and increases the cost of places to live for ordinary citizens, thus reducing housing affordability—especially in markets with a short supply of residences relative to demand. Others raise issues about public health and safety issues affecting residential neighborhoods and stretching police and other public safety resources more thinly across community. Long-term residents are concerned that as neighbors are replaced by transient visitors, the human relationships and community life on which they rely will be lost. Airbnb, for its part, often vigorously disputes these concerns directly and responds indirectly by cultivating a brand image of sharing, trust and belonging.

Controversies over short-term rentals have produced litigation and regulatory and legislative action in the United States and on a global basis. Some of the most well-known conflicts have occurred in New York, San Francisco, Vancouver, BC, and Berlin among other locations.

Into the context of controversy in the United States, Airbnb has inserted a campaign offering state and local governments agreements, which it describes as providing for Airbnb’s prospective collection of lodging taxes that apply to its rental transactions in their jurisdictions. This report analyzes twelve agreements that have been publicly released. Airbnb claims to have entered 200 such agreements and hopes to sign 500 more in 2017.⁴

The analysis proceeds by comparing the agreements to well-established “voluntary disclosure agreements” that states use to secure tax compliance by businesses and individuals who have not been collecting, filing and paying taxes. These agreements are carefully designed to encourage voluntary compliance by non-filers, while still retaining sufficient sanctions to make non-compliance unattractive and ensuring fairness to taxpayers fully compliant with the law. We evaluate the Airbnb agreements as to whether they serve their intended purposes or other unstated purposes, whether they are fair overall to taxpayers and community residents, and whether they conform to standards of integrity and effectiveness in taxation. Chief among those standards is the ability of a tax agency to hold a taxpayer accountable for paying the right amount of taxes. More broadly, attention is given to whether the agreements support the rule of law by ensuring proper compliance with all applicable laws. We also evaluate the agreement to determine if tax agencies, in entering the agreements, are adhering to requirements for transparency, public participation in decision-making, and accountability to the public.

³ A report by the New York Attorney General provides well-organized documentation of complaints about commercial-style rentals offered through Airbnb. See New York Office of Attorney General, “Airbnb in the City,” October 2014, available at <https://ag.ny.gov/pdfs/Airbnb%20report.pdf>.

⁴ Leslie Hook, “Airbnb looks to secure 700 tax deals with cities,” *Financial Times*, November 20, 2016.

Section B

Airbnb Agreements: Comparison with Voluntary Disclosure Agreements

1. What Are the Airbnb Documents?

Airbnb devises and presents to tax agencies what are typically ten to twelve-page documents covering back-tax forgiveness, prospective payments, information access and multiple other terms that produce, as this report documents, serious negative consequences for society. Airbnb labels these documents as “voluntary collection agreements,” which they most assuredly are not. These Airbnb-drafted documents do not guarantee the proper collection of taxes due. They block tax agencies from verifying the accuracy of Airbnb payments. Airbnb may be seeking to superficially to liken these documents to the high quality “voluntary disclosure agreements” that states use to bring non-compliant taxpayers into full conformity with the law. However, these documents profoundly undermine sound tax administration and the rule of law. For these and other reasons detailed below, we will not use Airbnb’s misleading label for these documents but will refer to them objectively as “Airbnb agreements.”

Beyond not being what Airbnb claims for them, the agreements do not even qualify more generally as “tax settlements.” A tax settlement resolves a tax dispute between one taxpayer and a tax agency and often includes proprietary or confidential tax information. With a few exceptions, these agreements do not appear to be prompted by a tax dispute arising from an audit or legal action by a tax authority. None of the agreements released publicly refer to any such disputes or contain references to being entered under the authority of tax settlement laws. They do not, as tax settlements normally do, specify agreed upon amounts of values, income or taxes. None of the publicly released agreements, even if they contain confidentiality clauses, include any proprietary or confidential tax information. Further, these agreements are not simply between a tax agency and one taxpayer because they provide substantial tax benefits to a large class of unknown numbers of Airbnb lodging operators and occupants. Finally, as explained below these agreements range far beyond the content of tax settlements in terms of the scope of laws, practices and parties affected.

What is the nature of these Airbnb agreements? Regardless of how Airbnb characterizes them, the agreements are, in truth, rules that grant special advantages to one taxpayer and its customers. They are rules because they embody multiple decisions that sprawl across a range of tax policy and administrative issues, including but not limited to:

- granting tax and regulatory benefits to a class comprised of large numbers of unidentified beneficiaries who are not signatories of the agreements,
- creating unusual, if not unprecedented, limits on tax administration that undermine the proper accountability for taxes collected, reported and paid,
- limiting the information available to other agencies to enforce laws that affect public health and safety and the quality of community life, and
- restricting the ability of the public and other agencies to know about and participate in decision-making about the public policy judgments being made in the agreements.

These rules should be subject to consideration through open, public participation processes. Bringing these provisions out of the shadows and into the public square for scrutiny and debate is

even more compelling when one considers their impact on tax equity, market competition, the integrity of tax administration, public health and safety and the well-being of community residents.

While the agreements are, in fact, rules, they also represent a special deal. They allow Airbnb unusual and legally questionable latitude to determine how much they will pay in taxes. Several agreements grant special tax amnesty to Airbnb lodging operators and occupants even though they have neither requested it nor signed the agreements. The agreements provide several layers of secrecy to shield Airbnb lodging operators and occupants from complying with an array of laws. The shield of secrecy for Airbnb customers enables Airbnb to unfairly expand its market share within the lodging industry and divert housing stock away from ordinary citizens who merely want to find a place to live.

The Airbnb agreements specify terms that cut across an array of tax policies and practices to benefit Airbnb and its network of lodging operators. It provides general rules skewed to serve private interests to the detriment of the public interest. Disturbingly, too many tax agencies agree to work with Airbnb to clothe these efforts in secrecy lest they be discovered and responded to by the public. Fortunately, efforts to keep these agreements secret has not been entirely successful.

2. Introduction to Description and Analysis of Agreements

This section of the report compares and contrasts Airbnb agreements with voluntary disclosure agreements. Voluntary disclosure agreements have become a highly successful, equitable and fiscally advantageous method for bringing non-compliant taxpayers into compliance with the law. Voluntary disclosure agreements are the “gold standard” of tax compliance agreements. We will make this comparison for three reasons:

- It helps to understand how, despite some similarities, the Airbnb agreements diverge radically from and extend beyond the best tax compliance practices embodied in voluntary disclosure agreements;
- It helps reveal the tax inequities created by the Airbnb agreements, and
- It discloses the real function of the Airbnb agreements is not to ensure the proper payments of taxes, but to help Airbnb expand its share of the lodging market at the expense of competitors.

The analysis in these section is not the full story. This section focuses on providing a general knowledge of the Airbnb agreements and exploring how they measure up against the tax equity standard of equal treatment of similarly situated taxpayers. In Section C, we will consider the broader impacts of the Airbnb agreements on economic competition, effective tax administration, democratic governance, and the rule of law.

There are some surface similarities between these two types of agreements. Both the Airbnb agreements and voluntary disclosure agreements facilitate payments for taxes not currently being collected. Both types of agreements appear to have a similar framework: a recitation of facts by the person or business followed by concessions, usually by the tax agency to induce the tax collection payments. Even some of the words are borrowed from voluntary disclosure agreements for use in the Airbnb agreements. Once below the surface, however, the terms vary significantly between the two.

The greatest similarities between the voluntary disclosure agreements and the Airbnb agreements are found not in their terms but in the circumstances of the persons and businesses benefitting from the two types of agreements. A lodging operator located in a taxing jurisdiction who exceeds lodging tax reporting thresholds and who fails to file and pay lodging taxes is in an identical situation as a resident or business located in the taxing jurisdiction who fails to file and pay income or sales taxes. These lodging operators own property and are conducting lodging business in the taxing jurisdiction. Under the principle of treating taxpayers in identical circumstances equally, the net benefits received from a tax agreement should be the same for a lodging operator non-compliant with lodging taxes as it is for a person or business non-compliant with sales or income taxes. There is no reason Airbnb operators and occupants should be treated more favorably than taxpayers who participate in voluntary disclosure agreements.

There is also a similarity between Airbnb and multistate or multinational taxpayers entering voluntary disclosure agreements. Under U.S. constitutional standards, out-of-state companies must have sufficient contacts with a state for that state to require the company to collect, file and pay taxes. If the nature of a company's contacts with the state meet constitutional tests, the company is said to have nexus with the state and is, therefore, subject to the state's jurisdiction. Multistate businesses that seek voluntary disclosure agreements for income or sales taxes are typically those whose contacts with a state make it subject to either definite or probable jurisdiction for that state's taxes.

Airbnb's contacts with many states appear sufficient constitutionally to require it to collect, file and pay state taxes. The case for Airbnb having nexus with states is substantial:

1. Airbnb's business and earnings in the United States are fully dependent on its affiliation with local lodging operators,⁵
2. Airbnb, by its own statements on its website, contracts with photographers, translators and other providers who provide services in support of lodging within the states,⁶ and
3. Airbnb is serving as a negotiating agent for its lodging operators and occupants for tax agreements in most states.

If Airbnb made a proper disclosure of facts or if it were subject to a nexus audit, it is likely that other facts supporting nexus would be found. Because Airbnb and multistate businesses seeking voluntary disclosure agreements are substantially similar in constitutional terms, it is proper to compare the two.

Observers will likely note that, on state law grounds, Airbnb may be less obligated to collect and pay lodging taxes because those laws have not kept up with changing technology and business operations—thus failing to ensure that lodging provided to consumers through business networks organized via automated systems is taxed fairly, efficiently and effectively. However, that statutory

⁵ States have successfully asserted "affiliate nexus" regarding out-of-state companies with in-state affiliates where the affiliates are less central to the out-of-state company than the Airbnb lodging operators are to Airbnb. Airbnb cannot conduct its business without the in-state lodging operators and their property.

⁶ See: <https://www.airbnb.com/help/article/414/should-i-expect-to-receive-a-tax-form-from-airbnb?topic=248>.

problem can be remedied by states or localities through legislative action—a better alternative than entering seriously flawed tax agreements that damage the public interest. Analytically, it is necessary that this statutory issue be held in abeyance so that the public and policy-makers can see the difference in the choice between legislatively updating lodging taxes and the administratively adopted Airbnb agreements.

3. Voluntary Disclosure Agreements

While voluntary tax disclosure agreements have existed in some form for a long time, states have used them more extensively since the late 1980s. Changes in interstate business operations combined with ambiguities in the circumstances under which states could tax interstate economic activity produced greater use of these agreements. The Multistate Tax Commission (MTC) contributed significantly to the trend by establishing the National Nexus Program, which coordinates disclosure agreements between interstate businesses and multiple states. States typically offer within their states similar agreements to non-filing residents and local businesses.

State voluntary disclosure agreements have produced impressive results. In ten years from FY 2006-2015, the MTC's voluntary disclosures produced over \$197 million in back-tax payments not including interest or future tax payments.⁷ Using a conservative methodology, the report estimates total revenues from these multistate agreements likely exceeded \$500 million over this decade.⁸ These amounts do not include the major revenues produced by individual state voluntary disclosure programs for residents and local businesses. In comparison, the twelve Airbnb agreements produced exactly \$0 in back-tax payments. While other Airbnb agreements remain secret, the likelihood those agreements produced material back-tax payments is low given Airbnb's negotiating posture. The prospects of future revenues from Airbnb agreements needs to be discounted by the fact that, as discussed in Section E, states and localities increasingly have the means available for collecting taxes on online lodging rentals. States should be mindful that terms they agree to for Airbnb agreements could undermine settled practices for voluntary disclosure agreements and place at risk the substantial revenues gained from their voluntary disclosure programs.

Because of their expanded use, states have adopted formal procedures, rules and even laws to govern and guide voluntary disclosure programs. The objectives of the legal framework for these agreements is to ensure (a) the integrity of the agreement process and (b) equitable treatment of taxpayers in similar circumstances. The development of these laws and rules have provided opportunities for public input into the policies governing these agreements. Individual states and the MTC make substantial efforts to ensure there is public knowledge of voluntary disclosure agreements and the standard terms generally offered. Voluntary disclosure agreements are well-grounded in law and administrative practice and are equitable and effective.

State voluntary disclosure programs strike a balance in offering previously non-compliant taxpayers some limited, carefully circumscribed relief from penalties and some back-tax

⁷ Compiled from Multistate Tax Commission Annual Reports for applicable periods.

⁸ Future revenues were calculated at one-third of back tax payments received each year extended over remaining future periods in the decade. Continuing revenues in the FY 2006-15 period from MTC agreements signed in years prior to FY 2006 were excluded, making the estimate more conservative. Interest was estimated using the IRS large corporate underpayment rate of 5%.

payments—but not so much as to be unfair to taxpayers who have long been compliant with the laws. The voluntary disclosure programs are carefully designed to not offer relief from the pain of back-tax payments to the degree that makes non-compliance a more attractive choice than compliance. Thus, voluntary disclosure programs support equitable compliance with the law.

A key element of a voluntary disclosure agreement is the taxpayer's disclosure of facts previously unknown to the tax agency, which is sensitive information contrary to the taxpayer's interests. These facts (a) establish why the taxpayer should likely have been filing and paying taxes for prior tax periods and (b) certify that taxpayer has not previously been contacted by taxing authorities and is, thus, coming forward voluntarily. Importantly, this representation of facts is subject to audit and verification by the tax agency and, if it is materially inaccurate, the tax agency can withdraw the benefits of the agreement and impose the penalties and assessments foregone under its terms.

Having an accurate and complete disclosure of facts subject to verification is essential for a tax agency to determine the proper treatment of the taxpayer. Further, while this initial disclosure of facts is held confidential by the tax agency to facilitate the agreement, future information filed by the taxpayer in tax returns, including the taxpayer's identity, will be subject to sharing with other public agencies pursuant to laws and information exchange agreements. In short, beyond the initial agreement, the taxpayer gains no continuing secrecy from other agencies.

The typical voluntary disclosure agreement requires the taxpayer to register, file and pay taxes for a prior "look-back" period (typically three years) and all future years subject fully to the tax laws, rules and procedures of the jurisdiction. Importantly, the agreement preserves the authority of the tax agency to conduct a proper, independent audit of the taxpayer's books and records for the "look-back" period and future years. Years prior to the "look-back" period can be subject to audit if the taxpayer's disclosure of facts was not true or complete.

States apply tougher requirements in some types of cases. When taxpayers have collected but not remitted employer withholding taxes or sales/use taxes, states will generally require the taxpayer to pay all the collected but unremitted tax—plus penalties—for as long a time as the failure to pay occurred. These funds, once collected from employees and customers, are held in trust for the state and do not belong to the taxpayer.

Finally, except for pass-through entity taxpayers, voluntary disclosure agreements do not provide any direct benefits to parties other than their signatories. For pass-through entities, many states will require only the entity to enter and sign the voluntary disclosure agreement, and not its owners. For their portion of the tax liability of the pass-through, the owners share in the costs and benefits of the entity entering a disclosure agreement. This exception is limited to the unique structure and complexity of pass-through businesses.

The key elements of current practices regarding voluntary disclosure agreements are summarized as follows:

- They are often grounded in a formal legal framework to ensure integrity and equity.
- The public has knowledge of and access to voluntary disclosure programs.

- The essential element for the taxpayer to secure an agreement is a disclosure of facts unprompted by any agency contacts and that remains subject to verification by the tax agency—thus ensuring its completeness and accuracy.
- If the disclosure is materially inaccurate, the tax agency can cancel the agreement and reclaim or cancel its benefits to the taxpayer.
- The disclosure of facts is protected from sharing with other agencies if they are accurate, but there are no limits on sharing the taxpayer’s future tax return and audit information with other agencies.
- The taxpayer commits to timely, future tax payments.
- The taxpayer commits to back-tax payments with interest for a “look-back” period of typically three years, with a potentially longer period plus penalties applying to collected, but unremitted taxes held in trust for the state.
- The taxpayer is fully accountable to the tax agency, which retains its normal supervisory and enforcement authority, audit and other administrative tools.
- With a possible exception for pass-through entity owners, no parties benefit from voluntary disclosure agreement other than the signatories themselves.

4. Airbnb Agreements

a. Introduction to Agreements and Their Provisions. This subsection describes provisions of twelve different agreements between Airbnb and state or local tax agencies. States and localities have released these agreements under various circumstances. Some agreements are in the public domain because of state public meeting laws. Tax agency decisions or open records requests account for others being released. The agreements are between Airbnb and the following jurisdictions by state listed in Table 1.

Table 1. Airbnb Agreements by State—Listed Alphabetically

State	Agreement	Effective Date
California	Humboldt County	July 1, 2016
	City of Palm Desert	July 1, 2016
	City of San Jose	February 1, 2015
Florida	Florida Dept. of Revenue—State & 22 Counties	December 1, 2015
	Hillsborough County	February 1, 2017
	Pinellas County	December 1, 2015
	Polk County	February 1, 2017
Maryland	Montgomery County	July 1, 2016
New Mexico	City of Santa Fe	August 1, 2016
	City of Taos	August 1, 2016
Oregon	Multnomah County (except City of Portland)	July 1, 2014
	Washington County	July 1, 2016

Collectively, these documents represent a sample of the larger number of agreements Airbnb claims to have executed with states and localities—agreements running to 200 per recent Airbnb statements made to the Financial Times.⁹

Table 2 on page 16 displays problematic provisions in the Airbnb agreements in categories by jurisdiction. These provisions typically depart from and extend well beyond established tax practices. They are considered problematic because the provisions weaken accountability for tax payments, create tax inequities, shield lodging activities from regulations, or generate confusion. The four categories are tax administration benefits, back-tax amnesty, confidentiality and information benefits, and miscellaneous.

The miscellaneous category is not used for substantive evaluation purposes. It is included to note the irony that although all the agreements provide benefits to third parties—Airbnb’s lodging operators and occupants—ten of these agreements include misleading language claiming there are no such third-party beneficiaries.

The presence of a provision in the agreement for a jurisdiction is indicated by a color-highlighted cell with a character inside. A different color family is used for each category. Within each category, there are three levels of shading. The darkest color with the upper case “X” indicates that the provision is a strong form of the language. The second darkest color with the lower case “x” indicates a lesser version of the provision, but still one that has a significant impact. The lightest color indicates the presence of a provision that is ambiguous or has a minor impact.

In terms of frequency of provisions, those involving tax administration are most often present in the agreements. Incomplete and/or inaccurate recitals and requiring audits to use anonymous data are in all the agreements. Blocking auditor access to Airbnb’s books and records, limiting audits of lodging operators and occupants, and exempting lodging operators from registration are the next most frequent provisions. Back-tax amnesty provisions are included 58% of the time. Confidentiality and information benefits are included 40% of the time.

To analyze the relative degree to which jurisdictions provide benefits to Airbnb and its lodging operators and occupants, we classify them by the number of categories for which each jurisdiction provides benefits. The classification is indicated by the number in the yellow-highlighted row at the bottom of the table. Level 1 indicates the jurisdiction provides benefits in one of the categories. Level 2 indicates the jurisdiction provides benefits in two categories, and level 3 denotes benefits provided in all categories. The higher the number, the worse the agreement’s impact on the public interest.

There are a few judgments involved in the classification. Palm Desert is grouped in Level 1 jurisdictions even though it offers a minor provision in a second category. Multnomah County provides benefits in three categories. However, its back-tax amnesty provision is of medium impact, its tax administrative benefits are less favorable to Airbnb than other agreements, and it does not compromise information exchange. These factors result in classifying Multnomah in Level 2.

⁹ Leslie Hook, “Airbnb looks to secure 700 tax deals with cities.”

Four items spread across various agreements warrant comment. First, the row labeled, “Defines the Tax Base,” refers to tax base interpretations and calculation procedures included in the Florida and Multnomah agreements. Their presence is noted because they are examples of provisions that constitute rules that should be proposed through rule-making processes.

Second, the “asterisk” for audit limits for lodging operators and occupants for Hillsborough County is the net result of (a) language restricting audits for operators and occupants as in other agreements counter-balanced by (b) added language in the agreement that county officials believe give them authority to audit operators and occupants when warranted.

Third, three of the agreements—Florida, Santa Fe and Multnomah—require tax officials to receive written consent from Airbnb before talking to the media about its agreements with Airbnb. This provision breaks the chain of command specified by law that runs from the agency through elected officials to the public and hands supervision of the agency over to Airbnb for media inquiries about the agreement.

Fourth, in Pinellas County, the agreement requires the tax agency to give notice to Airbnb that another public agency has requested information about Airbnb or its lodging operators. If the tax agency provides that notice, it may alert Airbnb and its lodging operators to a pending investigation or review by a regulatory agency. That notice could undermine the regulatory agency’s efforts. It seems questionable for tax officials to inform a private business of investigations by a separate public agency that may affect that business or its customers

Table 2. Problematic Provisions of Airbnb Agreements by Jurisdiction												
	California			Florida				Maryland	New Mexico		Oregon	
	Humboldt	Palm Desert	San Jose	FL + 22 Co's	Hillsborough	Pinellas	Polk	Montgomery	Santa Fe	Albuquerque	Portland	Washington
Tax Administration Benefits												
Incomplete/Inaccurate Recitals				X	X	X	X	X	X	X	X	X
Defines Elements of Tax Base												
Books & Records Excluded from Audits			X		X	X		X	X	X		
Audit Limits for Operators or Occupants		X				X		X	X	X		
Anonymous Data--Returns & Audits					X	X			X			
Audit/Assessment Limits--Certain Tax Periods												
No Operator Registration for Airbnb Trans.				X					X			
Back-Tax Amnesty												
Amnesty for Airbnb												
Amnesty for Operators & Occupants												
Confidentiality & Information Benefits												
Agreement Confidential				X								
Negotiations Confidential				X								
Notice of FOIA Requests-Agreement				X								
Notice/Consent for Media Discussions				X								
Returns Confidential--Separate from Law	X			X								
Exemption from Information Exchange	X			X								
Notice of Information Exchange												
Miscellaneous (Not Included in Category Count)												
No Third Party Beneficiaries	X	X	X		X	X	X	X	X	X		X
Problematic Categories Included in Agreement	2	1	1	2	1	3	1	3	3	2	2+	2

The subsections below evaluate these agreements collectively as a composite of provisions, which essentially means looking at a scenario of “maximum impact.” That is the necessary and reasonable result of wanting to consider all the major features that appear in any of the Airbnb agreements. The composite view is also justified and realistic because three of the twelve agreements substantially conform to the “maximum impact scenario” and represent all the issues raised by the agreements.

b. *Perplexing Structure and Scope of Agreements.* The Airbnb agreements have a perplexing and likely unprecedented structure in which Airbnb bargains for and secures extensive monetary, procedural and regulatory benefits for its customers—lodging operators and occupants—who do not sign the agreements. Many of these benefits hide the identity of operators from regulatory and law enforcement agencies. Nonetheless, the lodging operators and occupants commit no legally-binding performance to the tax agency and are not even known to the agency.

We have noted a limited instance of a non-signatory impact in voluntary disclosure agreements for pass-through entities. That exception arises from ownership relationships defined by statutory law, including laws on pass-through taxation. The substance involved in this exception is narrow and involves distributing the tax effect on a pass-through entity among the owners of the business. No new burden or benefit is created in total sum for the owners beyond the burden and benefit secured by the pass-through entity itself.

In contrast, there does not appear to be a clear basis in law for including Airbnb’s customers—local lodging operators and occupants—in a tax agreement signed only by Airbnb. There is no specific legal authority cited in these agreements for the tax agencies to structure an agreement that provides major benefits to non-signatory, local businesses. The scope of the benefits for Airbnb customers range beyond the benefits provided Airbnb in the agreements. The customer benefits are not governed by provisions of law and, in fact, often constitute exceptions to or exemptions from the law. The exceptions to law begin with suspending registration for tax purposes of these local lodging operators. Public registration is a centuries-old method fundamental to administering taxes, regulations and other laws. The benefits for Airbnb’s customers grow from there and significantly shield Airbnb’s lodging facilities from regulatory and law enforcement authorities.

The structure and scope of the Airbnb agreements raise a multitude of questions that should be the subject of vigorous policy and legal debate. Two questions that arise almost immediately that should give tax agencies pause about these agreements are the following:

- Is it proper for a tax agency to grant exclusive, wide-ranging benefits to local businesses in agreements that those businesses do not sign and to which they are not legally bound? And,
- Is it also proper for a tax agency to enter agreements that weaken, with respect to these local businesses, the implementation of laws administered by other agencies?

Special Note on Table 3: The remaining subsections below compare in detail specific features of the Airbnb and voluntary disclosure agreements. A useful reference for that discussion is Table 3 below, which summarizes key differences among the agreements.

Table 3. Comparison of Taxpayer Responsibilities and Benefits for Voluntary Disclosure Agreements and Airbnb Agreements			
Description	Taxpayers in Voluntary Disclosure Agreements	Airbnb in Airbnb Agreements	Operators and occupants in Airbnb Agreements
Taxability Facts			
Constitutional Nexus	Taxpayers are probably or clearly subject to state's jurisdiction.	Taxpayer is highly likely or clearly subject to state's jurisdiction.	Taxpayer is clearly subject to state's jurisdiction.
Statutory Applicability	Tax laws for which the disclosure is made apply to the taxpayer.	Lodging tax laws may or may not apply; legislation can remedy the issue.	Lodging tax laws apply to taxpayer—collection required above thresholds.
Taxability Conclusion: Taxpayers are equal or nearly equal in their taxability status on constitutional grounds. Where statutes do not apply to Airbnb, those statutes can be updated to apply. There is a strong case for tax agencies to treat these taxpayers similarly.			
Taxpayer Responsibilities			
Factual Representations	Must make a complete and accurate disclosure of facts, subject to verification.	Makes recitals of their own determination; not required to be complete and accurate; not subject to verification.	Taxpayer does not recite or disclose facts of any kind in the agreements.
Back-Tax Payments with Agreements (See related feature of "Back-Tax" Forgiveness in Tax Benefits section below.)	Taxpayers typically pay three years of prior taxes plus interest. Penalties forgiven. Harsher treatment may apply for taxes collected but unremitted.	No agreement requires Airbnb to make back-tax payments.	No agreement requires lodging operators or occupants to make back-tax payments.
Future Tax Compliance	Taxpayer must register for, timely file and pay future taxes, subject to full audit accountability to the state.	Taxpayer must register, file and make future payments, on favorable terms that do not require full accountability.	Taxpayers exempt from registering, filing and paying taxes on Airbnb bookings, but required for non-Airbnb rentals.
Legal Commitment to Agreement	Signs the agreement and must abide by its terms.	Signs the agreement and must abide by its terms.	Does not sign the agreement, but receives benefits from it.
Taxpayer Responsibilities Conclusion: The responsibilities borne by the taxpayer entering a voluntary disclosure agreement are huge in comparison to responsibilities borne by operators and occupants under the Airbnb agreements, even though their taxpayer circumstances are equal. In addition, the voluntary disclosure taxpayer bears responsibilities that are more extensive than Airbnb bears even though their constitutional circumstances are similar.			
Taxpayer Benefits			
Back-Tax Forgiveness	In cases where taxpayer was a non-filer and had nexus prior to the last three years, taxpayer benefits from tax forgiveness for periods prior to last three years. Example: If a taxpayer had nexus for five years, the earliest two years are forgiven—but taxes and interest are paid for the most recent three years.	In five agreements, Airbnb receives amnesty for back taxes, interest, or penalties. Most of the other agreements are silent on back-tax liabilities for Airbnb, and none require back-tax payments.	In seven agreements, operators and occupants receive amnesty for back taxes, interest, or penalties on Airbnb bookings only. Five split between those unclear about operators' back-tax liabilities for Airbnb bookings and those preserving rights to them. No back-tax payments are required.

Future Filing Exemption	No.	No.	Yes, for Airbnb transactions in all but one agreement. Secrecy allows avoidance of registering for other transactions.
Limits on or Exemptions from Audits.	No. Full accountability under audits applies.	Yes. Audits always limited to anonymous data; nearly always limited to returns and supporting documents for the returns; some agreements limit periods of audits and assessments.	Most agreements exempt operators and occupants from audits for transactions completed through the Airbnb platform for periods the agreement is effective.
Confidentiality of Agreement.	Yes, due to confidential and proprietary information, including information contrary to the taxpayer's interests.	Yes, many agreements include confidentiality clause despite no confidential or proprietary information being present.	Yes, many agreements include confidentiality clause despite no confidential or proprietary information being present.
Confidentiality of negotiations.	Yes	Yes.	Yes, despite operators not being agreement parties.
Limits on Information Exchange.	Only Initial disclosure of facts and identity is exempt from exchange with other public agencies. All future tax and identity information subject to exchange.	Five agreements limit or exempt information generated under the agreement from exchange with other public agencies, unless required by law.	Five agreements limit or exempt information generated under the agreement from exchange with other public agencies, unless required by law.
Confidentiality of Tax Information from Public Disclosure	Yes, to the extent confidentiality is required by law.	Yes. Some agreements provide broader confidentiality than law.	Yes. Some agreements provide broader confidentiality than law.
<p>Taxpayer Benefits Conclusion: The benefits enjoyed operators and occupants are huge compared to benefits received by voluntary disclosure taxpayers even though their circumstances are the same. The strictly tax-related provisions favor operators and occupants over the voluntary disclosure taxpayers, and the long-term secrecy shield for operators and occupants from compliance with a range of laws is a substantial, added advantage. The tax benefits enjoyed by Airbnb are significant as compared to the benefits received by voluntary disclosure taxpayers in terms of back-tax treatment. Airbnb's tax benefits are even more extensive if Airbnb takes advantage of their ability under the agreements to underreport and underpay taxes. Finally, Airbnb's benefits are huge in terms of a rising market share in the lodging industry arising from secrecy provisions that shield Airbnb operators and occupants from compliance with a range of laws.</p>			
<p>Overall Conclusion: For both burdens and benefits, Airbnb and its operators and occupants receive substantially more favorable treatment than do similarly situated taxpayers entering traditional voluntary disclosure agreements.</p>			

c. The Facts Not Established—A Failure of Basic Administrative Practice. The Airbnb agreements fail to establish complete and accurate facts about Airbnb, its lodging operators, and occupants necessary to making proper decisions concerning their tax treatment. Worse yet, tax agencies relinquish the power to determine relevant, true facts while the agreements are in effect. In doing so, these agencies fail, to an extraordinary degree, standards of sound administrative practice. Establishing facts in tax cases is a critical first step to ensuring that an agency applies the law correctly and equitably. Voluntary disclosure agreements do that job well. The Airbnb agreements do not.

The Airbnb agreements present Airbnb's "recitals," a statement of facts—but not a full disclosure of its business operations in the relevant jurisdiction. Unlike the taxpayer's disclosures in voluntary disclosure agreements, these recitals do not appear to include any information contrary to Airbnb's interests. Nor do they reveal proprietary information, which is typically necessary to understand the nature and extent of a company's business contacts with a state or locality. The recitals summarize largely public information about the Airbnb operations, much of which can be gleaned from their website. Airbnb's recitals often include a brief operational description of payment processing that appears to conform to standard practices for lodging transactions. In other cases, the recitals describe what Airbnb does not do in a jurisdiction or the limited nature of their activities in terms of what Airbnb "only" does.

Here are examples of some missing pieces in Airbnb recitals relevant to tax agency decisions on issues in the proposed agreements:

- The number of Airbnb's lodging operators and number of occupant/nights in the jurisdiction;
- Information about the number and scale of operators categorized by type (home-sharing vs. commercial style operations that are season-long, full-time or multi-unit in nature), by amount of rental revenues, frequency of rentals and size of facilities;
- Airbnb's engagement of contractors who provide photographic, translation and other services in various jurisdictions;¹⁰
- The fact that Airbnb serves as a negotiating agent on behalf of lodging operators and occupants to secure major benefits on their behalf in the agreements, and¹¹
- The identity of the lodging operators Airbnb proposes to receive benefits from the agreements so the agency can determine if there are prior tax violations, delinquencies or other circumstances that would disqualify the operators from those benefits.

The types of issues to which the information listed above is relevant include, but are not limited to:

- Whether Airbnb and its operators qualify for the favorable tax treatment sought;
- The amount of back-tax forgiveness and other benefits being granted to each;
- The extent of public health and safety, housing and other community issues that would be aggravated by maintaining secrecy of operators and suspending information sharing with other agencies, and
- The impact of the agreements on the ability of the agency to ensure proper collection of taxes by Airbnb or the lodging operators.

¹⁰ Airbnb's web site references services it provides through contractors. One reference to Airbnb contractors, for example, is located at: <https://www.airbnb.com/help/article/414/should-i-expect-to-receive-a-tax-form-from-airbnb?topic=248>.

¹¹ The benefits to lodging operators include, among others, back-tax amnesty; exemptions from registering for, reporting and paying current taxes; immunity from audits, and secrecy provisions that prevent the tax agency and other public agencies from knowing the identities of lodging operators and occupants. Airbnb's negotiating role for lodging operators is separate and distinct from the role it describes in its Terms of Services of being able to register and collect lodging taxes due on transactions booked through its web site.

The fact that agencies may have disregarded these issues in entering these agreements does not lessen the need for the agreements to have a complete and accurate disclosure of facts. To the contrary, establishing the full and true facts first is necessary to ensure that the tax agency consciously considers all relevant issues. Tax agencies should not have so readily agreed to the inadequate and superficial information that Airbnb has offered in its recitals of fact, but should have instead insisted on full disclosures of information.

The need for tax agencies to secure the identities of lodging operators deserves comment, considering Airbnb's focus on keeping the information secret.¹² It is necessary and reasonable for tax agencies to know operator identities because they are conducting business within their jurisdictions and may be subject to various taxes, including lodging taxes if they meet the applicable thresholds. Specifically, the agencies need to know operator identities to:

- Determine if there are any circumstances in a lodging operator's tax history and status that would disqualify the operator from tax benefits from the agreements;
- Collect applicable back taxes not forgiven under the agreement or due upon breach of the agreement;
- Ensure that operators are in compliance with relevant, future tax obligations,¹³ and
- Maintain an administrative process that enables cross-checking Airbnb's tax returns and payments against the lodging operators' records.

The latter item is comparable to dual registration by wholesalers and retailers for sales taxes, with wholesalers making sales without tax applied through use of a sale for resale certificate.

The items of fact omitted from Airbnb's agreements may simply be the tip of the iceberg. To secure full and true facts, tax agencies should also have insisted that Airbnb's representations be subject to verification by the agency. The agreements do not authorize agencies to check the facts Airbnb presents. Further, as will be discussed later in this report, the agreements effectively block agency access to Airbnb books and records—access necessary to check on the validity of the facts. Further, if found materially inaccurate or incomplete, Airbnb and/or its lodging operators should be subject to consequences, such as payment of back taxes and penalties and cancellation of other agreement benefits granted under the agreement. Thus, the agreements do not require Airbnb to be either accurate or complete in its statement of facts. Inexplicably, tax agencies surrender their authority to secure full and true facts about Airbnb operations. In doing so, the agencies cannot ensure the integrity of the agreement or equitable treatment of other taxpayers.

d. Accountability Lost: Airbnb Gains Control of Process—Operator Responsibility Disappears. The agreements require Airbnb to commit to collecting and reporting lodging taxes on a prospective basis for future tax periods. However, unlike all other taxpayers, including those entering traditional voluntary disclosure agreements, Airbnb is not required to meet regular

¹² Contrary to its negotiating posture, Airbnb's terms of service specifically authorize Airbnb to disclose the identities of lodging operators and occupants if Airbnb decides to collect lodging taxes on Airbnb bookings in a jurisdiction.

¹³ The Airbnb agreements provide that lodging operators are responsible for collecting and paying taxes, for back and future periods, on non-Airbnb transactions. Without the identity of the lodging operations, these provisions are an empty promise. Supplying operator identities is a reasonable requirement to ensure implementation of this agreement language.

standards of accountability to the tax agency for the amounts they collect from lodging occupants and then subsequently pay. The agreements do not guarantee that Airbnb will report and pay the correct amounts of tax, but instead allow it latitude in determining the amounts it will pay. Finally, the agreements largely relieve lodging operators that meet the thresholds for tax filing of their legal obligation to collect and pay lodging taxes.

A disclaimer is in order here. This subsection, and others that appear elsewhere, discuss provisions in the Airbnb agreements or features of Airbnb procedures that would allow Airbnb, if it chose to do so, to underreport or underpay taxes or otherwise abuse the tax system. Discussing what is possible under the agreements or company procedures does not in any manner suggest, imply or assert in any manner that Airbnb is, in fact, underreporting or underpaying taxes or engaging in improper or illegal activities of any kind. The analysis conducted here is aimed only at identifying the potential for problems to occur, but provides no insight into whether the problems are occurring.

The unusual and unprecedented provisions that diminish Airbnb's accountability for the taxes they remit include:

- Tax agencies are allowed under the agreements to audit Airbnb's tax returns and supporting documents (often qualified as documents "filed" with the tax agency), but not Airbnb's books and records—effectively blocking auditors from verifying the accuracy of its returns and payments.¹⁴
- Tax agencies are strictly limited to auditing only Airbnb-supplied anonymous transaction data that do not identify the lodging operators and their rental locations, making it possible for the data and the tax returns they generate to be fictional.
- Most tax agencies are also effectively prohibited from auditing lodging operators and occupants for Airbnb transactions during the periods when Airbnb assumes responsibility for collection and payment of the lodging taxes—thus blocking the use of operator or occupant records to verify the accuracy of Airbnb's returns and payments.

Tax agencies are essentially allowed to conduct audits of secondary information Airbnb constructs—tax returns, supporting documents and anonymous data—and that information may or may not balance with the actual transactions and taxes in the jurisdiction. Whether the constructed information represents fact or fiction could be only be determined by looking at Airbnb's full books and records, and that is blocked in these agreements. With permission to use anonymous data and to prepare schedules and returns based on that data, Airbnb has gained the ability to determine what it will pay in taxes. It has essentially wrested control of the tax process from the agencies and secured it for itself.

¹⁴ Tax agencies are typically authorized by law to audit the books and records of taxpayers to determine the accuracy of tax returns and payments. The Airbnb agreements do not reference audits of Airbnb's books and records, but instead being conducted "on the basis of returns and supporting documentation." If an argument is made that the language does not literally prohibit access to Airbnb's books and records, the rebuttal is two-fold. First, if that is not intent, why the absence of the standard reference to auditing books and records? Second, if tax auditors were to access Airbnb's books and records, they would likely discover the identities of lodging operators rendering moot Airbnb's provision requiring tax agencies to audit only anonymous data. The anonymous data provision confirms that conducting audits "on the basis of returns and supporting documentation" is designed to prevent access to Airbnb's books and records.

Airbnb does not gain enough control over the tax process to send zero dollars to the tax agencies. That would invite instant suspicion. But Airbnb does gain enough control that it could choose, if it decided to do so, to make a profit from tax manipulation with minimal risk of detection. Recall that the tax money involved here does not come from Airbnb's earnings. It comes from taxes paid by guests when they rent lodging. Under the agreements, Airbnb could charge guests the full amount, but send less to the tax agencies while pocketing the difference.

There is no evidence that Airbnb has engaged in this manipulation. The point is that there is a risk that it could occur. The best way to detect and deter this type of abuse is for auditors to have access to Airbnb's books and records, and that access does not occur under these agreements.

The agreements eliminate the clear responsibility of lodging operators, if they exceed filing thresholds, to collect and pay lodging taxes on Airbnb bookings. Operators are exempted from registering for, filing and paying taxes. Their identities are kept secret from tax and other public agencies through layers of measures including the anonymous data provisions. As discussed below, they are substantially immune from audits if a tax agency, by chance, did find them. These provisions not only lessen accountability for taxes on Airbnb bookings, but also make it more difficult for tax agencies to identify these operators to report and pay other taxes they owe. The first parties responsible under lodging tax laws for tax payments are effectively relieved of that responsibility by these agreements.

The language varies among the agreements regarding restrictions on tax agencies auditing lodging operators and occupants for Airbnb transactions. Several agreements provide that tax agencies may audit "hosts and guests" after the conclusion of an audit of Airbnb with "the matters unresolved." That language is likely ineffective in allowing audits of lodging operators because it sets up a Catch 22 situation. With tax audits limited to Airbnb's secondary data (returns, schedules and anonymous data), the audits may never produce a discrepancy or any issue to resolve whatsoever. Beginning with a file of anonymous data for the jurisdiction, Airbnb could construct supporting schedules and returns that balance completely to the anonymous data regardless of whether that data is true or false. Using its software expertise, Airbnb could keep these items in sync, ensuring that there are no unresolved audit issues. At that point, the language of the agreement blocks tax agencies from auditing the lodging operators and occupants or guests, which would otherwise serve as independent information to discover problems with the returns, schedules or data constructed by Airbnb. Thus, language authorizing "host and guest" audits after an "unresolved" Airbnb audit is meaningless, making lodging operators immune from audits.

Three (Humboldt, Taos and Washington Co.) of the agreements limit Airbnb audits and assessments to 12 months out of either a 48-month period (in two agreements) or a 36-month period (in one agreement). It is common practice for transaction taxes for tax auditors to sample a limited set of transactions to generate error rates and apply those rates to the full audit period to generate a complete assessment. That does not appear to be the case in these agreements. These agreements limit not only the audit but also the assessment to the 12-month period. The language suggests the data from the 12-month period would not be extrapolated to produce an assessment covering the entire 48-month or 36-month periods. That would eliminate assessments for 75% of the time for two of the agreements and 67% of the time for the other. For two agreements Airbnb could be consistently underreporting over a 48-month period, but it will be assessed for underreporting in only 12 of those months. In that case, Airbnb would get to keep 75% of an

improper gain from underreporting. The agreements are also silent on who gets to select the 12-month period: Airbnb, the tax agency, or both concurring.

The fractional audit and assessment language in these three agreements makes no sense. A fourth agreement (Polk) confirms this conclusion. That agreement also provides for audits and assessments limited to 12 months out of 36. However, it includes additional language that specifically allows the agency to project from the 12-month results to produce an assessment over the full 36 months, subject to Airbnb's discretionary choice to allow that extrapolation or require the agency to audit for the additional months. In other words, Airbnb can check to see if the extrapolation or the actual audit would yield a lesser payment and direct the final audit process based on that comparison. The absence of this extrapolation language from the other three agreements would appear to confirm that their assessments are limited to fractional time periods.

In contrast, taxpayers entering voluntary disclosure agreements remain subject to having their books and records examined by tax agencies. They are granted no exceptions, exemptions or immunity from what the law requires in terms of prospective tax reporting. In short, they remain fully accountable to the tax agency for the amounts they collect, report and pay. They do not gain control of the tax process, which remains in the custody of the tax agency as intended by the law.

e. Lessons from the VW "Dieselgate" Scandal. There may be some discussion over the conclusion that tax agencies will not be able to hold Airbnb properly accountable for the taxes it chooses to pay. That conclusion is based on the text of the agreements themselves. However, we have learned that Airbnb has offered at least one tax agency skeptical of the anonymous data a side agreement to assuage those concerns. That side agreement consists of the offer to allow the tax agency access to Airbnb's software system to test and observe its operation. At its discretion, the tax agency will be able to log on, initiate a lodging transaction and observe the transaction getting translated into anonymous data with ID numbers attached.¹⁵ The tax agency can see that the transaction it enters results in the correct amount of tax and gets properly recorded in the anonymous data system. What could go wrong here?

The answer is the same thing that allowed Volkswagen to cheat on its emissions testing for diesel cars. The EPA uses a "test and observe" system for auto emissions. Vehicles are hooked up to testing equipment and the emissions are measured. The problem is that Volkswagen programmed its diesel cars to know when they were being tested, so when the testing began a signal was sent to the engine's computer that turned on the car's full emissions control system, and the car passed the test. When the car was not being tested and observed, the engine's computer dialed back the emissions system to a lower, inadequate level of control.

The same thing might happen here. We assume that Airbnb likely does not open its software system simply to allow anyone to observe bookings being translated into anonymous data for tax reporting purposes. Rather, we assume that Airbnb created a special feature that allows an

¹⁵ This description of the test process for Airbnb transactions comes from an interview with Hillsborough County tax officials. As noted in Appendix A, the Hillsborough County Tax Collector, Doug Belden, has negotiated the best agreement among the twelve reviewed here. Any errors or misunderstandings concerning the test system are entirely my own. Any skepticism expressed here about the "test and observe" system does not subtract from the features of the Hillsborough agreement that represent improvements over other agreements.

authorized tax agency to open a window into Airbnb's software to view the data getting translated. To start the tax agency test, the software needs a signal to open the window. That signal to open the window into the software system would be comparable to the signal that the software in VW diesel cars recognized when they were hooked to emissions testing equipment—a signal that turned on the full emissions control equipment. The signal to open the tax agency's observation window into the Airbnb reservation/accounting system could also simultaneously signal Airbnb's system to activate a version of the software that translates booking transactions fully and accurately into anonymous data (or simulates that occurring). Once the tax agency, comforted by the observations, turns off the test and closes the observation window, the system could turn back on a different version of its software that skims off part of the guests' payments and records lower levels of lodging rent and tax in the anonymous data used only for tax reporting purposes (but not for financial accounting or management purposes).

The purpose of this discussion is not to suggest that Airbnb does or would program its software in this manner or engage in tax cheating. No such accusations are being made here. Instead, the purposes are only to describe:

- what is technologically possible,
- that what Airbnb has offered as a "fix" for objections to using anonymous data may not be a reliable "fix," and
- that an otherwise reputable multinational company has notoriously violated laws by using procedures and software structures analogous to what Airbnb appears to have proposed to a tax agency.

If the explanation of how the software might operate sounds like the equivalent of the old-fashioned "two sets of books—one for the tax people and one for everyone else," that is correct. Only in this case the separate books would be hidden inside sophisticated software that makes their discovery harder. However, that is exactly what the anonymous data provision in the Airbnb agreements invites—two sets of books. Whether Airbnb accepts that invitation is unknown. If problems were to arise with Airbnb's tax reporting, the tax agencies would need to recognize that they have helped create any such problems themselves by failing to preserve the ability to audit Airbnb's true books and records.

Relevant here is how West Virginia University scientists discovered the problem with VW diesel cars. They discovered the problems by developing equipment to measure emissions in real world conditions as the vehicles were being driven, bypassing any signals to the emission system that a test was occurring.¹⁶ They did not decode the software responsible for the deception. They discovered the actual problem by doing the equivalent of what tax auditors do: they looked at the actual "books and records" to find the truth of what was occurring. The lesson here is that a flaw in the Airbnb agreements is not simply the use of anonymous data but also the prohibition on auditor access to information necessary to complete a full and proper audit. If the West Virginia scientists were operating under the equivalent of the Airbnb agreements, they would not have been allowed to measure the vehicle emissions while the cars were being driven. Instead, they would have been left with the equivalent of examining data generated through the EPA testing protocols. That is a

¹⁶ See: <http://www.npr.org/2015/09/24/443053672/how-a-little-lab-in-west-virginia-caught-volkswagens-big-cheat> and https://en.wikipedia.org/wiki/Volkswagen_emissions_scandal.

fundamental risk for the public interest in the Airbnb agreements: the potential that false data could be created that tax auditors cannot compare against true, real world information.

f. Preferential Amnesty for Airbnb and Lodging Operators. As compared to the three years of back taxes plus interest typically required by voluntary disclosure agreements, several of the Airbnb agreements provide amnesty to lodging operators and many to Airbnb as well. The amnesty granted to either is overly generous compared to the standard voluntary disclosure agreement. That is especially true for lodging operators who have failed to comply, but receive amnesty without volunteering to collect taxes prospectively. Amnesty for Airbnb and lodging operators creates a risk that voluntary disclosure taxpayers will demand similar treatment, upsetting the careful balance that has made voluntary disclosure agreements a successful compliance tool. Amnesty granted to everyone substantially removes the incentive for non-compliant taxpayers to begin complying with tax laws.

Five of the agreements provide amnesty to Airbnb for all taxes, interest, penalties or other associated charges for all prior periods. Three agreements are silent on Airbnb's liability for taxes in prior periods, stating only that Airbnb will begin collecting and remitting as of the effective date of the agreement. Palm Desert and Montgomery Co. include language reserving rights of the parties to dispute claims, which implies either the existence of or potential for claims for prior periods. Hillsborough and Polk Counties explicitly preserves prior claims and do not release Airbnb of "existing claims, cause of action, or indebtedness." However, none of the Airbnb agreements specifically require three years of back-tax payments with interest as is the case for the typical voluntary disclosure agreements.

Seven of the agreements give complete amnesty to lodging operators and occupants from back taxes, interest and penalties on Airbnb bookings. Unlike voluntary disclosure agreements, none of the Airbnb agreements require lodging operators to pay any back-tax payments for prior non-compliance. In contrast, voluntary disclosure agreements—which deal with non-compliant taxpayers in similar circumstances—typically require the taxpayers to pay three years of back taxes with interest upon entering the agreements. Of course, the fact that there are no back-tax payments required of Airbnb lodging operators and occupants simply highlights the incredible defect of these agreements in providing benefits to parties who are not signatories and thus cannot be required to fulfill any responsibilities in exchange for benefits received.

The other five Airbnb agreements that do not grant amnesty vary regarding lodging operator and occupant liability for taxes in prior periods. They range from being (a) silent to (b) unclear to (c) attempting to preserve those liabilities. Since none of these agreements provide any tools for collecting these taxes from operators or occupants, the language is largely meaningless.

Granting lodging operators and occupants an amnesty as seven of the agreements do is perplexing given the severe penalties tax laws typically impose on non-compliant taxpayers who have previously failed to file returns. For such taxpayers, there is often no statute of limitations. That means taxpayers who have failed to file returns can be required, if discovered by tax authorities, to pay taxes, interest and penalties for as long as the taxpayer engaged in taxable activities and the amount of such taxes can be reasonably estimated. Granting amnesty to operators and occupants who have failed to file and pay taxes is a huge injustice to any non-filing taxpayer who has been required to pay extensive back taxes, interest and penalties for non-filing. More importantly, granting amnesty to non-filers undermines the incentives for non-compliance with

taxes generally. If tax authorities will not require any back taxes, interest or penalties for failing to file and pay, why should a taxpayer ever begin paying a tax?

g. Multiple Layers of Secrecy. The Airbnb agreements are startling in terms of the degree to which they construct a shield of secrecy protecting lodging operators and occupants from becoming known to local authorities, especially those responsible for local regulations and law enforcement. The extensive secrecy of these agreements contrasts with the very limited provision in voluntary disclosure agreements that temporarily defers the sharing of the identity of a taxpayer with other agencies until the taxpayer begins filing tax returns.

Secrecy for lodging operators begins even before there are agreements because of the way Airbnb designs its website. It does not identify the address of a property prior to a guest booking a transaction. A 2015 memo from the Humboldt County (CA) Treasurer-Tax Collector to the County Supervisors noted that the Airbnb platform makes it nearly impossible to know the locations of the rentals, thus creating a tax collection problem. He stated, "Not knowing the location of the rentals facilitated by Airbnb makes collection efforts unreasonably difficult and too costly to collect."¹⁷ With tax collection problems being created by Airbnb's secrecy practices, the tax collector reported he asked Airbnb to help solve the tax collection issue. Airbnb responded, of course, with a version of its tax collection agreement that preserves that secrecy and provides many other benefits to its lodging operators and occupants.

Because secrecy plays a central role in the issues surrounding Airbnb, we summarize in Table 4 the secrecy provisions that run through the Airbnb agreements and discuss them in some detail here. These secrecy provisions are redundant and only a few are necessary in any agreement to achieve a strong barrier to public authorities discovering the identity of lodging operators.

Table 4. Secrecy Provisions in Airbnb Agreements

Provisions	Number of Agreements	For Lodging Operators	For Airbnb
Airbnb Website—Operator Secrecy	Everywhere ¹	Yes	N/A
Operator Identity & Facts Hidden	12	Yes	N/A
Airbnb Facts Incomplete	12	N/A	Yes
Registration Exemption	9	Yes	No
Audit Exemption	9-11 ²	Yes	No, but limits
Airbnb Books & Records Off-limits in Audits	11	Yes	Yes
Anonymous Data for Audits	12	Yes	Yes
Return Information Confidential	4-6 ³	Yes	Yes
Information Exchange Blocked	5	Yes	Yes
Agreement Confidential	6	Yes	Yes
Negotiations Confidential	6	Yes	Yes

¹Applies everywhere Airbnb operates. Website does not disclose rental addresses prior to booking.

²Language varies in agreements, producing variable interpretations of affected agreements.

³Language varies in agreements, producing variable interpretations of affected agreements. Laws in jurisdictions provide for return confidentiality, but on different terms than stated in agreements.

¹⁷ John Bartholomew, Humboldt County Treasurer-Tax Collector, Memorandum to Board of Supervisors, "Transient Occupancy Tax and Airbnb Inc. Compliance with County Ordinances," July 17, 2015, p 1.

The Humboldt County Treasurer was correct. The problem of lodging operator secrecy originates in Airbnb's software design that does not disclose an operator address until a booking transaction is made. The consequence, in the past at least, has been that states and localities faced high costs to identify the lodging operators in the absence of ready access to the addresses.¹⁸ Astonishingly, Airbnb is successful in leveraging the tax problem it created into legal agreements that provide a heavy shield of secrecy preventing public agencies from knowing who is conducting lodging businesses in their jurisdictions.

After the website, the first layer of secrecy for lodging operators arises from the nature of the recitals of facts. If the recitals of facts were true disclosures, as they are in the voluntary disclosure agreements, tax agencies would require Airbnb to include a list or electronic record of lodging operators in the applicable jurisdictions. That would be especially appropriate given all the benefits that the agreements provide to the non-signatory lodging operators. However, the recitals unfortunately are not true disclosures, and all the agreements fail to identify the lodging operators who receive the agreement's benefits. Further, as to the disclosure of Airbnb's operations in states, the recitals of facts are incomplete and not fully subject to verification because of the limits on tax agencies auditing Airbnb's books and records.

The second layer of secrecy involves twin provisions that exempt lodging operators from registering and/or being audited for Airbnb transactions. As noted earlier, governments historically have used public registration to administer taxes, regulation and law enforcement activities. Not requiring local lodging operators to register publicly is a radical departure from established practices of public administration. In terms of taxation, we have noted the impact of these provisions on eliminating operator records as a cross-check on Airbnb's reporting and reduced accountability by the operators themselves for collecting and paying lodging taxes they may continue to owe. Beyond that, the absence of operator registration also reduces the ability of non-tax regulatory and law enforcement agencies to identify and ensure that lodging operators are in compliance with a range of non-tax laws. A few agreements retain these lodging operator registration and audit requirements, most do not.

The third layer of secrecy involves the limits in the agreements on Airbnb audits. There are two parts to this layer as well. One provision prevents auditors from reaching past Airbnb's tax returns and supporting schedules to examining Airbnb's books and records where they could, among other information, secure the identity of lodging operators. The second provision in this layer is the requirement that auditors use only anonymous data for their audits, further shielding the identity of lodging operators and occupants. These provisions are highly unusual and significantly reduce Airbnb's accountability to tax authorities. The anonymous data provision is included in all agreements, and the limit on accessing Airbnb's books and records is in all save one.

The fourth layer of secrecy would seem routine and involves language in the agreements requiring confidentiality of return information. That is a frequent provision in law in any event. However, the language in the agreements does not appear to follow at least some of the laws on the subject. The agreement language is broadly stated and could create conflicts with the law in individual jurisdictions. Further, the return confidentiality language in the agreements fails to distinguish carefully between prohibited disclosure to the public, but allowable disclosure for

¹⁸ This set of facts may be changing with advent of software services that claim to be able to identify Airbnb lodging operators. We will discuss those services in Section E of this report.

official purposes to other public agencies. The presence of this language appears to be a source of confusion and a possible effort to create a separate basis for confidentiality claims.

The fifth layer of secrecy is unusual because it involves an agreement by the tax agency to not exchange information about Airbnb, lodging operators and occupants with other public agencies for official purposes even though the agencies are authorized to receive that information. Exemption of the agreement and any taxpayer return and audit information from being exchanged with other public agencies through the normal network of information sharing laws and agreements. This layer of secrecy helps shield in an unprecedented way lodging operators and occupants from being asked to comply with a range of state and local laws and regulations, such as zoning and occupancy standards, and law enforcement oversight.

Some agreements add insult to injury regarding information exchange with other agencies by preventing the sharing of the agreement itself with other public agencies. The effect of this restriction is to keep secret from those agencies the fact that the tax agency is withholding from them information about Airbnb, its lodging operators and occupants.

There are auxiliary provisions in some of the agreements related to the secrecy provisions. They include a requirement in several agreements for Airbnb to be notified in advance of freedom of information or public records requests concerning the agreement. Three agreements require advanced notice and consent by Airbnb before the tax agency officials respond to media requests concerning the agreement. Another agreement requires notice in advance to Airbnb of any information requests from other public agencies concerning the agreements.

The extensive shield of secrecy from tax and regulatory laws has obvious economic value to the lodging operators and to Airbnb, if in no other way than facilitating the conduct of lodging businesses in areas prohibited by zoning laws, occupancy standards, and building or fire codes. The Airbnb agreements that include these provisions enable Airbnb lodging operators who operate any illegal lodging facilities in the applicable jurisdictions to do so without receiving the necessary approvals from state or local authorities. Any such facilities that operate illegally, nonetheless, expand Airbnb's revenue and market share.

There is nothing in the voluntary disclosure agreements that compares to these secrecy benefits in the Airbnb agreement other than possibly the tax agency keeping confidential the initial disclosure of culpable facts by the taxpayer. The taxpayer under a voluntary disclosure agreement must register and pay taxes both prospectively and for three prior years. The voluntary disclosure taxpayer is fully subject to audits and must provide access to their books and records, without exception, so that the tax agency can determine if the tax payments were properly made. Beyond any general confidentiality from public disclosure enjoyed by all taxpayers, there is no extra secrecy or anonymity provided to voluntary disclosure taxpayers. Importantly, there are no exclusions from sharing the taxpayer's tax return and audit information with other public agencies. The voluntary disclosure agreements do not shield taxpayers over the long term from complying with any tax or regulatory laws.

h. Unjustified Confidentiality of Airbnb Agreements. Finally, some of the most curious provisions are those that seek to make the agreement and its negotiations confidential in five of the twelve agreements, all of which are now publicly released. Secrecy for the agreement is asserted

even though there does not appear to be any confidential or proprietary information in the now-public agreements.

The evidence that there is nothing confidential or proprietary in these agreements comes from the release of the twelve agreements described and analyzed in this report. Collectively, these twelve agreements include all the variations of content covered here, including the various forms of the recitals of facts by Airbnb. In terms of their original status, seven of the agreements do not include a confidentiality clause for the agreement itself. Three of these are from California, which has strong open records and open meeting laws. The California agreements appear to have been posted publicly prior to public hearings and meetings during their approval by authorities there. The content of the California agreements, including facts about Airbnb, is not significantly different from other agreements with language asserting their confidentiality. If these agreements published in California contained proprietary or confidential information, steps would have needed to be taken to protect that information from disclosure. The fact that no such steps were taken confirms the absence of confidential or proprietary information in those agreements. Similar public processes may also have taken place in some of the other states.

For five other agreements that are publicly released, language is present which asserts the agreement is confidential. The tax agencies apparently reviewed their agreements and realized that there is no confidential or proprietary information or anything else in the agreements that justifies that they be kept secret. The release of these documents without redactions for taxpayer facts or other sensitive information is proof that there is nothing in these agreements that justifies confidentiality for the documents.

In contrast, voluntary disclosure agreements are confidential because they contain confidential taxpayer information and proprietary information, including information that is otherwise contrary to the interests of the taxpayer. It is essential to understand that voluntary disclosure do not include, unlike Airbnb agreements, secret language on policy. In further contrast to Airbnb agreements, the policies involved in voluntary disclosure agreements are typically publicly known and embodied in rules, laws or both. There have been substantial opportunities for the public to participate in the decisions to offer voluntary disclosure agreements. The presence of that confidential information in voluntary disclosure agreements—and the absence of policy content—justifies those agreements being held confidential by tax agencies.

i. Summary of Comparisons of Agreements. The Airbnb agreements provide Airbnb and its lodging operators and occupants huge benefits as compared to those received by taxpayers entering voluntary disclosure agreements.

Airbnb receives amnesty for back-tax payments in exchange for permission to collect, report and pay future lodging taxes under lax standards of accountability. The agreements enable Airbnb to define the tax audit process in terms that undermine its independence and effectiveness. In general, Airbnb gains substantial latitude in determining the amount of taxes it will remit to tax agencies. Most importantly, it secures a shield of secrecy for its lodging operators that creates a de facto tax and regulatory haven for them. Overall, the audit, reporting and secrecy provisions in the Airbnb agreements extraordinarily intrude into and undermine the normal tax administrative processes to the point of raising legal and constitutional questions explored in Section C.

In comparison, voluntary disclosure agreements typically require taxpayers to pay three years of back taxes with interest and to adhere to the same standards of accountability as other taxpayers. Disclosure agreements do not provide any benefits to the taxpayer's customers. They also do not intrude into, undermine or disrupt standard tax administrative processes.

Airbnb lodging operators and occupants are not even parties to the Airbnb agreements, yet they receive benefits from them. Lodging operators do not identify themselves to tax agencies, do not disclose culpable facts, do not commit to any level of tax compliance or agree to be legally bound by any of the agreements' terms. Voluntary disclosure taxpayers are required to fulfill all these responsibilities. Shockingly, in exchange for no commitments by lodging operators and occupants, all the agreements provide benefits to them.¹⁹ Most of the agreements give substantially greater benefits to lodging operators and occupants than states provide to voluntary disclosure taxpayers. Beyond amnesty, agreements provide exemptions from registrations and tax reporting, immunity from audits and multiple layers of secrecy benefits to lodging operators and occupants—again without any of them requesting the benefits or committing any performance in exchange. These provisions can best be viewed as an outright gift by the tax agency especially to the lodging operators.

The great disparity in the tax treatment of (a) Airbnb, its lodging operators and occupants as compared to (b) voluntary disclosure taxpayers is inequitable and cannot be justified. On tax equity grounds alone, the Airbnb agreements should be rejected. Beyond that, Airbnb agreements undermine compliance with regulatory laws. Indeed, the agreements with their multiple secrecy provisions assist the conversion of residential property into commercial-style short term rentals in violation of local zoning and housing laws. These broader impacts should further disqualify Airbnb agreements from consideration.

Tax agencies would do well to recall that they do not administer tax laws in a vacuum. They depend on information they secure from other agencies concerning general business registrations, professional and occupational licensing, unemployment and worker's compensation records, building permits and more. Other public agencies support the tax system. Thus, it is disturbing to find provisions in these agreements that cut off the normal flow of information from tax agencies to other public agencies for official purposes—and for no apparent reason other than Airbnb seeks to disrupt that flow. Worse yet, the language of some agreements appears to keep even the fact of this disruption of the flow of Airbnb-related information secret from those other agencies. Suspending exchange of information processes at the request of a taxpayer risks reducing cooperation by other agencies with the tax system to the detriment of effective tax administration over time.

5. Why All the Secrecy in the Airbnb Agreements?

A major question remains as to why the extensive layers of the secrecy shield for lodging operators and occupants are included in the agreements given that the operators and occupants are not parties to them. The secrecy shield for lodging operators and occupants happens because Airbnb leverages its pledge to collect future lodging taxes—even if that collection is flawed—into secrecy concessions for its customers and affiliates. Typical voluntary disclosure agreements do not

¹⁹ Even the best agreements from a tax equity standpoint provide Airbnb lodging operators and occupants with the benefit of hiding their identities, addresses and tax data from the taxing agencies through the anonymous data provision.

have clauses that state, in effect, what many of the Airbnb agreements say:

If Taxpayer A collects and pays taxes in the future, the Tax Agency will grant Taxpayer A's Customers amnesty for their back taxes and secrecy for their identities and localities. If despite agreeing to not access any direct records that can identify the Customers, the Tax Agency happens to learn who the Customers are, the Tax Agency will not share information about the Customers with other Public Agencies that would normally receive it for official purposes under exchange agreements. Further, the Tax Agency will keep this agreement and its negotiations secret so that the other Public Agencies do not even know that potential information about the Customers will be withheld from them.

Airbnb's leveraging of its commitments to make tax payments into benefits for its customers is a key difference between the Airbnb and voluntary disclosure agreements. Voluntary disclosure taxpayers do not leverage their agreement to comply with the tax laws into benefits for their customers, but Airbnb does. Why is that the case?

The answer may well be that there is a self-limiting flaw in Airbnb's business model, popularized in its advertising, that it is simply trying to help people earn a little extra income by renting out some spare space in their homes to other people. There is an inherent limit in the number of people who (a) have extra space in their homes and (b) are willing to rent that space out to strangers. For Airbnb to grow, they need to recruit as many full-time, more than half-time or multiple unit (2 or more units) operators as possible. These facilities are essentially commercial, instead, occasional lodging operations. They may be seen within neighborhoods as converting residential housing into *de facto* hotels, and replacing neighbors with a transient population. Many of these commercial-style operations may violate occupancy standards, building and fire codes, or zoning regulations. These operators would not want to be identified to public agencies. If they can also be relieved of filing lodging taxes or declaring their rental income on income returns, that is all to the good as well. So, Airbnb "purchases" from tax agencies a shield of secrecy that they "resell" to lodging operators to attract more owners or long-term lessees of residential property to conduct Airbnb lodging businesses.

The shield of secrecy from taxes and regulations likely has less significance for home-sharing—the occasional lodging operator renting out a room a few nights a month. Home-sharing is often allowable under zoning and housing laws, so also does not need to be hidden. Secrecy has more significance and appeal for those who are renting lodging continuously through vacation periods or year-round and for multiple unit operations. These are commercial operations where the owner does not live in the property. These operations more likely run afoul of zoning or housing laws, and thus hiding their location is quite valuable to their owners. Otherwise, local authorities may shut them down. There is also more rental income at stake here than with home-sharing. Commercial-style operations currently represent Airbnb's greatest revenue growth.²⁰

Airbnb is competing with traditional lodging companies for market share in the short-term rental market. It is also competing with people for living space. Airbnb cannot maximize its growth and value unless it converts existing owner-occupied and long-term rental housing, including apartments, into commercial-style short-term lodging rentals. Airbnb's drive for growth and market share translates into achieving these conversions from long-term residences to short-term

²⁰ O'Neill and Ouyang, "From Air Mattresses to Unregulated Business."

rentals as quickly as possible. These conversions would certainly be slowed and many would not occur if they were required to undergo review to ensure their consistency with zoning, occupancy, and building and fire codes before they occur. Instead of supporting any such local reviews, Airbnb has opposed requirements for their lodging operators to register as lodging businesses. Further, it has designed these tax agreements as vehicles for gaining credit for collecting taxes from guests, while constructing a shield of secrecy over the identity and location of local lodging facilities to avoid applicable regulations. Airbnb has even acknowledged that these agreements are important to reducing its "regulatory risk."²¹ The shield of secrecy facilitates unimpeded and often illegal conversions of residential property into commercial-style lodging facilities. Unfortunately, by entering these agreements, tax agencies become unwitting partners with Airbnb in enabling this process.

²¹ Leslie Hook, "Airbnb looks to secure 700 tax deals with cities."

Section C

The Public Impact of the Airbnb Agreements

The prior section describes and analyzes in detail the features of Airbnb tax agreements in contrast to the voluntary disclosure agreements that are the “gold standard” of agreements to encourage proper compliance with state tax laws. This section pulls together the prior analysis and adds to it in relevant and significant ways. The objective here is to produce conclusions in three broad areas of public policy: tax policy, democratic governance and undermining the rule of law. The tax policy summary here is relatively brief because much of the material has been discussed in detail in Section B. The review of democratic governance issues is more detailed because it was less well developed previously. The impact of the Airbnb agreements on the rule of law is the outcome of the issues developed in the tax policy and democratic governance discussions.

1. Tax Policy: Fairness and a Level Playing Field

In terms of fairness, we will summarize findings concerning the Airbnb agreements in three areas:

1. Do the agreements treat compliant taxpayers fairly in comparison to Airbnb and Airbnb’s lodging operators and occupants?
2. Do the agreements establish a level playing field between traditional lodging businesses and Airbnb and Airbnb’s lodging operators and occupants with respect to both taxes and regulations?
3. Is it fair and reasonable to subject ordinary residents seeking a place to live to face competition for houses and apartments from illegal commercial lodging operations?

a. Unequal Treatment of Compliant Taxpayers Compared to Airbnb and Its Operators.

The agreements are unfair to taxpayers who file and pay their taxes diligently. They are unfair as well to newly compliant taxpayers who have entered traditional voluntary disclosure agreements, paying three years of back taxes with interest and remaining fully accountable for future taxes. The agreements provide overly generous benefits to lodging operators and occupants in terms of complete forgiveness for unpaid back taxes on Airbnb transactions, an exemption from any future tax responsibilities on those transactions (even from filing returns as a check on Airbnb’s filings) and secrecy provisions that shield lodging operators from proper compliance with any regulatory laws applying to their short-term rental business. There is no doubt that lodging operators, if they meet filing thresholds, should be collecting and paying lodging taxes. If they fail to do so they should be required to pay back taxes along with appropriate sanctions. Forgiving back taxes completely removes the incentive that any non-complaint taxpayer would have to come into compliance. Being allowed to avoid applicable non-tax regulations and laws is unacceptable and inappropriate in a tax agreement.

Airbnb itself may or may not have been required to have collected and paid taxes for prior periods due to outdated statutes, which should be corrected as a priority over any agreements. However, the agreements still grant overly generous treatment to Airbnb because, due to a lack of adequate controls and accountability, it can effectively determine the amount of future taxes they will collect and pay. The agreements could even allow Airbnb, if it chose to do so, to make a profit on tax collections, charging one amount to guests and sending a lesser amount to tax authorities with no real risk of discovery. Other taxpayers do not get to set their own taxes and avoid accountability for what they report and pay. Further, Airbnb benefits even more from the secrecy

provisions for their lodging operators because it expands their number of lodging operators, revenues and market share. This author is unaware of any other business taxpayer receiving comparable preferential regulatory secrecy for their customers. Again, providing a de facto shield from regulatory enforcement is inappropriate in a tax agreement.

b. *Unfair Competition for Traditional Lodging Facilities.* The agreements allow Airbnb lodging to compete unfairly with traditional hotels, thus failing to establish a level playing field for competition between the two. The unjustified advantages gained by Airbnb lodging include forgiveness of back taxes on Airbnb lodging with traditional hotels that have been collecting and paying taxes. Further, the advantages include granting Airbnb the ability to determine how much it will collect and pay in future lodging taxes, extending even to the ability to make a profit off the collection if it chooses to do. Finally, the agreements through the secrecy provisions for lodging operators create a regulatory haven for Airbnb lodging when traditional hotels are required to comply with all laws and rules applicable to lodging facilities. The agreements, in economic terms, discriminate against traditional hotels and in favor of Airbnb lodging.

c. *Unfair Competition for Community Residents.* Society provides through zoning and other policies residential neighborhoods as places of private repose and relaxation. They are places where people can raise their families, send their children to school, and care for each other in times of need. They are where people engage in community and civic activities and exercise their political and religious rights as citizens. For these and other worthwhile purposes, society typically seeks to ensure the stability of residential areas. Competition for houses and apartments is structured to proceed among citizens who bring personal resources to securing a place to live. When long-term residences are converted, quite illegally, into *de facto* commercial lodging properties (beyond occasional home-sharing), the competition for housing and apartments is manifestly unfair to committed citizens. That is because commercial lodging facilities can finance the purchase or long-term lease of residences through the anticipated future stream of revenue from short-term rentals. Citizens are limited to their own personal income and assets. The anticipated future stream of lodging revenues will often swamp the personal resources of ordinary citizens. Increasingly, residential neighborhoods intended for citizens will be placed out of their reach. Over time, neighborhoods will cease to be residential despite being designated for that purpose by local zoning and housing laws. It is fundamentally unfair to allow technology and private capital to illegally undermine local laws on land use planning and regulation designed to protect the character and integrity of residential neighborhoods. No tax agency should enter tax agreements that aid and abet that process.

2. Democratic Governance: Integrity, Public Transparency and Improper Favoritism

In terms of achieving high standards of quality in public administration and governance, will summarize the agreements in terms of these questions:

1. Do the agreements meet standards of integrity?
2. Do the agreements support transparency and public participation in decision-making?
3. Do the agreements violate agency authority through favoritism?

a. *Integrity.* The agreements have an overly flexible relationship to the truth, discard procedures designed to discover the truth, and condone potential behavior that lacks integrity.

Consider first some simple matters of fact. The recital of facts by Airbnb are certainly incomplete and may be inaccurate, but there is no mechanism in the agreements for verifying the true facts. Ten of the agreements state that there are no third-party beneficiaries, but they each grant benefits to the non-signatory Airbnb lodging operators and occupants who are, in fact, third-party beneficiaries.

Second, the agreements in several different ways claim to be one thing, but in truth are something else. The agreements claim to be about taxes, but their real purpose appears to be the construction of a shield of secrecy for Airbnb lodging operators that protects them from complying with various land use and housing laws to the economic benefit of the lodging operators and Airbnb itself. The agreements superficially appear to be tax settlements, but they (a) do not cite any legal authority confirming the nature and basis of the agreements, (b) do not generally arise out of a tax dispute that justify settlements, and (c) are not tax settlements at all, but disguised rules tailored to benefit Airbnb and its customers. Finally, several of the documents claim to be confidential, but do not contain even one iota of confidential and proprietary information. Upon review these documents labeled “confidential” have been released publicly because, in truth, they were never.

Third, the agreements contain provisions that condone potential behavior that lacks integrity. The use of anonymous data and the bar on examining books and records invite Airbnb, if it were to choose to do so, to underreport and underpay taxes. These are “collection agreements” that don’t guarantee proper collection. The shield of secrecy for lodging operators put in place by many of these agreements is designed to facilitate non-compliance with a range of laws. The worst of these agreements are a virtual handbook for bad behavior.

Finally, there is a major feature of most of the agreements that strains credibility. It is difficult to understand how it is possible for most of the agreements to offer substantial tax and regulatory benefits to Airbnb lodging operators and occupants who are not parties to them. Can tax agencies give special gifts to an entire class of unknown businesses or individuals who commit to no performance in return and whose only distinctive, but common feature is that they are customers of one business? Can this really be true?

Tax agreements should have integrity. They not should get the facts wrong from the beginning, at least without the means for their correction. They should not claim to be one thing, but actually do something else—in this case something else in many different ways. They should not open a pathway to bad behavior. They should not contain provisions that are not credible. Yet that is what many of these agreements do.

b. Transparency and Public Participation. We have already established that none of the twelve agreements contain any confidential information, even though five of them contain a provision stating that the agreement is confidential. Fortunately, the tax agencies for these five agreements, upon review, concluded that the agreements were public documents and should be released despite the confidentiality provision. That is also likely to be the case with a larger number of the agreements around the nation that still are being withheld from public view. Airbnb has been campaigning from state to state and city to city with similar language. That language contains no confidential information about Airbnb, but to the contrary contains policy language granting amnesty; establishing rules for administration and auditing; suspending information exchange processes with other public agencies, and endowing benefits to a general class of unidentified taxpayers who are not signatories to the agreement. That information, most assuredly,

under any reasonable reading of open records laws should and must be released to the public. In the few cases where an agency may have included specific confidential tax return information, investigation results or proprietary facts, that information can be redacted, and the remainder of the language that constitutes policy, rules of administrative practice, affects other agencies and grants benefits to a taxpayer class should be publicly available. Given the content of the twelve agreements released to date, there is no excuse for agencies to fail to release the remainder of the agreements, provided any truly confidential information, if it occurs, is redacted.

The policy substance of the agreements also requires them to be adopted as rules. How can a document that provides new terms for tax amnesty, establishes administrative and audit procedures, denies access by other agencies to otherwise standard tax information, and creates a class of taxpayers to receive a flood of tax and regulatory benefits be anything other than a rule? If the substantive content is not enough, the societal impact of this content on tax equity, market competition, the rule of law, the integrity of tax administration, and the quality of life and affordability of housing in residential neighborhoods demands that these provisions be proposed as rules. Agencies or local authorities should conduct public hearings, provide for written comments and consider all input before any of these provisions are adopted as rules and translated into agreements. For any existing agreements that have not been subject to public participation, agencies or local authorities should undertake appropriate remedial action and decision-making.

c. Do the Agreements Violate Agency Authority through Favoritism? There are at least three specific areas in the agreements where tax agencies, legislative oversight authorities and the public should carefully consider questions of whether the actions taken under the agreements contravene legal authority. The questions involve whether the law authorizes the granting of favorable treatment to Airbnb or its lodging operators and occupants that is not available to other taxpayers. Of course, the answers to these questions will vary among states and localities depending on state constitutions and applicable state and local laws.

The three areas involve (a) tax benefits, especially back-tax forgiveness and exemptions from tax registration, reporting and audits, provided to Airbnb's lodging operators, (b) exempting Airbnb information from information sharing arrangements and (c) improperly ceding control of taxing authority to Airbnb.

The first question involves whether agencies have authority to provide Airbnb lodging operators and occupants with benefits, especially back-tax amnesty, through agreements to which the operators and occupants are not a party. Typically, back-tax relief is only given to parties directly through agreements in which the parties participate and commit to a level of performance justifying whatever relief is given. Is it possible to give relief outside a direct agreement? If the answer is that the relief is justified because Airbnb commits to future collection, why then aren't customers of other taxpayers who enter voluntary disclosure agreements and agree to collect also given back-tax relief? Why do Airbnb's customers get relief when Taxpayer X's customers do not? Is there another equal treatment issue here in that the standard back-tax relief is to require three prior years of taxes with interest? In the Airbnb agreements, a complete amnesty for prior years is provided. What is the rationale and authority for granting customer relief at all? If relief is granted to Airbnb's operators, is there a way to structure it to require three years of back taxes with interest instead of no back taxes at all?

Parallel questions can be raised about the exemption of lodging operators from tax registration, reporting and audits.

The second area of questions is whether tax agencies have the authority to selectively withhold information secured from one taxpayer from other public agencies with which it exchanges information for official purposes. Five of the agreements have some type of language limiting the exchange of information with other agencies, with one of the agreements being less restrictive than the others.²² The language varies among the agreements, and the underlying exchange of information laws and agreements also, of course, vary. Thus, it is difficult to analyze these provisions. However, the overall thrust is to prohibit exchanges of information unless they are required by law or are for purposes of tax collection (including legal proceedings related to tax collection), with the tax collection in some agreements limited to only the lodging taxes that are the subject of the agreement. There is the strong potential for confusion over what “required by law” means, especially in the cases where the law permits tax agencies to exchange information with other agencies and have entered exchange of information agreements which require those exchanges to occur. While that is an important complication, it is not the focus of the discussion here.

The focus here is on the question of whether agencies, under exchange of information laws and agreements, can selectively withhold information from one taxpayer source while supplying information from all other taxpayer sources. Do the agreements to exchange information with other public agencies allow information to be withheld purely based on taxpayer identity? What is the rational basis for tax agencies to not provide information that originates with Airbnb as opposed to information from all other taxpayers? Is the withholding of Airbnb information an arbitrary, preferential act? If these or similar questions cannot be answered satisfactorily, then the tax agencies need to consider whether they have exceeded their authority in agreeing to the limits on exchange of information with other agencies.

The third question is whether tax agencies have ceded control to Airbnb to potentially determine the amount of taxes it will pay. That ceding of control occurs because of the egregious audit limits that bar access by tax agencies to Airbnb books and records and that require the use of anonymous data. Those audit limits effectively allow Airbnb to decide what it will pay in taxes because underpayments would not be discovered. Two types of provisions come into play. Many states have “no surrender of tax authority” clauses in their state constitutions. Montana’s clause reads as follows: “Article VIII—Revenue and Finance, Section 2. Tax power inalienable. The power to tax shall never be surrendered, suspended, or contracted away.” In addition, state and/or local governments may define the duties and authority of their tax agencies to include being responsible for taking actions to ensure that taxpayers comply with the laws of the state or local governments. Such statutes imply that the agencies should not take any actions that allow taxpayers to fail to comply with the laws. The specific question that needs to be explored, if such constitutional and statutory provisions are present, would be, “Does ceding effective control of taxes to be paid to Airbnb in these agreements constitute (a) a ‘surrender’ or ‘contracting away’ of the state’s taxing authority to a private party or (b) an action knowingly taken by a tax agency to allow a taxpayer to

²² The State of Florida, Pinellas County, Montgomery County, and Santa Fe agreements prohibit exchanges of information with public agencies beyond certain allowable exchanges. Humboldt County is less restrictive by listing certain allowable exchanges and remaining silent on other exchanges, which are prohibited only by implication.

fail to comply with the law?" If the answer is "yes" to either part of the question, that would appear to require a modification of the Airbnb agreement to ensure that the tax agency has sufficient access to books and records to ensure Airbnb is properly complying with the tax law.

If "surrendering, suspending or contracting away of taxing authority" sounds like an abstract legal concept, be assured its roots are found in public revulsion over tax favoritism. The idea of including this type of provision in state constitutions emerged in the late 19th century during the "Robber Baron" era of U.S. history. Much of the public was upset over public officials making tax deals with powerful corporations and wealthy individuals that gave them special benefits at the expense of everyone else. The language was intended precisely to stop special tax arrangements that constitute favoritism.

Unfortunately, in contemporary state and local tax administration there is continuous pressure to reach compromises with taxpayers that "anti-surrender" clauses in state constitutions and "duty to take action to ensure compliance with the law" statutes get bypassed or overlooked. However, the Airbnb agreements represent an extensive surrender of control over audit processes to a taxpayer such that these over-arching constitutional or statutory provisions designed to ensure equity and integrity in tax compliance cannot be ignored.

3. Undermining the Rule of Law

The Airbnb agreements do not support, but in fact undermine the rule of law. We will look at areas of impact on compliance with the law: lodging taxes, state and local taxes in general, and local land use laws and regulations.

Regarding lodging taxes, the corrosive impact of the agreements on compliance with the law arises from the restrictions in the agreements on the ability of tax agencies to conduct standard tax audits of Airbnb's books and records. We have noted at length how Airbnb could effectively determine what taxes it will collect and pay to state and local authorities because the limits on tax audits make it impossible for agencies to hold Airbnb accountable. Other provisions in some agreements require Airbnb to report to each operator and occupant the amount charged in taxes might further encourage this profiteering. So, the right amount could get collected but not paid to authorities. The discussion on pages 24-26 explains how Airbnb's technological assurance that the right tax amounts are collected and paid may not be reassuring at all. We don't know what choices Airbnb will make under the agreements concerning compliance with law. If it makes the wrong choices, the rule of law suffers.

The content of the agreements themselves, as more of them are publicly released, will create new pressures to undermine general compliance with all types of state and local taxes. The pressure will mostly come in terms of eroding the effectiveness of voluntary disclosure agreements that carefully, but effectively encourage non-compliant taxpayers to come into tax compliance without reducing the incentives for most taxpayers to comply in the first place. The formula of having taxpayers honestly disclose all relevant facts subject to verification, pay three years of back taxes with interest but not penalties, and commit to future compliance with full accountability has worked to steadily improve compliance and generate impressive sums of revenue for state and local governments. By comparison, agencies "give away" more under the Airbnb agreements while they are not likely to yield the revenue that the voluntary disclosure agreements have in the past or should in the future. The word "should" is used here with respect to the voluntary disclosure

agreements, because one of potential adverse effects of the Airbnb agreements is to endanger the future of these extraordinarily valuable agreements.

There is a threat of the Airbnb agreements undermining traditional voluntary disclosure agreements because when laid side by side, the Airbnb agreements are hugely generous in the relief granted to non-compliant taxpayers, primarily the Airbnb lodging operators, as compared to the taxpayers entering voluntary disclosure agreements. As an unfortunate precedent that could be applied in other tax contexts, the Airbnb lodging operator treatment is so generous that it removes most incentives for non-compliant taxpayers to ever comply until they are about to be discovered by tax agencies and they lobby or litigate for Airbnb-style terms. Taxpayers will look at the Airbnb terms vs. the voluntary disclosure terms and say, "Give us the Airbnb dessert please." And if the tax agencies resist, attorneys may start looking for ways to file lawsuits to secure Airbnb terms.

The three provisions in the Airbnb that are irresistible to taxpayers are (a) zero back-tax payments for past tax years for lodging operators²³ and occupants, (b) control of the audit process—no books and records audited and anonymous data used, and (c) an exemption from information sharing with other public agencies. Once the Airbnb agreement terms get known, why wouldn't taxpayers apply pressure to secure them? Indeed, why wouldn't a voluntary disclosure taxpayer having paid a hefty three years of taxes with interest file for refund and demand on equal protection grounds to receive the same treatment as Airbnb's lodging operators secured? In a Gresham's law for tax administration, bad practices (Airbnb agreements) will drive out good practices (voluntary disclosure agreements).²⁴ In the process, the Airbnb agreements will undermine compliance with state and local laws generally. The rule of law will lose again.

The final area where the Airbnb agreements will undermine the rule of law is regarding local land use, zoning, housing, occupancy and building safety laws. As described earlier, the Airbnb agreements that create shield of secrecy for lodging operators will effectively allow and enable the growth illegal hotels to operate in traditional residential areas. Is it possible that the goal is to undermine compliance with local land use and housing laws enough to change the reality on the ground to sufficiently that if laws are enacted to stop the conversions to commercial lodging, those laws will "grandfather" in place the illegal hotels? If that occurs, change would have occurred improperly at the expense of the rule of law with those who violated the law getting rewarded.

²³ It is the back-tax treatment of the Airbnb lodging operators that will be referenced by voluntary disclosure taxpayers. These operators, with their indisputable constitutional and statutory obligation to have paid prior taxes, offers the disclosure taxpayers the best point of comparison. The disclosure taxpayers either had the identical obligation to pay taxes as the lodging operators or a lesser obligation, yet their voluntary disclosure agreements require three years of back payments and the operators pay none.

²⁴ State tax agencies that have signed Airbnb agreements, but are also active in offering voluntary disclosure agreements, such as those coordinated by the Multistate Tax Commission's National Nexus Program, may find themselves at the "point of the spear" facing claims of inequitable treatment of Airbnb lodging operators as compared to voluntary disclosure taxpayers.

Section D

Commentary on Short-Term Rental Legislation

State legislatures and local metropolitan areas have begun considering and enacting legislation applicable to short-term rentals. The actions thus far appear to be limited and cluster at two different directions. One category of legislation is aimed at prohibiting or reducing the short-term rental of apartments that are not occupied by a permanent resident. Legislation in this category has been enacted in San Francisco and New York that seeks to limit what officials in these areas view as the conversion of long-term apartments into short-term hotels. Maintaining an affordable supply of long-term rentals is a motivating factor for this cluster of legislative activity. Rules prohibiting advertising of such rentals, fees and fines are part of the discussion and controversy around this type of legislation.

A second cluster of legislation, enacted or proposed, is aimed in an opposite direction and is represented by legislation enacted in Arizona in 2016 (SB 1350) that (1) severely narrows the grounds on which local governments can regulate short-term rentals, (2) allows online marketplaces to collect and pay taxes for the lodging operators, but only in returns that do not identify the lodging operators, and (3) exempts the returns submitted from a major portion of information exchange laws. The latter includes prohibiting information sharing with local governments, other Arizona state agencies, other state governments and the Internal Revenue Service. For the limited disclosure that is allowed, the online marketplace must give written consent to the disclosure. The American Legislative Exchange Council (ALEC) has approved an even less specific model bill based on the Arizona legislation.

The Arizona law and proposals patterned after it promote the expansion of short-term rentals, including the conversion of long-term residential housing into lodging rentals. The strongest provisions of the Arizona law are those that preempt local government authority to regulate short-term rentals and that expand the secrecy of short-term rental information through limits on public agencies exchanging information. Ironically, the Arizona bill still allows local governments to regulate short-term rentals based on public health and safety, but prohibits the state from acquiring information (lodging operator identities) and sharing it with local governments that would assist cities, towns and counties in protecting public health and safety. The Arizona law is patterned after the privacy and information exchange limits in the Airbnb agreements and serves the Airbnb formula of expanding its market share by attracting more lodging operators to sign up because they gain a shield from federal, state, and local enforcement of laws—both tax and regulatory in nature.

What should alarm state and local tax agencies is the growth in the extent of Airbnb-type restrictions on information exchange in Arizona's tax law. There is now a precedent in state law whereby one narrow business interest has limited the information provided to the state's tax agency and has prohibited even that small amount of information from being shared with cities, towns, and counties, other state agencies in that state, tax agencies of other states, and the IRS. Information sharing among tax agencies is a critical foundation of effective tax administration and compliance in the United States. The Arizona law may well have opened the first crack in that foundation. Tax agencies everywhere should take note of this development and rally events to

prevent it from occurring again. Most certainly agencies should not encourage the spread of exchange of information restrictions further by signing more Airbnb agreements.

Also of concern in the Arizona law is that, for what exchanges of information remain, Airbnb and other online booking companies must consent to the information sharing in advance. That law expands a process, first appearing in the Pinellas County agreement, which requires notice to Airbnb of information exchanges for official investigative or enforcement activity underway. Under the Pinellas terms, the county is supposed to allow Airbnb sufficient time to take legal action to prevent that sharing from occurring. Further, nothing in that agreement stops Airbnb from spreading the knowledge it learns about investigative or enforcement activities with its operators. The Arizona law spares online companies the trouble of going to court to block information sharing by giving them approval authority over whether the tax agency can share information if other public officials. The implications of the Pinellas provision for private interference with public action was bad enough, but the Arizona law is even worse.

The questions tax agencies should ask themselves include, "What will be the next group of taxpayers that lobbies the legislature to gain the same exemptions from information exchanges?" We do not know the answer to that question yet. However, if the precedent continues to expand and spread, state agencies know that it can have a serious negative effect on tax compliance. Prohibiting exchanges of information with other state governments and the IRS starts to cut off a state from vital information it uses in its tax audit and compliance activities. Further, if more states expand limits on interstate exchange of information, it could have serious implications for the viability of cooperative compliance programs such as those maintained by the Southeastern Association of Tax Administrators, the Multistate Tax Commission and other organizations.

Another question to ask is, "Where did the Arizona legislature get the idea that these limits on information exchange were OK to do?" We likely know the answer to that question. Legislators were probably advised that these limits on information exchange are fine from a tax administrative standpoint because a large and growing number of state and local tax agencies have already signed Airbnb agreements in which they agree to limit the exchange of information with other local, state and federal agencies. Tax agencies can try to object that the agreements they signed did not limit exchanges with other local, state and federal tax agencies or those required by law. However, critical details, as evidenced by the Arizona law, like that get lost in the legislative shuffle. When the ball starts rolling in more states with other select taxpayers lobbying for and securing limits on their information being exchanged for tax and regulatory purposes and the whole network of exchange processes among the several states and the IRS begins to unravel, tax agencies will only be able to blame themselves for signing Airbnb agreements. The sheer number of agreements begins to cover up their underlying flaws through a sense of inevitability, which may be an element of Airbnb's strategy.

The same is true for local tax agencies that signed these agreements that focus on collecting relatively modest sums of lodging tax revenues, while disregarding the needs of regulatory and public safety agencies for information to do their jobs. What that disregard has turned into in the Arizona law is preemption of traditional zoning tools used to protect the nature of residential neighborhoods. Although minimal local regulatory authority for public health and safety is preserved in the Arizona law, the state tax agency is prohibited from sharing online marketplace

information with all local agencies—not simply zoning offices, but also police, fire and other public safety officials. So even where limited local authority for public health and safety is saved from preemption, information that supports the exercise of that authority will not be provided.

Tax officials, state and local, should step back and look at the process that is occurring. It began with Airbnb creating software that keeps secret the addresses of local lodging facilities. The secrecy grew and spread through the agreements that state and local agencies signed. It is now beginning to spread into the legislative arena where laws are made to extend the secrecy and cut off the flow of information through the circulatory system of information that gives life to public administration at various levels and locales of government. And some of legislation is not just cutting off the flow of information, but also eating away and destroying the authority to use information to achieve what had been previously public policy goals important to citizens.

Tax agencies should stop—absolutely stop—signing the Airbnb agreements that are full of provisions that are unacceptable and unfair. They are bad enough on their terms. However, as the agreements are extended into legislation, there are now clear warning signs that unacceptable agreements can turn into legislation that threatens the equity and integrity of state and local tax systems, the protection of public health and safety, and quality of community life.

Once agencies stop signing these agreements, the community of state and tax administrators—working with legislators and members of civil society—should turn to the task of guaranteeing fair and equitable tax collection without damaging side effects. That is the subject of the next and final section of this report.

Section E

Achieving Equity and Integrity in Short-Term Rental Taxation

The challenges of equitable and effective tax and regulatory administration for online lodging rentals are relatively simple. They have been complicated by Airbnb's online secrecy practices and their agreements which do more harm than good and divert policy away from the public interest. All the tools of quality tax administration are in place. Only one addition to the toolkit—emerging from the technology that produced the online booking industry itself—may be advisable: engaging software-based services that identify and locate lodging operators.

The basic strategy for state and local governments is three-fold: (1) do no harm to sound tax practices, (2) update lodging tax laws, if needed, to clearly include online booking companies and their customers, the lodging operators, on equal terms with all other taxpayers, and (3) enforce current tax laws as fairly and effectively as possible.

We will discuss what should be done by different parties: tax agencies, legislative bodies and private parties—community groups and lodging businesses working together. For these groups, the first step of doing no harm means the same thing for everyone. Doing no harm means rejecting the framework of the Airbnb agreements and any legislation that attempts to ratify that framework and its special interest provisions into the law.

1. Action by Tax Agencies

a. Support for Positive Legislation. For tax agencies, beyond not signing Airbnb agreements or agreeing to its framework in legislation or rules, a top priority should be to work with legislative bodies to update the existing lodging tax structure to reflect current market circumstances on an equitable basis. That would involve updating definitions to place reporting and collection duties on both the online booking companies and the local lodging operators, with mechanisms for coordinating tax collection between the two. However, both online companies and the operators should bear reporting responsibilities so there are no gaps in collection because operators can take bookings through different means. Further, the reports from both levels can serve as a check on each other.²⁵ The legislation should provide for a publicly available registry of lodging operators and reporting by the online companies to the tax agencies of the identity and location of their affiliated operators. The legislative body will want to address the policy question of the taxation or exemption of booking fees, and the tax agency should be prepared with information and advice on that topic.

Given the substantial community-level impacts of online lodging rentals and their dispersed nature, care should be taken to enhance and not reduce the flow of information from state or local

²⁵ This measure is quite like how sales taxes are handled where the retailer/marketer (Airbnb) handles the sale and the product is delivered or fulfilled by a wholesaler who is serving as a "drop shipper" (lodging operators). Dual registration and record-keeping is required in this context, and so should it be in the case of Airbnb and its lodging operators to ensure integrity and accuracy in lodging tax reporting.

tax departments to local regulatory and law enforcement agencies. If states already have a structure of locally-administered lodging taxes, the nature and modest size of online booking operations should not entail a radical centralization of responsibilities at the state level. That step could disrupt the information needed for effective enforcement of local zoning and housing regulations and convenient availability of information for law enforcement and other public safety authorities. Further, other than the nature of the software platform, the actual lodging rentals that are occurring are usually of small scale and are dispersed in communities. If anything, local knowledge and relationships become more important in this context, favoring continuation of any existing local administration. Finally, regardless of the level at which taxes are collected, care should be taken to evaluate if exchange of information laws need to be updated to ensure an adequate and timely flow of information from tax agencies to other public agencies for official purposes. Make no mistake, this consideration is the exact opposite of what Airbnb has attempted with its agreements and now legislative efforts (Arizona and its ALEC model) that attempt to suspend or disrupt information exchange processes, including by allowing private parties to online companies interfere directly in them. The right thing to do is to strengthen, not weaken, those exchange of information processes.

Additional legislation that could be pursued either separately from or as part of the update of the lodging tax laws should require online lodging marketplaces to provide the name and rental locations of their lodging operations. This legislation would substitute for contracting for a lodging operator identification service discussed below. The legislation would be patterned after a Colorado law that requires direct markets to provide customer information to assist in use tax collection. That legislation was approved by the 10th Circuit Court of Appeals, and the U.S. Supreme Court declined to review the case, so the circuit decision stands. Other circuits might take another view, but many experts consider that unlikely.

b. A Comprehensive Tax Compliance Program. State and local agencies should undertake effective programs aimed at securing equitable compliance from online booking companies and local lodging operators. Wherever possible, opportunities for coordinated or joint action should occur. Two multistate efforts may be particularly helpful. The first would be multistate audits of online booking companies to determine whether, under the Constitution and statutes, the audited companies have a legal duty to file, collect and pay various taxes, including lodging, sales and corporate taxes. Local governments should be encouraged to participate as partners with their state tax agencies to secure the benefits of that effort. The vehicle for such audits would be the Multistate Tax Commission (MTC).

The second multistate effort would be the exploration of a joint contract among multiple states and local governments of software-based services to identify local lodging operators and their locations. As previously noted, there is one such provider, Host Compliance, and others could always emerge.²⁶ If exploration of joint contracting does not yield efficiencies, cost savings or other

²⁶ See <https://hostcompliance.com> for the range of services offered by this company from which governments can select the types they prefer. The services include identifying and locating lodging operators, providing assistance in securing tax and regulatory compliance, analyzing data for decision-making regarding short term rentals, and other activities. Because its services are useful to tax and regulatory agencies, such agencies within a jurisdiction could potentially share costs.

advantages, it could yield useful information for individual states and local governments to proceed with contracts. Because this service is designed to assist both tax and regulatory compliance, the base of funding at the local level may be able to bring together the resources of several agencies. This activity should be explored rapidly at the national, state and local levels, because effective identification of lodging operators can yield a substantial change in the circumstances state and local governments face with regard to dispersed lodging booked through online companies. Agencies have been stymied by not being able to identify the lodging providers, and this alternative can quickly change that picture. Again, the MTC could be asked to coordinate research and information gathering on this topic, but they should be asked to do so on an expedited basis.

With more information about both the online booking companies and the identity of local lodging operators, state and local agencies can proceed with appropriate compliance strategies. The prompt acquisition of the identities and locations of local operators could enable the launch of voluntary disclosure programs using the traditional voluntary disclosure agreements (not the Airbnb agreements). A six-month program with advertising might occur with lodging operators given the opportunity to sign up to collect future taxes and pay three years of back taxes with interest, but no penalties. At the end of whatever open sign-up period might be set, agencies should be prepared with new identification information in hand to begin contacts to require compliance.

The voluntary disclosure agreements are a good example of the excellent tools that tax administrators already have available to convert non-compliant taxpayers into taxpayers. An unfortunate danger of this entire Airbnb episode is that the Airbnb agreements with their features damaging to tax administration threaten to undermine voluntary disclosure agreements as taxpayers subject to income, sales and corporate business taxes demand the same treatment. It is time for tax agencies to take a firm stance and reject the Airbnb formula with its elimination of back tax payments, amnesty for the taxpayer's customers, taxpayer control of tax reporting, audit process using anonymous data and no access to books and records, and its secrecy for the taxpayer and the taxpayer's customers. If tax agencies fail to reject those agreements, they may potentially face lawsuits and aggressive negotiations that will erode the integrity and equity of state tax systems and possibly cost public treasuries multiple times the amount of taxes collected through lodging taxes.

If Airbnb or other online booking companies seek agreements, the appropriate response is to offer them a traditional voluntary disclosure agreement, making clear the Airbnb agreements are unacceptable. If they object that the current lodging taxes do not apply to them and, therefore, a back-tax payment from them is not order, then the counter is to ask their assistance with the voluntary disclosure process for their lodging operators. They could circulate those agreements to their lodging operators and request that they communicate with the state or local tax agency before the deadline for voluntary disclosure offers close and direct contacts begin by the tax agency.

c. Public Participation and Reevaluation by Tax Agencies with Airbnb Agreements. Tax agencies that have signed the Airbnb agreements should reconsider them. As a first step, these agencies should release their agreements, except for redaction of any confidential or proprietary information. If the twelve agreements are representative, it is doubtful that any information will need to be redacted. If the agencies do not release the agreements on their own decisions, they should respond as positively as they can to open records request.

As a second step, agencies that have signed agreements should be subjected to a public participation process. Policy provisions, like those identified in this report, should be noticed as rules for public hearings and comments or other relevant public process. Any provisions limiting exchange of information with other agencies should be a part of the same public process. The learning from this public process would be a means of re-evaluating the agreements, leading to cancellation, suspension or re-negotiation.

Finally, even if the agreements remain in place, agencies should join the audit, host identification and voluntary disclosure efforts with other agencies as described above. These agencies should use the results as best they can to improve compliance from their lodging operators for transactions made by any means or platforms.

2. Action by State Legislatures

The topic of legislative action was addressed above, and the identical ideas apply here. They will be mentioned here in abbreviated form. Legislative bodies should consider legislation that brings online booking companies and local lodging operators into the structure of the lodging tax laws as operators required to collect, report and pay taxes. As explained above both levels in these transactions should report so that the returns can be a check on each other. The responsibility for payment can be coordinated so that only one level in the transaction pays the tax with the other taking a credit against taxes due. Local operators may also have taxes to collect and pay because not all their rentals may be covered by online companies collecting the tax.

Legislatures should give careful attention to improving the exchange of information between tax agencies and regulatory and law enforcement agencies that deal with short-term rentals. Restructuring of the lodging taxes in ways that would disrupt the flow of information to local non-tax agencies should be avoided. A public registry of lodging operators is critical so the public as well as local agencies know where lodging facilities are located that are operating in residential areas. Most importantly, no legislation should be enacted that ratifies the unfortunate Airbnb agreements or that incorporates their provisions. Legislatures should consider carefully any requests for additional resources from tax agencies to respond to lodging tax compliance needs.

Legislatures should also enact legislation or incorporate it in lodging tax updates to require online booking companies to provide names and property locations for their lodging operator customers, as discussed in the subsection on actions by tax agencies.

Most importantly, legislatures should reject any legislation, such as the Arizona law, that ratifies the Airbnb agreements.

3. Action by Community and Business Organizations

Community groups and business associations concerned with the impacts of short-term rentals in neighborhoods and fairness in the tax system have several actions they should consider. The first is a concerted effort to file open records requests of a detailed nature to secure a broader sample of agreements for public scrutiny and discussion. Requests can be tailored for release of documents comparable to these agreements that are devoid of any confidential or proprietary information. The request should express a willingness to accept redaction of any part of

agreements that may include some confidential information to facilitate the release of information that is not confidential. If requests are denied, consideration should be given to follow-up legal action to secure public disclosure of Airbnb agreements.

When organizations make open records requests, they should also consider requesting the records of any communications with Airbnb in the process of (a) negotiating the agreements, (b) notifying Airbnb about open records request including the one being made, (c) notifying and, if applicable, seeking consent from Airbnb for media communications about the agreement, (d) notifying and, if applicable, seeking consent from Airbnb for information sharing with other public agencies, and (d) any other communications with Airbnb concerning the administration of the agreement.

When agreements are released and if they are found to contain provisions that constitute rules, petitions for rule-making on those provisions should be filed with the signatory agencies. If rules are proposed, the groups should actively participate to indicate in detail the problems with the policies embodied in the agreements. If rule-making is not undertaken in specific cases where agreements clearly include rules material, then legal action should be filed to seek rulemaking by the agency.

These organizations should also actively contact tax agencies urging them to take the administrative actions described above, to actively support positive legislation updating lodging tax laws, to resist signing Airbnb agreements, and to conduct a fiscal analysis of the impact of Airbnb agreements if they displace voluntary disclosure agreements and otherwise spread through the administration of other, more significant revenue sources than lodging taxes.

Community and business organizations should, of course, also focus on state legislatures and request that proper legislation be enacted updating lodging taxes to provide for their equitable and effective collection, a public registry of lodging operators, and effective exchange of information with local regulatory and law enforcement agencies.

Appendix

Rating the Tax Agreements

This appendix presents a rating of the twelve Airbnb agreements along with two versions of voluntary disclosure agreements. This rating process can be used to evaluate Airbnb agreements in other jurisdictions if their provisions are relatively comparable.

The rating scale uses these categories: excellent, good, conditionally acceptable, unacceptable, and terrible. None of the twelve Airbnb agreements by themselves are rated as acceptable. Four of the twelve agreements are rated as conditionally acceptable, meaning they can become acceptable if combined with additional measures to improve their equity, integrity and effectiveness. Five agreements are rated as unacceptable, and three as terrible.

Although the ratings may appear critical overall, some jurisdictions have done an excellent job of negotiating in a difficult environment in which Airbnb has actively promoted agreements contrary to the public interest. Officials from Hillsborough and Polk Counties, FL, and the Palm Desert and San Jose, CA, have done an excellent job. Of these four, the Hillsborough County agreement represents the greatest progress overall.

Unfortunately, none of these four agreements achieve transparency in lodging operator registration, collect back taxes due, or wrest control of the tax and audit process from Airbnb.

Under the other eight agreements, circumstances are worse. Back taxes remain unnecessarily forgiven for lodging operators in seven agreements and for Airbnb in five. Lodging operators are rewarded for non-compliance, and the public is permanently short-changed. Most of these agreements harden the secrecy for lodging operators—making more difficult the job of regulatory agencies in holding these facilities accountable for impacts on communities. Most help expand Airbnb's market share by offering lodging operators a stronger shield of secrecy allowing them to escape local detection and regulation, and Airbnb's ability to avoid tax accountability will only increase as its market presence grows. These agreements help Airbnb grow in the wrong way and thus exacerbate the problems the agreements claim to solve. Thus, their ratings range from unacceptable to terrible.

Table 5 summarizes the rating of Airbnb agreements. The table should not be interpreted as implying that Airbnb agreements, by themselves, are adequate measures for achieving equitable and effective tax and regulatory compliance. At a minimum, they require the supplemental measures referenced in and listed below Table 5.

Table 5. Ratings of Airbnb Agreements Combined with Supplemental Measures

Rating	Jurisdictions	Characteristics
Excellent	None	A traditional voluntary disclosure agreement agreed to by Airbnb combined with steps 1 through 3 below.
Good	None	A traditional voluntary disclosure agreement agreed to by Airbnb for future taxes, combined with steps 1 through 4 below, which include disclosure agreements with operators (step 4).
Conditionally Acceptable	Hillsborough, Polk, San Jose, and Palm Desert	"Level 1" Airbnb agreements. Add all steps 1 through 5 below to move from conditionally acceptable to good.
Unacceptable	Humboldt, Florida, Taos, Multnomah, and Washington	"Level 2" Airbnb agreements.
Terrible	Pinellas, Montgomery, and Santa Fe	"Level 3" Airbnb agreements.

The four agreements rated as "conditionally acceptable" can move to a rating of "good" by adding to and modifying the existing agreements with these five steps:

1. If not accomplished already, jurisdictions should submit, as modified and supplemented by the measures here, the policies in the agreements to public scrutiny and participation by proposing those policies as rules or ordinances as appropriate.
2. Jurisdictions should establish, for all rental platforms (not simply Airbnb), a lodging operator registration system backed up by a lodging operator identification process to secure compliance by those who do not register voluntarily. The basic registration information about the lodging facilities, ownership and location should be publicly available. The registration and identification processes will support tax collection and local regulatory activities and inform the public in affected neighborhoods of lodging activities in their areas. The identification process could use a commercially available service to identify operators using online services, and its costs can be shared by tax and regulatory agencies.²⁷
3. Jurisdictions should establish an operator tax reporting system requiring returns of lodging rental revenues from all sources, payment of taxes on those revenues, with a credit for taxes collected and paid by online booking platforms such as Airbnb. Even if all taxes are paid by Airbnb for a given facility, the revenue provides a cross-check on Airbnb's tax reporting. The tax return information would be confidential and protected from public disclosure, but available for official purposes to other public agencies eligible to receive it by law.
4. Tax agencies should undertake back-tax collection efforts by offering voluntary disclosure agreements to operators requiring three years of back taxes with interest (or less if the facility has operated for less time) but no penalties. If operators fail to register voluntarily before being contacted by the tax agency, they would not qualify for penalty relief.
5. Agencies should renegotiate the Airbnb agreements to gain access to Airbnb's books and records in the audit process, eliminating the artificial restrictions on auditing in current

²⁷ See footnote 25.

agreements. This is necessary to ensure Airbnb's accountability for taxes collected and paid, including cross-checking Airbnb's returns with lodging operator returns.

These measures assume the four jurisdictions continue their Airbnb agreements, with modifications. If Airbnb does not modify the agreements to make them acceptable, the jurisdictions can terminate the agreements and implement the measures recommended in Section E, which are preferable to relying on Airbnb agreements in any form.

Google Groups

Re: CF 14-1635-S2

Zina Cheng

Jun 8, 2017 5:10 PM

Posted in group: **Clerk-PLUM-Committee**

Please be aware that the correct email address for your written response is clerk.plumcommittee@lacity.org
For your convenience, I have included the correct email address for you.

The Office of the City Clerk is in receipt of your comment. It is included in the public record.

*****NOTE TO LA CITY STAFF**********Please Cc sharon.dickinson@lacity.org on all emails related to PLUM Committee.*****

Zina Cheng
Deputy City Clerk/Legislative Assistant for:
Energy and Environment Committee
Health, Mental Health, and Education Committee
Planning and Land Use Management Committee

City of Los Angeles, Office of the City Clerk
Council and Public Services
(213) 978-1537
zina.cheng@lacity.org

On Wed, Jun 7, 2017 at 6:15 PM, Ruth Schwartz <rschwartz@shelterpartnership.org> wrote:

Ruth Schwartz
Executive Director
Shelter Partnership, Inc.
520 So. Grand Avenue, Suite 695
Los Angeles, CA 90071
213-943-4580

To make an online donation, visit our website at www.shelterpartnership.org

Shelter Partnership is a Charity Navigator 4 Star Charity!



Shelter Partnership

520 South Grand Avenue, Suite 695 • Los Angeles, CA 90071 • Fax (213) 689-3188 • (213) 688-2188

June 8, 2017

Honorable Herb Wesson
Council President, Los Angeles City Council
Los Angeles City Hall
200 N. Spring Street, Room 430
Los Angeles, CA 90012

Re: CF 14-1635-S2

Dear Council President Wesson:

In my role as the Executive Director of Shelter Partnership, Inc., a nonprofit organization working for over 30 years with the City of Los Angeles to solve homelessness, I am writing to request that the City proceed cautiously and limit short-term house sharing to **no more than 60 days** annually in the City of Los Angeles.

The City's rental vacancy rate is dangerously low at less than 2.7% and for low-income and very low-income households the rental market is even tighter. This is evidenced by the fact that according to data from one year ago, only 60% of the households who were issued a Section 8 Voucher were successful. (Even with housing location assistance and additional time provided to locate a rental unit.) In healthy rental markets, over 80% are able to locate willing landlords and secure rental units. There are many indications that this year's success rate will be even lower than 60%.

Los Angeles has always been a City of home sharing where many homeowners and renters rent out a bedroom or bedrooms to lower-income and middle-income households, including students, seniors, single individuals, and family members. The practice of subleasing is done for multiple reasons, including financial benefits, the ability to assist someone in financial hardship, as well as the desire for companionship. This practice is an important portion of our affordable housing stock.

Homeowners who might otherwise rent out bedrooms long-term are now choosing transient uses. While there may be financial windfalls for homeowners and apartment leasers resulting from renting out extra bedrooms for transient uses, this would reduce the volume of housing that is available for additional house-sharing purposes, thus further tightening our rental market. **It is important to limit the time so that profit from transient use does not replace long-term rental purposes.**

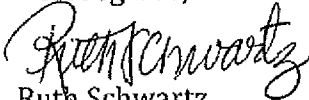
This past year, an all time high of more than 14,000 homeless individuals in the County were assisted in securing permanent housing, yet the population of individuals and families homeless increased by 20% in the City of Los Angeles. It is evident that the increase was driven by insufficient affordable housing stock, rent increases, and income stagnation.

There are no plans on the horizon to build sufficient housing in our City to meet the current needs of our low-income population. We cannot allow further erosion of our affordable housing stock. Accordingly, we need to protect valuable rental housing opportunities wherever they are found, including long-term rental of bedrooms within houses and apartments.

A reasonable limit of 60 days annually will serve to help protect this vital housing stock, which otherwise would effectively be converted from our low-income housing inventory to hotel rooms.

Thank you for your consideration.

Best regards,



Ruth Schwartz
Executive Director
Shelter Partnership

Cc: City Councilpersons
Zina Cheng