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# Can Sharing Be Taxed?

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# CAN SHARING BE TAXED?

**SHU-YI OEI***
**DIANE M. RING****

ABSTRACT

*In the past few years, we have seen the rise of a new model of production and consumption of goods and services, often referred to as the "sharing economy." Fueled by startups such as Uber and Airbnb, sharing enables individuals to obtain rides, accommodations, and other goods and services from peers via personal computer or mobile application in exchange for payment. The rise of sharing has raised questions about how it should be regulated, including whether existing laws and regulations can and should be enforced in this new sector or whether new ones are needed.*

*In this Article, we explore those questions in the context of taxation. We argue that, contrary to the claims of some commentators, the application of substantive tax law to sharing is mostly (though not completely) clear, because current law generally contains the concepts and categories necessary to tax sharing. However, tax enforcement and compliance may present challenges, as a result of two distinctive features of sharing. First, some sharing businesses opportunistically pick the more favorable regulatory interpretation if there is ambiguity regarding which rule applies or whether a rule applies. The existence of these ambiguities has been exacerbated by the structures of the new sharing economy and this has led to compliance and enforcement gaps. Second, the "microbusiness" nature of sharing raises unique compliance and enforcement concerns. We suggest strategies for addressing these dual challenges, including lower*

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*information reporting thresholds, safe harbors and advance rulings to simplify tax reporting, and targeted enforcement efforts.*

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## INTRODUCTION

In the past few years, we have seen the rise of a new model of production and consumption of goods and services. In this so-called "sharing economy," startups such as Uber, Airbnb, and TaskRabbit enable consumers to summon rides, rent accommodations, or hire services from peers via personal computer or a mobile app, in exchange for payment.[1] On the supply side, these models enable owners of homes, apartments, or vehicles, or those who possess certain skills (such as house painting, home

1. *See generally* AIRBNB, https://www.airbnb.com (last visited Jan. 3, 2016); TASKRABBIT, https://www.taskrabbit.com (last visited Jan. 3, 2016); UBER, https://www.uber.com (last visited Jan. 3, 2016).

organization, or dogsitting), to monetize those assets or skills.[2] The technological platforms employed by these startups enable individual producers and consumers to transact with each other with unprecedented ease.[3]

Also known as "collaborative consumption," the "peer-to-peer economy," or "peer-to-peer consumption," a broad range of commentators suggest that the sharing economy is transforming the way people consume and supply goods and services, such as transportation, accommodations, and task help.[4] Commentators note that sharing arrangements have the potential to significantly affect traditional industries such as taxicabs, limousine services, and the hotel industry.[5] As such, the sharing economy raises important legal and regulatory issues, including questions of whether and how the new startups should be regulated and questions about the appropriate relationship between regulation and innovation.[6]

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2. *See The Rise of the Sharing Economy*, THE ECONOMIST (Mar. 9, 2013), http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy; Benita Matofska, *What Is the Sharing Economy?*, PEOPLE WHO SHARE (Apr. 25, 2016), http://www.thepeoplewhoshare.com/blog/what-is-the-sharing-economy/ (describing the sharing economy as "the shared creation, production, distribution, trade and consumption of goods and services by different people and organisations").

3. *See* sources cited *supra* note 2.

4. *See, e.g.*, Dina Bass, *Microsoft Said to Invest About $100 Million in Startup Uber*, BLOOMBERG TECH. (July 31, 2015, 8:06 PM), http://www.bloomberg.com/news/articles/2015-07-31/microsoft-said-to-consider-funding-uber-at-50-billion-valuation (noting that Uber, which has "disrupted established taxi and limousine companies," has a valuation of $50 billion based on the reported Microsoft investment); *The Sharing Economy: A Shift Away From Ownership?*, NPR, http://www.npr.org/series/244583579/the-sharing-economy-a-shift-away-from-ownership (last visited Jan. 3, 2016) (exploring different aspects of the sharing economy); *2015 1099 Economy Workforce Report*, REQUESTS FOR STARTUPS, https://web.archive.org/web/20160331171108/http://www.requestsforstartups.com/survey (last visited June 27, 2016) ("The 1099 Economy . . . is rapidly redefining how we experience many fundamental parts of our lives and . . . . [is] reshaping the way we think about work."); Pricewaterhouse Coopers, *The Sharing Economy: How Will It Disrupt Your Business?*, PWC UK BLOGS (Aug. 2014), http://pwc.blogs.com/files/sharing-economy-final_0814.pdf (estimating that "[f]ive key sharing sectors (P2P finance, online staffing, P2P accommodation, car sharing and music/video streaming) have the potential to increase global revenues from around $15 billion now to around $335 billion by 2025" and warning that "[i]ncumbents need to see disruption coming from an expansion of sharing and develop effective strategies to respond, whether by acquisition, partnership or launching their own sharing services"). We note that the popular press has, in some sense, been ahead of scholars in examining the sharing economy, interviewing its participants, and commenting on its development.

5. *See, e.g.*, Georgios Zervas et al., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* 30–33 (Bos. Univ. Sch. of Mgmt. Research Paper Series, No. 2013-16, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366898.

6. *See, e.g.*, Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 598–605 (2016); Christopher Koopman et al., *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS., ENTREPRENEURSHIP & L. 529, 538–39, 544 (2015); Orly Lobel, *The Law of the Platform*, MINN. L. REV. (forthcoming 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742380; Stephen R. Miller, *First*

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One set of emerging questions concerns whether existing laws and regulations are adequate and should be enforced in the sharing sector, or whether new laws and regulations are needed.[7] These questions have taken on particular urgency because of the perception that sharing economy businesses often ignore the law, choosing to lobby and negotiate with regulators only after the fact.[8] Such questions have permeated the tax field

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*Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 151–53 (2016); Bronwen Morgan & Declan Kuch, *Radical Transactionalism: Legal Consciousness, Diverse Economies, and the Sharing Economy*, 42 J.L. & SOC'Y 556, 583–84 (2015); Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 422–24 (2015) [hereinafter Ranchordás, *Does Sharing Mean Caring*]; Sofia Ranchordás, *Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation*, 55 JURIMETRICS 201, 202–08 (2015); Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501, 541–47 (2016); Stephen R. Miller, Transferable Sharing Rights: A Theoretical Model for Regulating Airbnb and the Short-Term Rental Market 1–2 (Oct. 24, 2014) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514178.

7. *See, e.g.*, Fan, *supra* note 6, at 584–86; Morgan & Kuch, *supra* note 6, at 563–65; 1099.IS, http://1099.is (last visited Jan. 4, 2016); *All Eyes on the Sharing Economy*, THE ECONOMIST (Mar. 7, 2013), http://www.economist.com/news/technology-quarterly/21572914-collaborative-consumption-technology-makes-it-easier-people-rent-items; Joyce E. Cutler, *Cities Grappling with Challenges of How to Tax, Regulate Short-Term Rentals*, BLOOMBERG BNA (Oct. 21, 2014), http://www.bna.com/cities-grappling-challenges-n17179897258/; Mike LaBossiere, *The Sharing Economy II: Taxes*, TALKING PHIL. (July 25, 2014), http://blog.talkingphilosophy.com/?p=8067; Kathleen Pender, *If You Make Money in the Sharing Economy, the IRS Will Know*, S.F. CHRON. (Feb. 22, 2014, 2:43 PM), http://www.sfgate.com/business/networth/article/If-you-make-money-in-the-sharing-economy-the-IRS-5258941.php; Brad Tuttle, *The Other Complication for Airbnb and the Sharing Economy: Taxes*, TIME (June 15, 2013), http://business.time.com/2013/06/15/the-other-complication-for-airbnb-and-the-sharing-economy-taxes/. Some commentators suggest that new legal and regulatory regimes or categories may be required to address the challenges raised by sharing. *See, e.g.*, Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?*, STAN. TECH. L. REV. (forthcoming 2016) (manuscript at 12–15), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2658603; Nancy Leong & Aaron Belzer, *The New Public Accommodations*, 105 GEO. L.J. (forthcoming 2017) (manuscript at 6–8), *available at* http://ssrn.com/abstract=2687486; Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Governmental Law: The Future of Local Regulation of the "Sharing Economy,"* 76 OHIO ST. L.J. 901, 905–09 (2015); Alex Rosenblat & Luke Stark, Uber's Drivers: Information Asymmetries and Control in Dynamic Work 14 (Oct. 15, 2015) (unpublished manuscript), *available at* http://ssrn.com/abstract =2686227; Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URBAN L.J. (forthcoming 2016) (manuscript at 9–12), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535656.

8. *See, e.g.*, Jason Clampet, *Sharing Homes, Cars—and Lawsuits*, BBC (May 1, 2014), http://www.bbc.com/travel/feature/20140501-sharing-homes-cars-and-lawsuits (describing the sharing economy's "sin-first, ask-forgiveness-later" strategy); Sam Shead, *'Arrogant' Uber Needs to Mature Before Going Public, Says VC*, TECHWORLD (Dec. 9, 2014), http://www.techworld.com/news/startups/arrogant-uber-needs-mature-before-going-public-says-vc-3590290/. This more aggressive strategy, though, may have backfired in Austin, Texas, in May 2016. Richard Parker, *How Austin Beat Uber*, N.Y. TIMES (May 12, 2016), http://www.nytimes.com/2016/05/12/opinion/how-austin-beat-uber.html?_r=0 (noting Uber's withdrawal from the Austin market on May 9, 2016, after losing a referendum on the local regulation of ride-sharing companies).

as well.[9] Some commentators claim that new sharing economy earners[10] do not know what tax rules apply, do not comply with the tax law, and may believe that sharing should not be taxed.[11] Others argue that existing tax laws and regulations may need to be reconsidered, expanded, or modified in light of sharing's rise.[12] Prompted by such perceived uncertainty, websites, online commentaries, and tax advising services have popped up, advising sharing economy earners on the tax issues raised by sharing and how to comply with their tax obligations.[13]

Given the growth of sharing arrangements, we think it is important to be clear at the outset about whether these claims are accurate, so as to

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9. *See* Cutler, *supra* note 7; Tuttle, *supra* note 7; *see also* Emily Badger & Zachary A. Goldfarb, *Uber Hired David Plouffe When It Realized 'Techies' Can't Do Politics*, WASH. POST (Aug. 19, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/19/uber-hired-david-plouffe-when-it-realized-techies-cant-do-politics.

10. This Article refers to the individuals offering goods and services in the sharing economy as "sharing economy earners" or "sharing earners." It refers to the startups that facilitate such collaborative consumption as "sharing economy businesses" or "sharing businesses." This Article refers to sharing economy earners and sharing economy businesses, collectively, as "sharing economy actors" or "sharing actors."

11. *See* Tuttle, *supra* note 7 ("[I]t seems as if almost no one involved in the sharing economy knows exactly what taxes they're supposed to pay, nor when or how to pay them. And for several reasons—the rules are unclear, enforcement is almost nonexistent, and many feel that 'sharing' shouldn't be taxed at all—*very few people pay them*."). These sentiments may stem in part from the difficulty many cities and localities have faced in collecting city and local hotel and occupancy taxes from businesses like Airbnb. *See, e.g.*, Carolyn Said, *S.F. Could Get $11 Million a Year When Airbnb Collects Hotel Tax*, S.F. CHRON. (Sept. 18, 2014, 7:42 AM), http://www.sfgate.com/business/article/S-F-could-get-11-million-a-year-when-Airbnb-5762838.php; Dara Kerr, *Airbnb Begins Collecting 14% Hotel Tax in San Francisco*, CNET (Sept. 17, 2014, 12:23 PM), http://www.cnet.com/news/airbnb-begins-collecting-14-hotel-tax-in-san-francisco/.

12. *See, e.g.*, Jordan M. Barry & Paul L. Caron, *Tax Regulation, Transportation Innovation, and the Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 69, 82–84 (2015) (examining the sharing economy under the fringe benefit rules of I.R.C. § 132); Christopher T. Lutz, *Legitimizing the Sharing Economy: Reconciling the Tension Between State and Local Policy Concerns and Innovation*, BLOOMBERG BNA (Dec. 5, 2014), http://www.bna.com/uploadedFiles/Content/PDFs/WSTR.December.5.2014.pdf (considering the potential for cooperative responses by state and local government to foster innovation and enhance revenues).

13. *See, e.g.*, Press Release, Intuit, Intuit and Uber Partner to Simplify Filing Taxes for On-Demand Economy Workers (Jan. 28, 2015), *available at* http://www.intuit.com/company/press-room/press-releases/2015/Intuit-Uber-partner-QBO-Self-Employed/; *About 1099.is*, 1099.IS, http://1099.is (last visited Jan. 10, 2016); Cutler, *supra* note 7; Charles R. Goulding et al., *Fast Growth of Sharing Economy Impacts Tax Reporting*, AICPA (Oct. 16, 2014), http://www.cpa2biz.com/Content/media/PRODUCER_CONTENT/Newsletters/Articles_2014/Tax/Sharing-Economy-Impact.jsp; Dan Johnson, *Lyft Driver: Tax Questions*, LYFT DRIVER TAX FAQ'S (Oct. 15, 2013), http://lyfttaxfaqs.wordpress.com; Mitch Lipka, *How the Sharing Economy Makes Tax Filing Tougher*, TIME MONEY (Apr. 15, 2015), http://time.com/money/3822148/sharing-economy-taxes-uber-lyft/ (offering tax tips for sharing economy workers); $HARED ECONOMY CPA, http://www.sharedeconomycpa.com (last visited Jan. 4, 2016); ZEN99, https://web.archive.org/web/20150809094012/https://tryzen99.com/ (last visited Aug. 9, 2015). In August 2015, Zen99.com announced that it was closing down. Kia Kokalitcheva, *Startup That Helped Freelance Workers Do Their Taxes Goes Bust*, FORTUNE (Aug. 12, 2015, 4:43 PM), http://fortune.com/2015/08/12/zen99-contract-workers/.

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avoid making ungrounded and poorly considered policy and regulatory decisions for this new industry. Thus, in this Article, we examine the broad question of whether the tax law is adequate to the task of taxing sharing economy earners, or whether new tax rules and regulations are required.[14] We argue that the application of substantive and doctrinal tax laws to sharing is generally (though not completely) clear and not particularly novel.[15] This is the case even though the rules themselves may be complex and the application of the law to the facts may sometimes produce a measure of uncertainty. In most respects, what is required is *clarification* of the tax law's application, rather than new legal or regulatory categories.

On the other hand, tax compliance and enforcement in the sharing sector may present challenges, due largely to two distinctive features of sharing. First, in determining how and whether to comply with existing laws and regulations, sharing economy businesses have displayed the propensity (and distinct capacity) to pick the more favorable legal or regulatory regime if there is ambiguity as to which regime applies. For example, in light of slight ambiguity regarding the applicable Form 1099-K information reporting rules, some sharing businesses have taken the position that they are subject to the same information reporting rules as "third party settlement organizations" such as Amazon and PayPal, and thus must comply with less onerous reporting thresholds.[16] We refer to this set of behaviors as "tax opportunism." We emphasize that this term is not meant to be pejorative; rather, it simply denotes the fact that the sharing businesses may be willing and able to take advantage of the opportunities presented by legal ambiguity. Tax opportunism more accurately describes some behaviors of certain sharing economy businesses than the claim that they are simply flouting the law. Furthermore, as we discuss, tax opportunism may be related to regulatory arbitrage (defined as parties incurring transactional costs to achieve a regulatory benefit), but the nuanced differences between the two categories may suggest different regulatory responses.

Second, the sharing sector involves many individual earners who may earn relatively small income amounts, may use otherwise personal property for business purposes, and may be filing and reporting independent contractor income for the first time. These "microbusiness"

14. This Article does not address the taxation of sharing economy businesses and platforms, focusing its attention instead on the individuals who earn income in the sharing economy.

15. *But see* Barry & Caron, *supra* note 12, at 82–83.

16. *See infra* Part III.A.2.

characteristics may make compliance challenging for taxpayers and enforcement difficult for the IRS. These characteristics are not themselves unprecedented; in fact, the tax compliance issues that they entail are reasonably well understood.[17] However, the rise of sharing has propelled large numbers of earners who are engaged in sharing on a sporadic or part-time basis into the microbusiness world. Such earners may have less incentive than full-time businesses to take steps to ensure accuracy (for example, by hiring a tax preparer). Moreover, the fact that sharing may be a sector of first impression for many tax preparers may make tax compliance and enforcement even more challenging.

We argue that the confluence of these two realities—tax opportunism paired with the microbusiness nature of sharing—may make it particularly difficult to ensure that the new sharing earners are complying with the tax laws. Yet the precise impacts are difficult to predict with certainty.

In Part I, we describe in brief the "sharing economy" phenomenon. In Part II, we discuss the substantive tax rules and doctrines that apply to sharing. We argue that in many (though not all) respects, existing tax laws and doctrines can be adequately applied to sharing, although such application may depend on factual interpretation and classification of the new transactions. In Part III, we define the term "tax opportunism" and describe four examples of it: (1) the decision by certain sharing businesses to take the position that they are "third party settlement organizations" for information reporting purposes; (2) the decision to embrace independent contractor classification for sharing earners; (3) the initial decision by Airbnb to take the position that it is not responsible for collecting local occupancy taxes; and (4) the decision of ridesharing businesses to operate outside taxicab medallion and permitting systems. Next, we discuss the potential problems raised by the microbusiness nature of sharing economy work.

Finally, in Part IV, we address some of the tax policy issues raised by sharing and suggest possible strategies for addressing sharing's challenges. In Part IV.A, we discuss the broader policy issues that are raised and the takeaways that can be gleaned from the rise of sharing. In Part IV.B, we consider relatively simple strategies that may help improve compliance

17. *See, e.g.*, Susan Cleary Morse et al., *Cash Businesses and Tax Evasion*, 20 STAN. L. & POL'Y REV. 37, 49–56 (2009) (using field interviews of 275 cash business owners to identify patterns in taxpayer behavior and circumstances under which evasion was most likely to occur); *see also* INTERNAL REVENUE SERV., TAX GAP FOR TAX YEAR 2006, at 2–3 (2012), *available at* www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf; Joel Slemrod et al., *Does Credit-Card Information Reporting Improve Small-Business Tax Compliance?* 1–3 (NBER Working Paper No. 21412, 2015), *available at* http://ssrn.com/abstract=2515630.

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with and enforcement of federal tax laws. These include lower information reporting thresholds, use of safe harbors and advance rulings to simplify expense taking, targeted enforcement efforts, and taxpayer education. In Part IV.C, we review longer-term solutions that may be employed by federal, state, and local taxing authorities in confronting the sharing economy.

This Article is the first in the tax literature to comprehensively examine the doctrinal and compliance issues raised by sharing. While its focus is on taxation, this Article is part of a broader conversation about the adequacy of existing legal structures and regimes in regulating the emerging sharing economy. This conversation implicates issues such as how the law might have to develop in light of changing economic arrangements, creative uses of technology, and innovation. While these are broad conceptual issues, they do demand careful examination of existing laws and their application. This Article's contribution is just such a close examination in the context of taxation.

Some initial caveats must be noted. First, we have focused largely on ridesharing and home sharing. While sharing has emerged as an overarching concept in the press and in scholarly literature,[18] our detailed tax study confirms that generalizations regarding the sharing economy, while possible, should be made carefully. This is likely to be true in other regulatory fields as well. The tax law example highlights this point rather well, because all types of sharing must confront the tax law, and yet we observe variation in the specific tax rules and issues that arise in each sub-area of sharing.

Second, because the sharing sector has emerged relatively recently, the actual tax return filing and compliance behaviors of sharing earners have been subject to scant empirical analysis. In fact, the 2015 tax filing season may be the first time that many sharing earners will be reporting sharing income. While existing tax compliance studies focusing on self-employed workers and independent contractors may be informative, they cannot provide precise answers. Further empirical study is required to accurately assess the tax compliance behaviors of sharing economy earners. Our analysis in this Article lays a roadmap for the conduct of such study.[19]

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18. *See, e.g.*, Ranchordás, *Does Sharing Mean Caring*, *supra* note 6, at 416–21; Rauch & Schleicher, *supra* note 7, at 910–13.

19. We undertake a qualitative analysis of the types of tax issues confronting ridesharing drivers in subsequent work. *See* Shu-Yi Oei & Diane Ring, *The Tax Lives of Uber Drivers: Evidence from Internet Discussion Forums*, 8 COLUM. J. TAX L. (forthcoming 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730893 (studying online discussion forums frequented by Uber drivers to better understand how drivers experience and interact with the tax system). For an

Finally, our inquiry takes place in a dynamic economic climate in which business models, practices, industries, and technologies are changing and evolving.[20] Given this dynamism, it is likely that the tax strategies employed by the sharing businesses will change over time.[21] Moreover, it is possible that as sharing economy earners become more familiar with tax compliance and tax reporting, their behaviors may change as well. Thus, the insights we develop in this Article are necessarily preliminary and will require ongoing attention and investigation.

## I. THE SHARING ECONOMY

While there is no universal definition of the term "sharing economy," commentators have described it as a model of production, consumption, and distribution of goods and services whereby people "share" their assets or other resources on an excess capacity basis via peer-to-peer arrangements.[22] For example, a homeowner or car owner might rent out a room or car, respectively, that she is not using.[23] A car owner might offer rides in her personal vehicle in her free time.[24] Or a person with a certain skill (such as computer repair or dogsitting) might provide that service to peers in their free time for a fee.[25]

Such peer-to-peer sharing is facilitated by a number of companies, including platforms such as Uber, Airbnb, and TaskRabbit. A distinctive feature of these sharing economy businesses is the use of technology

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interview and survey-based study released as this Article was going to press, see CAROLINE BRUCKNER, KOGOD TAX POL'Y CTR., AMERICAN UNIV., SHORTCHANGED: THE TAX COMPLIANCE CHALLENGES OF SMALL BUSINESS OPERATORS DRIVING THE ON-DEMAND PLATFORM ECONOMY (2016), *available at* http://www.american.edu/kogod/news/upload/shortchanged-caroline-bruckner-kogod-au.pdf.

20. *See, e.g.*, Deven R. Desai, *The New Steam: On Digitization, Decentralization, and Disruption*, 65 HASTINGS L.J. 1469, 1477–82 (2014) (hypothesizing that established players will eventually adapt to the new, decentralized sharing marketplace).

21. In fact, sharing businesses have already changed some of their reporting positions. *See infra* Part III.A.2.

22. *See, e.g.*, Matofska, *supra* note 2 ("The Sharing Economy is a socio-economic system built around the sharing of human and physical assets.").

23. *See* AIRBNB, https://www.airbnb.com/ (last visited Jan. 4, 2016); GETAROUND, https://www.getaround.com/ (last visited Jan. 4, 2016); TURO, https://turo.com/ (last visited Jan. 4, 2016).

24. *See* LYFT, https://www.lyft.com/ (last visited Jan. 4, 2016); UBER, https://www.uber.com/ (last visited Jan. 4, 2016).

25. *See* DOGVACAY, http://dogvacay.com/ (last visited Jan. 4, 2016); TASKRABBIT, https://www.taskrabbit.com/ (last visited Jan. 4, 2016); ZAARLY, https://www.zaarly.com/ (last visited Jan. 4, 2016).

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platforms (mobile phone applications and the Internet) to bring producers, providers, and consumers of goods and services together, in exchange for a fee for using the platform.[26] With the ease provided by such technology, almost anything—bicycles, wifi, clothing, and even kittens and toilets—can be shared.[27]

While informal pooling, renting, and borrowing arrangements are not new, access to the Internet and mobile technology means that the scale, scope, frequency, and transformative potential of such sharing transactions have reached an unprecedented degree.[28] The global sharing market is valued in the billions, and the valuation of sharing businesses like Airbnb and Uber has surpassed that of some hotel and traditional car-rental competitors.[29] The impact of sharing has been so significant that

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

27. *See, e.g.*, FON, https://corp.fon.com/en (last visited Jan. 4, 2016) (wifi); NEIGHBORGOODS, http://neighborgoods.net/ (last visited Jan. 4, 2016) (household and related goods); POSHMARK, https://poshmark.com/ (last visited Jan. 4, 2016) (fashion); SPINLISTER, https://www.spinlister.com/ (last visited Jan. 4, 2016) (bicycles); *see also* Dana Hedgpeth, *Need a Snuggle? Uber Delivers Kittens on Demand*, WASH. POST (Oct. 29, 2014), http://www.washingtonpost.com/blogs/local/wp/2014/10/29/need-a-snuggle-uber-delivers-kittens-on-demand/ (Uber delivery of kittens); LEFTOVERSWAP, http://leftoverswap.com/index.html (last visited Jan. 4, 2015) (sharing of leftover food).

28. *See* Pricewaterhouse Coopers, *supra* note 4 (estimating that revenue from five sharing sectors could potentially reach $335 billion by 2025); *see also* Bass, *supra* note 4 (suggesting value of Uber at $50 billion in July 2015); Sarah Cannon & Lawrence H. Summers, *How Uber and the Sharing Economy Can Win over Regulators*, HARV. BUS. REV., Oct. 13, 2014, *available at* https://hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators/ ("Sharing economy firms are disrupting traditional industries across the globe. For proof, look no further than Airbnb which, at $10 billion, can boast a higher valuation than the Hyatt hotel chain. Uber is currently valued at $18.2 billion relative to Hertz at $12.5 billion and Avis at $5.2 billion. Beyond individual firms, there are now more than 1,000 cities across four continents where people can share cars. The global sharing economy market was valued at $26 billion in 2013 and some predict it will grow to become a $110 billion revenue market in the coming years, making it larger than the U.S. chain restaurant industry. The revenue flowing through the sharing economy directly into people's wallets will surpass $3.5 billion this year, with growth exceeding 25%, according to Forbes."); Kathleen Kusek, *The Sharing Economy Goes Five Star*, FORBES (July 15, 2014, 2:09 PM), http://www.forbes.com/sites/kathleenkusek/2014/07/15/the-sharing-economy-goes-five-star/ (also noting Forbes' estimate). Fund raising efforts at Airbnb in 2015 have suggested a valuation of $20-25 billion. *See* Sara Ashley O'Brien, *'Crazy Money' - Airbnb Valued at over $25 Billion*, CNN MONEY (June 27, 2015, 6:59 PM), http://money.cnn.com/2015/06/27/technology/airbnb-funding-valuation-update/; Serena Saitto, *Airbnb Said to Be Raising Funding at $20 Billion Valuation*, BLOOMBERG TECH. (Feb. 28, 2015, 7:20 PM), http://www.bloomberg.com/news/articles/2015-03-01/airbnb-said-to-be-raising-funding-at-20-billion-valuation.

29. *See supra* note 28; *see also* Telis Demos, *Airbnb Raises $1.5 Billion in One of Largest Private Placements*, WALL ST. J. (June 26, 2015, 9:01 PM), http://www.wsj.com/articles/airbnb-raises-1-5-billion-in-one-of-largest-private-placements-1435363506; Natasha Lomas, *Uber Refueling Its Warchest Yet Again, at a Valuation of Up to $70BN*, TECHCRUNCH (Oct. 24, 2015), http://techcrunch.com/2015/10/24/one-more-billion/; Dan Primack, *Uber Now Worth More Than Hertz*, FORTUNE (June 6, 2014, 1:47 PM), http://fortune.com/2014/06/06/uber-is-now-worth-more-than-hertz/. *But see* Aswath Damodaran, *A Disruptive Cab Ride to Riches: The Uber Payoff*, MUSINGS ON MARKETS (June 9, 2014, 3:23 PM), http://aswathdamodaran.blogspot.com/2014/06/a-disruptive-

commentators frequently refer to sharing-based consumption and production as "disruptive" of traditional industries, such as hotels and taxicabs.[30]

In the remainder of this Part, we describe key characteristics and recent developments in ridesharing, home sharing, and other types of sharing.

### *A. Vehicle Ridesharing*

#### *1. Uber*

Uber is regarded by many as the market leader in the peer-to-peer ride service sector.[31] The service is available in about 186 US cities and sixty-seven foreign countries.[32] Uber uses a smartphone application to connect customers with drivers of vehicles for hire. Uber's basic business model involves partnering with local owners of licensed private car companies and also with ordinary citizens driving their personal vehicles. Uber itself does not own cars.[33] The drivers themselves decide whether and when to open up the Uber mobile application and accept ride requests from customers. Thus, Uber regards itself as a marketplace for the provision of services by these individual drivers, and treats the drivers as independent contractors.[34]

On the other hand, Uber itself sets the fares charged for rides, and fares depend in part on the "level" of service provided. UberX is Uber's best-known division and allows drivers to use their own vehicles to offer rides

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cab-ride-to-riches-uber.html (disputing Uber's $17 billion valuation as of June 2014); Aswath Damodaran, *Up, Up and Away! A Crowd-Valuation of Uber!*, MUSINGS ON MARKETS (Dec. 2, 2014, 8:15 PM), http://aswathdamodaran.blogspot.com/2014/12/up-up-and-away-crowd-valuation-of-uber.html.

30. *See, e.g.*, Bass, *supra* note 4 (citing disruptive impact of Uber on "established taxi and limousine companies"); Andrew J. Hawkins, *Why News of a Taxi Comeback Against Uber Was Wrong*, CRAIN'S N.Y. BUS. (Feb. 22, 2015), http://www.crainsnewyork.com/article/20150222/TRANSPORTATION/150229973/more-evidence-uber-is-wiping-out-city-taxi-industrys-value; Ryan Smith, *Sharing Economy Fuels Spirit of Disruption*, WALL ST. J. (May 5, 2014, 2:44 PM), http://blogs.wsj.com/accelerators/2014/05/05/ryan-smith-sharing-economy-fuels-spirit-of-disruption/ (referring to the sharing economy's "spirit of disruption").

31. *See, e.g.*, Erin Griffith, *Uber v. Lyft: The Credit Cards Don't Lie*, FORTUNE (Sept. 11, 2014, 9:00 AM), http://fortune.com/2014/09/11/uber-vs-lyft-the-credit-cards-dont-lie/; UBER, https://www.uber.com/ (last visited Jan. 5, 2016).

32. *Find a City*, UBER, https://www.uber.com/cities (last visited Jan. 5, 2016).

33. Uber recently partnered with Enterprise Rent-A-Car in a pilot program to allow drivers to rent a car at discounted rates to drive for Uber. Kirsten Korosec, *Uber and Enterprise-Rent-a-Car Partner to Add More Drivers to Denver*, FORTUNE (Dec. 2, 2015, 11:56 AM), http://fortune.com/2015/12/02/uber-and-enterprise-denver/.

34. UBER, https://get.uber.com/drive/ (last visited Jan. 5, 2016); *Legal: Terms and Conditions*, UBER, https://www.uber.com/legal/usa/terms (last updated Jan. 2, 2016).

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to customers at fares often significantly lower than taxi fares for comparable trips.[35] To become an UberX driver, applicants must meet an age requirement and have a driver's license, a car (2005 or newer, in most cities), proper insurance, and a clean driving record.[36] Applicants must also clear a background check.[37]

Uber offers other services in certain markets. UberBlack is a traditional "Black-Car" service that resembles typical limousine services. In many US cities, Uber riders also have the options of UberLUX,[38] a luxury car service; UberSUV,[39] a full-sized luxury SUV; UberTAXI,[40] a licensed taxicab; UberXL,[41] a non-luxury SUV; and UberPool, a reduced-fare pooled ride service.[42] Although the scope and increasing variety of Uber's services offer interesting insights into market development, for purposes of this Article our focus is on the basic car-sharing model, UberX, which we will generally refer to as "Uber."

A distinctive characteristic of Uber's fare structure is its use of varying levels of pricing, depending on demand.[43] Under such dynamic or "surge" pricing, changes in fare price are driven algorithmically when wait times increase and unfulfilled requests start to rise. Sometimes these fare increases occur because of a demand surge during high traffic times like

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35. Leena Rao, *Uber Brings Its Disruptive Car Service to Chicago*, TECHCRUNCH (Sept. 22, 2011), http://techcrunch.com/2011/09/22/uber-brings-its-disruptive-car-service-to-chicago/; Alex Wilhelm & Ryan Lawler, *In Another Strike Against the Competition, Uber Lowers UberX Prices in San Diego, LA, and DC*, TECHCRUNCH (Oct. 3, 2013), http://techcrunch.com/2013/10/03/in-another-strike-against-the-competition-uber-lowers-uberx-prices-in-san-diego-la-and-dc/. Additionally, Uber charges a "safe rides fee," which it now calls a "booking fee." *See* Olivia Nuzzi, *Uber's "Safe Rides Fee" Is Too Little, Too Late*, DAILY BEAST (Apr. 22, 2014, 12:45 PM), http://www.thedailybeast.com/articles/2014/04/22/uber-s-safe-rides-fee-is-too-little-too-late.html; *I Was Charged a Safe Rides Fee (US + Canada Only)*, UBER, https://help.uber.com/h/4fa83c50-ab30-434c-b911-f63ad11cd4d9 (last visited Jan. 10, 2016); *infra* note 51. Although Uber's safe ride charge was originally $1 when introduced in April 2014, the booking fee now varies depending on the city. *See* Biz Carson, *Here's How Much Uber Charges for a 'Safe Ride' in Different US Cities*, BUS. INSIDER (Oct. 16, 2015, 12:11 PM), http://www.businessinsider.com/us-cities-with-highest-uber-safe-rides-fees-2015-10.

36. Brian, *Drive with Uber—Earn Cash with Your Car! (Full-Time)*, UBER (Mar. 28, 2014), http://blog.uber.com/partnersfulltime.

37. *Safe Rides, Safer Cities*, UBER, https://www.uber.com/safety (last visited Jan. 5, 2016).

38. Michael Carney, *Uber Launches UberLUX Service in LA, Offers High-Priced Rides in Teslas, Mercedes, and BMWs*, PANDO (Dec. 19, 2014), http://pando.com/2014/12/19/uber-launches-uberlux-service-in-la-offers-high-priced-rides-in-teslas-mercedes-and-bmws/.

39. *Vehicle Requirements*, UBER N.Y.C., http://www.driveubernyc.com/cars/ (last visited Jan. 9, 2016).

40. UBER, https://www.uber.com/cities/boston (last visited Feb. 5, 2016).

41. *Id.*

42. Alex, *Announcing UberPool*, UBER (Aug. 5, 2014), https://blog.uber.com/uberpool (describing UberPool as "a bold social experiment").

43. *See What is Surge Pricing?*, UBER, https://help.uber.com/h/6c8065cf-5535-4a8b-9940-d292ffdce119 (last visited Feb. 5, 2016).

Friday or Saturday night. Other times, they can occur because of special conditions,[44] such as a holiday or inclement weather.[45] Uber's "surge pricing" has triggered significant public reaction[46] and has even given rise to competing applications such as Gett, which offers rides at prices that never surge.[47] Until May 2016, Uber claimed that its fare included tips and told customers that there was no need to give drivers an additional tip.[48] This tip policy created dissatisfaction among some drivers, leading to litigation over the collection and disbursement of tips.[49] As part of an April 2016 settlement agreement in class actions in California and Massachusetts regarding Uber's classification of drivers as independent contractors, Uber agreed to let drivers seek tips.[50] That settlement agreement is pending court approval and is not final. Uber also charges a "booking fee," previously known as the "safe rides" fee.[51]

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44. *See* David Streitfeld, *As It Shakes Up the Taxi Business, Uber's a Target*, BOS. GLOBE (Jan. 27, 2014), http://www.bostonglobe.com/business/2014/01/27/uber-hits-rough-patch/2zON2vyXha5AVhs5N15csI/story.html.

45. *See id.*; Douglas Macmillan, *Uber CEO: Surge Pricing Is Here to Stay*, WALL ST. J. (Jan. 7, 2014, 3:05 PM), http://online.wsj.com/articles/SB10001424052702304887104579306622013546350.

46. *See Uber Rage: Bostonians Irate over Price Surge in Snow Rides*, METRO (Dec. 15, 2013), http://www.metro.us/local/uber-rage-bostonians-irate-over-price-surge-in-snow-rides-metro-us/tmWmlo---21bnYkB3zwpZk/.

47. *See* Seth Porges, *Tired of Uber's Unpredictable Surge Pricing? This Car-Hailing App Hopes You'll Switch*, FORBES (Mar. 30, 2014, 8:41 PM), http://www.forbes.com/sites/sethporges/2014/03/30/tired-of-ubers-unpredictable-surge-pricing-this-car-hailing-app-hopes-youll-switch/; *see also* GETT, http://www.gett.com (last visited Jan. 5, 2016) ("Always pay a flat rate, even when there is heavy rain, traffic, or demand.").

48. *See Do I Need to Tip My Driver*, UBER, https://help.uber.com/h/1be144ab-609a-43c5-82b5-b9c7de5ec073 (last visited Feb. 5, 2016). *But see* Jay Barmann, *Now Uber Drivers Want You to Tip*, SFIST (Feb. 17, 2015, 10:30 AM), http://sfist.com/2015/02/17/now_uber_drivers_want_you_to_tip.php.

49. *See* Bob Egelko, *Uber Drivers' Suit over Tips Clears Hurdle*, S.F. CHRON. (Dec. 7, 2013, 4:16 PM), http://www.sfgate.com/business/article/Uber-drivers-suit-over-tips-clears-hurdle-5044858.php; Maya Kosoff, *Uber's Drivers Say They Don't Get Any Tip Money from All-Inclusive Fares—and They're Furious*, BUS. INSIDER (Sept. 17, 2014, 3:09 PM), http://www.businessinsider.com/ubers-drivers-say-they-dont-get-any-tip-money-from-all-inclusive-fares-2014-9; *cf.* Luz Lazo, *Some Uber Drivers Say Company's Promise of Big Pay Day Doesn't Match Reality*, WASH. POST (Sept. 6, 2014), http://www.washingtonpost.com/local/trafficandcommuting/some-uber-drivers-say-companys-promise-of-big-pay-day-doesnt-match-reality/2014/09/06/17f5d82c-224a-11e4-958c-268a320a60ce_story .html.

50. Declaration of Shannon Liss-Riordan in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement, O'Connor v. Uber Technologies, Inc., No. CV 13-3826 EMC (N.D. Cal. Apr. 21, 2016), *available at* http://hr.cch.com/ELD/OConnorDeclaration.pdf; *see also* Denise Lee Yohn, *Uber Allows Tips and Botches Stakeholder Engagement*, FORBES (May 11, 2016, 5:31 AM), http://www.forbes.com/sites/deniselyohn/2016/05/11/uber-allows-tips-and-botches-stakeholder-engagement/#126ba5146b63. However, as of May 12, 2016, the Uber website still says "No cash, no tip, no hassle." *Ride*, UBER, https://www.uber.com/ride/ (last visited May 12, 2016).

51. *See I Was Charged a Booking Fee*, UBER, https://help.uber.com/h/334e6e9e-9b15-45ba-bb94-e21d2877fa0e (last visited June 6, 2016) (explaining that the "booking fee" was previously known as the "safe rides fee" and is intended to support driver and passenger safety initiatives and cover "other operational costs"); *I Was Charged a Safe Rides Fee (US + Canada Only)*, UBER,

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In exchange for creating and providing the app-based marketplace for rides, Uber takes a portion of the gross fares (usually 20%, though this varies by market) generated by drivers.[52] Despite its claim prior to May 2016 that tips were included in the fare, Uber apparently took its percentage cut off the entire base fare, a practice that resulted in litigation.[53] Uber also charges drivers a weekly fee for the drivers' use of an Uber-ready smartphone, although drivers are encouraged to use their own phones and download the Uber smart phone application.[54] Drivers are responsible for their own expenses, including gas, equipment maintenance, and repairs.[55]

Uber offers drivers a commercial insurance policy that covers accidents occurring from the time the driver accepts a customer until the end of the trip.[56] The policy covers both driver liability as well as uninsured motorists and also includes contingent comprehensive and collision insurance.[57] Uber has also instituted a "gap" insurance policy to cover accidents that happen when UberX drivers are not ferrying customers but are logged onto the Uber application and accepting customers.[58] This policy, which

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https://web.archive.org/web/20151209012513/https://help.uber.com/h/4fa83c50-ab30-434c-b911-f63ad11cd4d9 (last visited June 22, 2016) (describing the safe rides fee, when that term was used, and noting that the fee supported local background checks and related safety measures); *see also* sources cited *supra* note 35. *But see* Ellen Huet, *Uber Faces Class-Action Lawsuit over $1 'Safe Rides Fee,'* FORBES (Dec. 27, 2014, 2:14 AM), http://www.forbes.com/sites/ellenhuet/2014/12/27/uber-class-action-lawsuit-safe-rides-fee/. Uber apparently changed the name for this flat fee as part of the settlement of litigation regarding the safe rides fee and Uber's claim that it was an industry leader in its background checks. *See, e.g.*, Mike Isaac, *Uber Agrees to Settle Class-Action Suit Over Safety Claims*, N.Y. TIMES (Feb. 11, 2016), http://www.nytimes.com/2016/02/12/technology/uber-settles-class-action-suit-over-safety-background-checks.html.

52. David Fagin, *Life as an Uber Driver: It's Just Not Fare*, HUFFINGTON POST (Apr. 5, 2014, 5:59 AM), http://www.huffingtonpost.com/david-fagin/life-as-an-uber-driver_b_4698299.html. According to Uber's website, Uber's cut may be as low as 5% in certain circumstances, and it can be as high as 35%, though the 20% rate seems more prevalent. *See* Ellen Huet, *Uber Tests Taking Even More from Its Drivers with 30% Commission*, FORBES (May 18, 2015, 6:32 PM), http://www.forbes.com/sites/ellenhuet/2015/05/18/uber-new-uberx-tiered-commission-30-percent; *see also Drive with Uber*, UBER, https://www.uber.com/driver-referral (last visited Jan. 5, 2016).

53. *See* Egelko, *supra* note 49; Maya Kosoff, *Here's How Uber's Tipping Policy Puts Drivers at a Disadvantage*, BUS. INSIDER (Oct. 29, 2014, 2:26 PM), http://www.businessinsider.com/uber-tipping-policy-2014-10.

54. *See* Luz Lazo, *Uber Gives Its Drivers Choice to Avoid $10 Weekly Fee for App Use*, WASH. POST (Sept. 9, 2014), http://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/09/09/uber-gives-its-drivers-choice-to-avoid-10-weekly-fee-for-app-use/; *About Device Subscription Fees*, UBER, https://help.uber.com/h/1eaa91f9-be2e-463d-809a-df7e4cdeb593 (last visited Jan. 5, 2016).

55. *See* Lazo, *supra* note 49.

56. Nairi, *Insurance for UberX with Ridesharing*, UBER (Feb. 10, 2014), https://blog.uber.com/uberXridesharinginsurance.

57. *Id.*

58. *Id.*

used to be contingent, is now primary to personal automobile insurance.[59] However, that policy does not cover damage to the Uber driver's own car during the gap period.[60]

### 2. *Lyft and Sidecar*

In addition to Uber, other peer-to-peer ride services have also arisen in various markets. Lyft is Uber's foremost competitor in the ridesharing market.[61] Uber and Lyft are similar services[62] and have nearly identical business models.[63] Like Uber, Lyft connects passengers and drivers through Lyft's smartphone application.[64] Like Uber, Lyft offers a basic service (Lyft), a shared ride service (Lyft Line), and a six-passenger ride service (Lyft Plus).[65] Like Uber, Lyft also elevates fares during periods when demand is high.[66] And like Uber, Lyft provides a liability insurance policy for periods when a Lyft driver is ferrying a customer.[67] There are some differences, however. For example, Lyft customers are prompted to pay within the app after the ride and are able to tip the driver using the Lyft application, though a tip is not required.[68] Prior to the 2016 California

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59. *Id.* This primary coverage was spurred by state law insurance changes, including California's new insurance law requiring transportation network companies such as Uber to provide primary liability insurance coverage during the gap period. Assemb. B. 2293, 2014 Leg. (Cal. 2014).

60. Ellen Huet, *New Laws Push Uber and Lyft to Bump Up Insurance Coverage, but a Collision Gap Remains*, FORBES (July 1, 2015, 2:30 PM), http://www.forbes.com/sites/ellenhuet/2015/07/01/new-laws-push-uber-and-lyft-to-bump-up-insurance-coverage-but-a-collision-gap-remains/.

61. *See, e.g.*, Mike Isaac, *Accusations Fly Between Uber and Lyft*, N.Y. TIMES (Aug. 12, 2014, 3:36 PM), http://bits.blogs.nytimes.com/2014/08/12/accusations-fly-between-uber-and-lyft/?_r=0.

62. *See* Farhad Manjoo, *Uber and Lyft Have Become Indistinguishable Commodities*, N.Y. TIMES (Aug. 28, 2014, 2:27 PM), http://bits.blogs.nytimes.com/2014/08/28/uber-and-lyft-have-become-indistinguishable-commodities/?_php=true&_type=blogs&_r=0.

63. *See* Vivek Saxena, *Lyft vs. Uber: What's the Difference Between These Dueling Apps?*, INQUISITR (Aug. 14, 2014), http://www.inquisitr.com/1409677/lyft-vs-uber-whats-the-difference-between-these-dueling-apps/.

64. *Request or Cancel a Ride*, LYFT, https://help.lyft.com/hc/en-us/sections/203117027-Request-or-Cancel-a-Ride (last visited May 28, 2016).

65. *Id.*

66. *Prime Time for Drivers*, LYFT, https://help.lyft.com/hc/en-us/articles/214586017-Prime-Time (last visited Jan. 10, 2016).

67. *Safety*, LYFT, https://www.lyft.com/safety (last visited May 28, 2016).

68. *How to Tip Your Driver*, LYFT, https://help.lyft.com/hc/en-us/articles/213583978-How-to-Tip-Your-Driver (last visited Jan. 10, 2016). Uber's tipping policy was one of the factors that contributed to a strike and lawsuit by Uber drivers. *See* Michael B. Farrell, *New Lawsuit Claims Uber Exploits Its Drivers*, BOS. GLOBE (June 26, 2014), http://www.bostonglobe.com/business/2014/06/26/uber-hit-with-class-action-lawsuit/JFlTJLMuBoXuEmMU3elTAI/story.html; Maya Kosoff, *Uber Drivers Across the Country Are Protesting Today—Here's Why*, BUS. INSIDER (Oct. 22, 2014, 8:10 AM), http://www.businessinsider.com/uber-drivers-across-the-country-are-protesting-tomorrow--heres-why-2014-10. Although it has agreed to permit tipping as part of its settlement of two lawsuits, see *supra* note 50, Uber has reiterated that is does not plan to add a tip feature on the app or to lower fares

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settlement (which is pending court approval), Uber did not allow additional tipping.[69] Lyft, like Uber, takes a cut of the base fare; however, Lyft drivers keep 100% of all tips.[70]

Yet another variant of a peer-to-peer ride service was Sidecar.[71] Unlike Uber and Lyft, Sidecar gave drivers and passengers more flexibility in setting terms—for example, in choosing rides based on drivers, car types, and fares.[72] Sidecar operated in fewer cities than either Uber or Lyft, but marketed itself based on its greater flexibility and lower prices.[73] In August 2015, Sidecar indicated that although it was not formally ending its ride hailing service, it was redirecting its focus away from ridesharing and towards delivery services.[74] And in January 2016, it sold its assets to General Motors and shut down its business, due in part to its inability to compete with Uber.[75]

Finally, it is important to note in describing these ridesharing services that there are geographic differences in how the businesses are structured and operated. For example, commentators have noted regional differences (such as differences in prices and incentive structures) between driving for these services in the New York versus the San Francisco market.[76]

### *3. Peer-to-Peer Car Rentals*

In addition to peer-to-peer ride services, the sharing economy has also seen the emergence of peer-to-peer car rentals, provided by companies such as Turo, Getaround, and Drivy.[77] Car owners create car profiles and

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to accommodate tipping. *See* Joshua Brustein, *With Settlement, Tipping Is Coming to Uber*, CHI. TRIBUNE (Apr. 27, 2016, 10:50 AM), http://www.chicagotribune.com/business/ct-uber-tipping-20160427-story.html.

69. *See* Dara Kerr, *To Tip or Not to Tip Drivers, That Is Uber's Question*, CNET (Feb. 16, 2015, 4:00 AM), http://www.cnet.com/news/to-tip-or-not-to-tip-drivers-that-is-ubers-question/.

70. *See How To Tip Your Driver*, *supra* note 68; *see also Lyft Commission Structure*, LYFT, https://help.lyft.com/hc/en-us/articles/213815618-Lyft-Commission-Structure (last visited Jan. 5, 2016).

71. *See* SIDECAR, http://www.side.cr/riders/ (last visited Jan. 5, 2016).

72. *Id.*

73. *See id.*

74. Ellen Huet, *Sidecar Puts Passengers Aside, Pivots to a Mostly-Deliveries Company*, FORBES (Aug. 5, 2015, 10:30 AM), http://www.forbes.com/sites/ellenhuet/2015/08/05/sidecar-pivots-to-mostly-deliveries-company/.

75. *See Why We Sold to GM*, SIDECAR (Jan. 20, 2016), https://www.side.cr/why-we-sold-to-gm/.

76. *See, e.g.*, Eric Markowitz, *Word on the Street: What My Lyft Drivers Told Me About Uber*, VOCATIV (Aug. 14, 2014, 10:11 AM), http://www.vocativ.com/money/business/lyft-uber/ (noting that a license is required to drive for Lyft and Uber in New York); *Get a TLC License*, UBER N.Y.C., http://www.driveubernyc.com/tlc/ (last visited Jan. 5, 2016) (same).

77. *See* DRIVY, https://drivy.com (last visited Jan. 5, 2016); GETAROUND, https://www.getaround.com/ (last visited Jan. 5, 2016); TURO, https://turo.com/ (last visited Jan. 5, 2016) (formerly

manage a calendar to let renters know when the car is available for rent and at what rate. Renters enter their travel dates and location details and can browse through a selection of vehicles with varying features and luxury levels. All of this can be done via smartphone application or through the Internet. These services offer insurance coverage for rentals. Turo, for example, covers the car owner for $1 million in liability insurance and offers 24/7 customer service.[78] Getaround also insures rentals up to $1 million.[79] If the renter has not paid for tickets or tolls during his or her reservation, Turo will reimburse the car owner for those charges.[80] Turo also has additional policies for smoking fees, pet fees, cleaning fees, gas fees, and late return fees.[81]

In exchange for providing the application or marketplace for these rentals, the companies take a percentage of the rental price as well as additional charges. For example, Turo car owners generally receive 75% of the rental price and excess mileage charges.[82] Like vehicle ridesharing services, peer-to-peer car rentals allow individuals to share underused vehicles and monetize a previously untapped resource. While this Article focuses primarily on ridesharing and home sharing, the existence of peer-to-peer car rentals demonstrates that sharing-economy arrangements are heterogeneous and can encompass a number of different service and rental relationships.

### *B. Peer-to-Peer Lodging and Accommodation*

Like the peer-to-peer transportation services, peer-to-peer marketplaces for accommodation, such as Airbnb[83] and Roomorama,[84] operate marketplace platforms that connect landlords (called "hosts" by Airbnb) and travelers, enabling these transactions without owning any rooms

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RelayRides). In 2015, Drivy acquired Buzzcar, a former competitor. *See* Romain Dillet, *Community-Based Car Rental Service Drivy Grabs Another $8.6 Million, Acquires Buzzcar*, TECHCRUNCH (Apr. 1, 2015), http://techcrunch.com/2015/04/01/community-based-car-rental-service-drivy-grabs-another-8-6-million-acquires-buzzcar/.

78. *Rent Safely, Travel Confidently*, TURO, https://turo.com/trust-and-safety (last visited Jan. 10, 2016).

79. GETAROUND, https://www.getaround.com (last visited Jan. 5, 2016).

80. *What Will I Earn and How Do I Get Paid?*, TURO, https://support.turo.com/hc/en-us/articles/203992000-What-will-I-earn-How-do-I-get-paid-- (last visited Jan. 10, 2016).

81. *Fees & Fines*, TURO, https://support.turo.com/hc/en-us/articles/203990780-Fees-Fines (last visited Jan. 10, 2016).

82. *What Will I Earn and How Do I Get Paid?*, *supra* note 80.

83. AIRBNB, https://www.airbnb.com/ (last visited Jan. 5, 2016).

84. ROOMORAMA, https://www.roomorama.com (last visited Jan. 5, 2016).

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themselves.[85] On Airbnb, for example, hosts can rent out anything from entire homes, to a room in a house, to an air mattress in a living room.[86] Hosts decide on the price they will charge and manage their own personal rental calendar.[87] Hosts can set custom prices for individual nights and weekends, special events, and monthly stays. Renters, via either the smartphone application or the website, input their travel dates and then can search through host listings based upon price, location, and amenities. Thus, home sharing services allow hosts to monetize unutilized space and provide renters an alternative to standard hotel accommodations.[88]

Like ridesharing companies, the home sharing companies take a cut of the rental payment. On Airbnb, for example, the payout for hosts is the listing price minus a 3% host-service fee, which Airbnb deducts every time a reservation is booked at its website to cover the cost of processing guest payments.[89] In addition, the guest pays a guest-service fee (usually 6-12%) each time a reservation is booked.[90] The percentage charged depends on the reservation price and decreases as the reservation amount increases. Like other sharing economy companies, Airbnb provides insurance to hosts,[91] a guest refund policy,[92] and customer support.[93]

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85. *See* Sangeet Paul Choudary, *The AirBnB Advantage: How to Avoid Competition and Become a Multi-Billion Dollar Startup*, NEXT WEB (Mar. 10, 2013, 5:00 PM), http://thenextweb.com/insider/2013/03/10/the-airbnb-advantage-how-to-avoid-competition-and-become-a-multi-billion-dollar-startup/; *see also* BEDYCASA, http://www.bedycasa.com/ (last visited Jan. 5, 2016); HOMEAWAY, http://www.homeaway.com/ (last visited Jan. 5, 2016); ROOMORAMA, https://www.roomorama.com/ (last visited Jan. 5, 2016); WIMDU, http://www.wimdu.com/ (last visited Jan. 5, 2016).

86. *See What Does the Room Type of a Listing Mean*, AIRBNB, https://www.airbnb.com/help/article/5 (last visited Jan. 10, 2016).

87. *How to Host*, AIRBNB, https://www.airbnb.com/help/getting-started/how-to-host (last visited Jan. 10, 2016).

88. *See* Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Jan. 23, 2013, 7:00 AM), http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/.

89. *What Are Host Service Fees?*, AIRBNB, https://www.airbnb.com/help/article/63 (last visited Jan. 10, 2016).

90. *What Are Guest Service Fees?*, AIRBNB, https://www.airbnb.com/help/article/104 (last visited Jan. 10, 2016).

91. *What Is Host Protection Insurance?*, AIRBNB, https://www.airbnb.com/help/article/937 (last visited Jan. 10, 2016).

92. *Guest Refund Policy*, AIRBNB, https://www.airbnb.com/help/article/324 (last visited May 28, 2016).

93. *Airbnb Help Center*, AIRBNB, https://www.airbnb.com/help/article/9 (last visited May 28, 2016).

### *C. Other Online Peer-to-Peer Marketplaces for Sharing*

Although the focus of this Article is peer-to-peer ride services and accommodation rentals, these are just two examples of how the sharing economy has grown and developed. With the availability of technology that can seamlessly connect peer suppliers and producers, almost anything can be shared, and a number of different industries now operate using the sharing model to provide a variety of goods.[94]

One prominent example, TaskRabbit,[95] allows users to outsource freelance services to others in their local neighborhood using an online marketplace model. Recently, TaskRabbit shifted their business model from a "freewheeling auction" model to a more controlled website.[96] Prospective employers, or "Clients," choose from a number of broad categories, including: "Cleaning," "Handyman," "Shopping and Delivery," "Moving Help," and others. After this selection, clients receive a choice of a number of "Taskers" with various hourly rates and skill sets. TaskRabbit will let clients set filters so that they only receive matches for certain job categories. After a client selects a Tasker, the two schedule a time for the job and communicate with one another in real time using a custom-messaging platform built by the company. In order to select a desired Tasker, clients utilize a user-controlled rating system to help make their decision.[97] TaskRabbit employs a transparent system where clients see the hourly rates for the Taskers. TaskRabbit takes a 30% service fee on each task.[98] By using TaskRabbit, Clients and Taskers receive 24/7 Members Services support and an insurance policy, which guarantees up to $1 million of coverage per task.[99]

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94. *See supra* note 27 and accompanying text.

95. TASKRABBIT, https://www.taskrabbit.com/ (last visited Jan. 5, 2016).

96. *See* Adrienne Raphel, *Taskrabbit Redux*, NEW YORKER, July 22, 2014, http://www.newyorker.com/business/currency/taskrabbit-redux (describing TaskRabbit's original auction-like model, which "made work look like a game"). TaskRabbit faced significant scrutiny for abandoning its original auction-like bidding system this year. *See* Harrison Weber, *TaskRabbit Users Revolt as the Company Shuts Down Its Bidding System*, VENTUREBEAT (July 10, 2014, 2:34 PM), http://venturebeat.com/2014/07/10/taskrabbit-users-revolt-as-the-company-shuts-down-its-bidding-system/.

97. TaskRabbit continues to experiment with ways to identify its top workers through its Elite Tasker program (based on approval rating and number of tasks performed). *Support Center*, TASKRABBIT, https://support.taskrabbit.com/hc/en-us/articles/206488433-Elite-Tasker-Holiday-Program-11-2-15 (last visited Feb. 9, 2016). Such workers receive recognition on the website that presumably generates more tasks for them.

98. *What Is the TaskRabbit Service Fee?*, TASKRABBIT (May 24, 2016, 1:55 PM), https://support.taskrabbit.com/hc/en-us/articles/204411610-What-is-the-TaskRabbit-Service-Fee-.

99. *The TaskRabbit Trust & Safety Fee*, TASKRABBIT (last visited May 17, 2016), https://support.taskrabbit.com/hc/en-us/articles/204940570-The-TaskRabbit-Trust-Safety-Fee.

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In addition to tasks and chores, the sharing economy has also reached numerous other industries, including dog boarding,[100] clothing, bicycles, and wifi.[101] Most of these industries operate on a similar model to ridesharing and home sharing: the business creates an online marketplace, bringing together consumers and suppliers of the goods or services, and takes a percentage commission in exchange for providing the matching platform.

## II. TAX ISSUES IN THE SHARING ECONOMY

We now turn to examining the substantive and doctrinal tax issues raised by sharing, focusing on the ridesharing and home sharing sectors. Commentators have claimed that tax issues and uncertainties abound for those earning income in the sharing economy.[102] In Parts II and III, we closely examine whether and in what respects these claims are accurate. We find that while they may be complicated, significant portions of the doctrinal tax rules governing the tax liability of sharing economy earners are not unclear. More importantly, these rules are generally adequate for taxing sharing. In a few respects, particularly regarding employment taxes and occupancy and other local taxes, the applicable law is less clear. But the conceptual framework and categories of current tax law should continue to be adequate once the necessary clarifications are provided regarding the law's application. In short, perhaps in contrast to other regulatory spheres, fundamental substantive overhaul of the tax law or introduction of new rules is not necessarily required. On the other hand, as further discussed in Part III, the sharing economy may raise fresh issues with respect to tax compliance.[103]

The tax issues at stake in the sharing economy vary depending on the industry, and contextualized study is required. For example, home sharing may implicate the I.R.C. § 280A limitations, while ridesharing may require use of the standard mileage expense method.[104] Thus, for clarity, we discuss ridesharing and home sharing separately, in Parts II.A and II.B, respectively. In Part II.C, we flag those areas—employment and local occupancy taxes—in which there may be uncertainty in determining which

100. *See* DOGVACAY, http://dogvacay.com/ (last visited Jan. 5, 2016); ROVER, http://www.rover.com/ (last visited Jan. 5, 2016).
101. *See supra* note 27.
102. *See, e.g.*, *supra* notes 7, 11.
103. *See infra* Part III.
104. *See infra* Parts II.A.2, II.B.2.

rule applies, while re-emphasizing that the rules themselves are quite clear and the concepts and categories of tax law remain sufficient.

### *A. Income Taxation of Peer-to-Peer Ride Services*

The tax rules that govern ridesharing can broadly be divided into three groups: (1) general rules for income inclusion and deduction; (2) rules governing apportionment of expenses between business and personal uses; and (3) self-employment tax rules. We show in Part II.A that the rules in the first two groups may be complex but are for the most part clear. We discuss the third group of rules in Part II.C.

#### *1. General Rules for Income Inclusion and Deduction*

The clear doctrinal rule with respect to income inclusion is that ridesharing drivers are taxed on a net basis on their income earned from driving activities minus allowable expenses.[105] Conceptually, this tax treatment is not unlike that of other business income earners operating as independent contractors. Income sources for ridesharing drivers will include the gross fares received as well as any additional tips received. They may also include referral and other bonuses, driver credits, and other such payments from the ridesharing services themselves. Expenses may include gas, amounts paid for vehicle repairs, and driving insurance. Ridesharing drivers may be subject to certain documentation requirements and other limitations in their ability to deduct expenses.[106]

As further discussed below, drivers may choose to either deduct actual expenses or use the standard mileage method.[107]

#### *2. Apportionment of Expenses Between Business and Personal Use*

While the general scheme for taxing income and expenses is clear, complexities may arise in the ridesharing sector because many ridesharing drivers do not drive full time.[108] Furthermore, the vehicle they use for

105. *See* I.R.C. §§ 61, 162, 212 (2014).

106. Business deductions under I.R.C. § 162 must meet the requirements of I.R.C. § 274(d), which dictates that listed property must meet certain documentation requirements. *See id.* § 274(d). Listed property includes: (1) passenger automobiles, and (2) any other property used as a means of transportation unless substantially all the use is for the "business of providing to unrelated persons services consisting of the transportation of persons or property for compensation or hire." I.R.C. § 280F(d)(4)(C) (2014).

107. *See infra* Part II.A.2.

108. A study commissioned by Uber and conducted by the Benenson Strategy Group found that, based on interviews conducted in December 2014, 52% of "partner-drivers" driving with Uber were

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ridesharing may also be driven for personal use, sometimes predominantly for personal use.[109] Thus, because the tax law only permits deduction of business-related expenses, ridesharing drivers may face more significant expense allocation and tracking issues than taxicab drivers.[110]

Most, but not all, expenses of ridesharing drivers will pertain to the vehicle they operate. For tax purposes, drivers may either (1) deduct the actual business expenses that they incur or (2) recover them using the standard mileage method.[111]

*Actual Costs Method*. If the driver uses "actual costs," the relevant covered expenses include: depreciation, garage rent, gas, insurance, lease payments, licenses, oil, parking fees, registration, repairs, tires, and tolls.[112] If the vehicle serves both business and personal uses, then the driver must apportion these expenses between the business and the personal use. Such apportionment may be based on miles driven. The driver must keep track of personal use miles and business miles and track all qualified actual expenses (the listed expenses above). These actual expenses are then divided based on mileage, with the business portion deductible.[113] For example, if two-thirds of the miles driven in the vehicle are business miles (e.g., driving with Uber), then two-thirds of the actual

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part-time drivers with no previous driving experience who drove fewer than 30 hours a week. BENENSON STRATEGY GRP., UBER: THE DRIVER ROADMAP (2015), *available at* https://newsroom.uber.com/wp-content/uploads/2015/01/BSG_Uber_Report.pdf [hereinafter UBER DRIVER ROADMAP]. For further study, see Jonathan Hall, *In the Driver's Seat: A Closer Look at the Uber Partner Experience*, UBER (Jan. 22, 2015), http://blog.uber.com/partner-experience (describing the decision to commission the study and outlining some of the findings).

109. The typical Uber driver uses his or her own car. *See generally Uber Vehicle Requirements for 2016*, RIDESHAREAPPS.COM, http://rideshareapps.com/uber-vehicle-requirements-for-2016/ (last visited Feb. 9, 2016) (specifying by city the oldest model year accepted for the vehicle and that it must be a 4-door vehicle); The Driver, *Uber Updates Car Requirements to 2001 or Newer in 2016*, RIDESHARE DASHBOARD (Feb. 2, 2016), http://ridesharedashboard.com/2016/02/02/uber-updates-car-requirement-2001-newer-2016/ (same). As noted, other Uber services coordinate with local licensed livery and taxicab services. *See, e.g.*, *UberTaxi*, UBER MOVEMENT BOS., http://boston.ubermovement.com/ubertaxi/?rq=taxi (May 28, 2016); *see also* Mina, *Uber, Just the Way You Like It!*, UBER (July 3, 2012), http://blog.uber.com/2012/07/03/choice-is-a-beautiful-thing/ (noting that riders in Chicago are able to hail and automatically pay for a taxicab using the UberTAXI app); *Uber Moves: San Francisco Bay Area*, UBER, https://www.uber.com/cities/san-francisco (last visited May 28, 2016) (providing access to vehicles under the UberTAXI program in San Francisco that are commercial taxis driven by an individual licensed and certified by the city of San Francisco).

110. *See* I.R.C. § 262 (2014) (disallowing deductions for personal expenses not expressly provided for by the Code). Cab drivers operating business-use only vehicles would have no need to allocate miles (and costs) between business and personal use.

111. *See* Treas. Reg. § 1.274-5(j)(2) (2000); I.R.S. Notice 2014-79, 2014-53 I.R.B. 1001 (Section 3); I.R.S. News Release IR-2014-114 (Dec. 10, 2014).

112. *See* I.R.S Publ'n No. 463, *Travel, Entertainment, Gift, and Car Expenses* (2015), at 16–17; *see also* Rev. Proc. 2010-51, 2010-2 C.B. 883.

113. *See* I.R.S. Publ'n No. 463, *Travel, Entertainment, Gift, and Car Expenses* (2015), at 17.

expenses of operating the vehicle may be deducted against the Uber business income. The remaining one-third of expenses allocated to personal use would not be deductible.[114] For vehicles for which business use does not exceed 50%, ridesharing drivers may be forced to use the alternative depreciation system, rather than Modified Accelerated Cost Recovery System ("MACRS") depreciation, and may not be able to make the I.R.C. § 179 election to expense certain car costs.[115]

*Standard Mileage Method*. On the other hand, if the driver uses the standard mileage rate, she must still keep track of the number of miles she drives for business, and she can deduct a certain number of cents per business mile driven.[116] For 2015, the allowable standard mileage deduction is 57.5 cents per mile.[117] If the driver uses standard mileage, then she cannot deduct her actual car expenses (e.g., lease payments, maintenance, repairs, gasoline, oil, insurance, and vehicle registration).[118] The standard mileage rate cannot be used in certain circumstances.[119] For example, standard mileage may not be used if the taxpayer has claimed depreciation deductions with respect to the car using a method other than straight line for the car's useful life, or if the taxpayer has taken accelerated depreciation under I.R.C. § 168 or bonus depreciation under I.R.C. § 168(k) with respect to that automobile.[120] Generally, this means

114. *Id.*

115. I.R.C. § 280F(b)(1) (2014); I.R.S. Publ'n No. 463, *Travel, Entertainment, Gift, and Car Expenses* (2014), at 16–23.

116. *See* Treas. Reg. § 1.274-5(j)(2) (2010); I.R.S. Notice 2014-79, 2014-53 I.R.B. 1001 (Section 3); I.R.S. News Release IR-2014-114 (Dec. 10, 2014). To use standard mileage, that method must be chosen in the first year the car is used in the business. The operator may switch to the actual expenses method in subsequent years. For a car that is leased, if a driver uses the standard mileage rate, that method must be used for the entire lease period (including renewals). *See Topic 510—Business Use of Car*, INTERNAL REVENUE SERV., http://www.irs.gov/taxtopics/tc510.html (last updated May 20, 2016). Other restrictions apply to the use of the standard mileage rate. *See, e.g.*, Rev. Proc. 2010-51, 2010-2 C.B. 883; I.R.S. Publ'n No. 463, *Travel, Entertainment, Gift, and Car Expenses* (2014), at 16–23.

117. I.R.S. Notice 2014-79, 2014-53 I.R.B. 1001 (Section 2); I.R.S. News Release IR-2014-114 (Dec. 10, 2014).

118. Rev. Proc. 2010-51, 2010-2 C.B. 883 (Section 4); I.R.S. Publ'n No. 463, *Travel, Entertainment, Gift, and Car Expenses* (2014), at 16.

119. I.R.S. Publ'n No. 463, *Travel, Entertainment, Gift, and Car Expenses* (2014), at 16 (providing that standard mileage cannot be used if you (1) "[u]se five or more cars at the same time (such as in fleet operations)," (2) "[c]laimed a depreciation deduction for the car using any method other than straight line, for example, MACRS," (3) "[c]laimed [an I.R.C. § 179] deduction" on the car, (4) "[c]laimed the special depreciation allowance on the car," (5) "[c]laimed actual car expenses after 1997 for a car you leased," or (6) "[a]re a rural mail carrier who received a qualified reimbursement").

120. Rev. Proc. 2010-51, 2010-2 C.B. 883 (Section 4.05(3)). Under straight line depreciation, the taxpayer recovers the asset's basis ratably over the estimated useful life of the asset specified by law.

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that the taxpayer cannot switch to the standard mileage method after having used actual operating costs.[121]

While automobile costs will likely constitute the dominant business expenses of ridesharing drivers, other costs may be incurred. For example, a ridesharing driver might decide to buy water and candy bars for passengers to boost her driver rating.[122] Such costs might be deductible regardless of whether the driver has selected the standard mileage rate method or the actual costs method, but the outlays would have to satisfy the deductibility requirements of the relevant statutes.[123] As another example, ridesharing drivers must generally use a smartphone as part of their driving business. Due to the potential constraints in trying to deduct expenses for a phone used partially for business and partially for personal use, at least one commentator has urged drivers to buy a separate phone used exclusively for their ridesharing business to ensure the full deductibility of their ridesharing phone costs.[124] The existence of these additional costs means that even use of the streamlined standard mileage rate method would not obviate the need for detailed record keeping. Also, at the margins, the business-personal distinction may become less clear, and there could be a question as to whether these additional expenses satisfy both I.R.C. § 162 (general deductibility of business expenses) and § 274 (further limits on the deductibility of otherwise § 162-qualified business expenses).[125]

To be clear, we do not claim that tax law and tax reporting as applied to ridesharing drivers is not complex. Drivers may have to undertake significant tracking and reporting burdens regarding their income and expenses. Furthermore, apportionment between business and personal uses

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121. Federal Tax Coordinator 2d, ¶ L-1903 (RIA Checkpoint Analysis Caution).

122. *Cf.* Jeff Bercovici, *Uber's Ratings Terrorize Drivers and Trick Riders. Why Not Fix Them?*, FORBES (Aug. 14, 2014, 12:31 PM), http://www.forbes.com/sites/jeffbercovici/2014/08/14/what-are-we-actually-rating-when-we-rate-other-people/.

123. *See, e.g.*, I.R.C. §§ 162, 274 (2014); Rev. Proc. 2010-51, 2010-2 C.B. 883 (Section 4.03) (noting that even if the standard mileage method is selected, the taxpayer may also deduct, as separate expenses, items such as parking fees and tolls).

124. *See* Rideshare Dashboard, *Lyft and Uber Driver Salary and Tax Rates*, LINKEDIN (Dec. 25, 2014), https://www.linkedin.com/pulse/lyft-uber-driver-salary-tax-rates-rideshare-dashboard?forceNoSplash=true ("[I]t is recommended you get another mobile phone with data just for Lyft, Uber and Sidecar so you can deduct the entire phone bill, or you will need to itemize how much for personal use or business purposes.").

125. Although not a likely risk for services like Uber, Lyft, and Sidecar, there is a possibility that in other less commercially structured variants, the IRS might deny losses on the ground that the activities are hobbies rather than part-time businesses. *See Homobiles: Transportation with a Social Mission*, NPR (Oct. 5, 2014, 7:57 AM), http://www.npr.org/2014/10/05/353849536/homobiles-transportation-with-a-social-mission (describing a "noncommercial, volunteer, 24/7 ride service for the LGBT community and others around San Francisco").

of a vehicle may further increase compliance costs. Complexity and administrability concerns may suggest that reform is required. Our point, rather, is that for the most part, the ridesharing sector does not raise new issues requiring fundamental overhaul of the tax rules, even if their factual realities exacerbate some issues currently confronting the taxing authority and tax filers. In general, tax laws already have the doctrines and structures in place that are necessary to accommodate new filers from the ridesharing sector.[126] As further discussed in Part IV, if deviations from existing doctrines are undertaken, they should be put in place for other carefully considered goals, and not simply on the grounds that current law cannot conceptually "reach" the sharing sector.

### *B. Income Taxation of Home Sharing*

Home sharing implicates some of the same tax issues as ridesharing, but there are some important differences as well. The main issues with respect to home sharing are: (1) the doctrinal rules governing income inclusions and deductions; (2) issues that arise in allocating expenses between business and personal categories; and (3) state and local occupancy taxes. It is possible that some home sharing hosts may encounter self-employment tax issues (for example, if they are found to be operating a full-service bed and breakfast equivalent), but this is generally less likely than in the ridesharing sector. Again, we argue that despite complexities surrounding business-personal allocations, the substance of the federal income tax law is quite clear. With respect to state and local occupancy taxes, the application of these taxes to home sharing may be slightly more ambiguous, even though the rules themselves are not unclear.[127]

#### *1. General Rules for Income Inclusion and Deduction*

Home sharing hosts must include rents received in gross income and may deduct qualified deductions in computing net taxable income. However, the sharing element of home sharing may give rise to complications less present in traditional real estate rentals. An important concern is the risk that expense deductions will be limited by I.R.C. § 280A. The provision was enacted to police the business-personal

126. Other commentators have explored potential I.R.C. § 132 questions. *See* Barry & Caron, *supra* note 12, at 82–84.

127. *See infra* Part II.C.2.

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borderline by imposing limitations on a taxpayer's deductions in connection with the rental of a "dwelling unit which is used by the taxpayer during the taxable year as a residence."[128] However, to the extent home sharing deductions are not limited by I.R.C. § 280A, taxpayers can proceed to do the usual business expense analysis and report all otherwise qualified deductions on their tax returns.[129]

In the most straightforward case, property used exclusively for business purposes (including home sharing rentals) and not for any personal purposes would not trigger the application of I.R.C. § 280A. Such exclusive business-use property might include, for example, a separate apartment with its own kitchen and toilet. It might also include a portion of the taxpayer's residence that itself constitutes a separate "dwelling unit" within the meaning of I.R.C. § 280A (such as a basement apartment with its own kitchen and toilet).[130] For these properties, taxpayers would not need to allocate expenses between personal and business use. On the other hand, taxpayers would still need to determine which costs are currently deductible and which must be capitalized. It seems likely, however, that a significant number of home sharing landlords will have property with respect to which there is personal use.[131] In that case, the I.R.C. § 280A limitations would apply.[132]

### *2. Expense Limitations Associated with Partial Business-Use Property*

Significant complexities may arise in home sharing rentals of properties where there is also some personal use by the taxpayer. There is

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128. I.R.C. § 280A(a) (2014).

129. Rental expenses are generally reported on I.R.S. Schedule E (Form 1040).

130. Prop. Treas. Reg. § 1.280A-1(c)(1), 45 Fed. Reg. 52,399, 52,401 (Aug. 7, 1980). This proposed rule defines a "dwelling unit" as a property that contains "basic living accommodations such as sleeping space, toilet, and cooking facilities." *Id.*

131. For example, Airbnb encourages prospective "hosts" to consider renting "out extra space effortlessly." *Hosts Love Using Airbnb*, AIRBNB, https://www.airbnb.com/info/why_host (last visited Jan. 9, 2016). In October 2013, Airbnb reported that its NYC Airbnb study found that 87% of hosts rent out the property where they actually live. Press Release, Airbnb, New Study: Airbnb Generated $632 Million in Economic Activity in New York (Oct. 22, 2013), *available at* https://www.airbnb.com/press/news/new-study-airbnb-generated-632-million-in-economic-activity-in-new-york; *see also generally* AIRBNB, GROWING THE ECONOMY, HELPING FAMILIES PAY THE BILLS: ANALYSIS OF ECONOMIC IMPACTS 2014, at 34 (2015), *available at* https://www.airbnbaction.com/wp-content/uploads/2016/02/New-York-City_Impact-Report_2015.pdf (noting that for 2014, 90% of hosts were renting their primary residence).

132. Neither I.R.C. § 280A(c)(3) and § 280A(c)(5) (limiting rental expense deductions where the rented dwelling unit is used by the taxpayer as a residence), nor § 280A(e) (requiring apportioning expenses between rental activity and personal use, including use as a residence), would be relevant in the case of exclusive rental of property with no personal use of any type.

reason to think that these mixed-use properties may be a sizable portion of home sharing rentals.[133] In the case of such properties, the following rules may limit the taxpayer's ability to deduct home sharing expenses.[134]

*a. The "Hotel" Exception*

Taxpayers may be able to participate in home sharing without being subject to the I.R.C. § 280A limitations on deductions associated with dwelling units if the property falls under the so-called "hotel exception." That exception provides that "[t]he term 'dwelling unit' does not include that portion of a unit which is used exclusively as a hotel, motel, inn, or similar establishment."[135] A room in a home is considered so used if it is "regularly available for occupancy by paying customers and only if no person having an interest in the property is deemed under . . . [the § 280A regulations] . . . to have used the unit as a residence during the taxable year."[136] So, for example, a taxpayer who rents a room in her home for short-term occupancy to paying guests and who does not use the room herself might be able to avoid the limitations of I.R.C. § 280A, if it were determined that the room falls under the hotel exception. In that case, however, costs associated with common spaces and the building exterior, and not related to the business, cannot be deducted.[137]

Hosts in the home sharing economy face several challenges in trying to fall under the hotel exception. The most obvious is the factual question of whether the identified room is regularly available for occupancy and whether there is personal use of the room by the taxpayer.[138] So, for

133. *See* Press Release, Airbnb, *supra* note 131.

134. The following discussion focuses on the treatment of income and deductible expenses in homesharing activities because these tax questions are most dominant and pressing for taxpayers venturing into that sector of the economy. Similar complexities, though, dominate the calculation of gain or loss on the sale of property used in whole or in part for rental activities. If rental property with no personal use is sold at a loss, the loss should be deductible, subject to any applicable passive activity loss rules. *See generally* I.R.C. §§ 165(c)(1)–(2), 469 (2014). If, however, the taxpayer rents her home during part of the year, and later sells the home, the rental use does not affect the calculation of gain or loss on the sale, and any loss on the sale is not deductible. *See* Treas. Reg. § 1.165-9(a) (1964); I.R.S. Publ'n No. 523, *Selling Your Home* (2015), at 7, 9.

135. I.R.C. § 280A(f)(1)(B) (2014).

136. Prop. Treas. Reg. § 1.280A-1(c)(2), 45 Fed. Reg. 52,399, 52,401–02 (Aug. 7, 1980); *see also* I.R.S Publ'n No. 527, *Residential Rental Property* (2015), at 2.

137. I.R.S. Priv. Ltr. Rul. 8732002 (Apr. 2, 1987).

138. Case law and rulings suggest that the "used . . . as a residence" requirement is interpreted strictly and that any personal use of the space by the taxpayer will take it outside of the hotel exception. *See, e.g.*, Fine v. United States, 493 F. Supp. 540, 543–44 (N.D. Ill. 1980), *aff'd*, 647 F.2d 763 (7th Cir. 1981); Grigg v. Comm'r, 62 T.C.M. (CCH) 465 (1991), *aff'd*, 979 F. 2d 383 (5th Cir. 1992); Byers v. Comm'r, 82 T.C. 919, 925 (1984); I.R.S. Priv. Ltr. Rul. 8518003 (Jan. 18, 1985).

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example, hosts who rent out a couch or an air mattress in the living room will be unlikely to qualify for the hotel exception. Similarly, taxpayers who rent out a spare room, but also use the room for personal purposes when not rented, would likely not qualify. Even for those taxpayers who reserve a room in their home solely for rental use, the ability to qualify for the "hotel exception" may be hampered by the distinctive operational features of this rental economy. For example, to the extent that Airbnb hosts have the right to screen, monitor, and evaluate potential renters, the room might not be considered "regularly available for occupancy by paying customers" in a manner comparable to hotels, motels, and inns.[139]

If the taxpayer's room rental falls within the hotel exception, then the general rules for income and deduction where there is no personal use apply irrespective of I.R.C. § 280A.[140] The taxpayer must divide expenses between the rental use portion of the property and the personal use portion of the property and may only deduct on Schedule E the rental use portion. "[A]ny reasonable method" may be used to divide expenses between rental and personal.[141] Certain allowable personal use expenses may continue to be deducted on Schedule A.[142]

#### *b. Partial Rental Use of a Dwelling Unit That Does Not Rise to the Level of a Residence*

If a taxpayer rents out property that is considered a "dwelling unit" within the meaning of I.R.C. § 280A but is not used exclusively for business, then I.R.C. § 280A applies. This scenario would arise, for example, if the taxpayer has a condominium that she rents out at fair rental value for most of the year but uses for personal purposes for some days. In such scenarios where there is partial personal use, two outcomes are possible.

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139. *See, e.g.*, *Am I Allowed to Decline Booking Inquiries?*, AIRBNB, https://www.airbnb.com/help/article/899 (last visited Jan. 6, 2016), *archived at* http://perma.cc/9XMJ-BUSK ("[Y]ou can tell any guest that your listing is unavailable for a trip they've asked about."); *see also What If I Feel Uncomfortable with a Guest*?, AIRBNB, https://www.airbnb.com/help/article/259 (last visited Jan. 6, 2016), *archived at* http://perma.cc/M62A-6NZY ("If a guest sends you a booking inquiry or reservation request and you find that they're not a fit for your space or hosting style, you are free to decline the booking."). More recently, Airbnb has been under pressure to combat discrimination encountered by renters on the platform, thus the parameters of hosts' ability to screen and evaluate renters may be in flux.

140. *See* I.R.C. §§ 61, 162, 183, 212 (2014).

141. I.R.S. Publ'n No. 587, *Business Use of Your Home* (2014), at 10 (noting that square footage or number of rooms, where rooms are all about the same size, are two commonly used methods).

142. For example, home mortgage interest may be deducted. I.R.C. § 163(h)(3) (2014).

First, to the extent the level of personal use does not rise to that of a "residence," the less restrictive portion of the I.R.C. § 280A rules applies. Personal use will only rise to the level of a "residence" if the use is for (1) more than 14 days or (2) 10% of the number of days for which the unit is rented at fair rental.[143] If the personal use does not rise to the level of a "residence," the taxpayer's deduction for expenses attributable to the rental of the unit is limited to Y, where[144]:

$$Y = \text{taxpayer's total rental expenses} \times \frac{\text{number of days in the year the unit is rented at fair value}}{\text{total number of days in the year the unit is used}}$$

Thus, consider a case in which a home sharing host rents a unit to various guests for 350 days in a year and uses it personally for 7 days. If the total expenses associated with the unit were $10,000 for the year, the rule provides the deductible expenses may not exceed $9,804.[145]

### *c. Partial Rental Use of a Dwelling Unit That Is Used as a Residence*

Second, if the level of personal use does rise to the level of a "residence," then the more extensive rules of I.R.C. § 280A apply. This situation might exist if, for example, the rented space is a "dwelling unit" and the personal use of that space exceeds the threshold for being a residence noted above.[146] If the taxpayer uses the dwelling unit as a residence and rents it out for fifteen days or more during the year, then the taxpayer must report the income and expenses (including depreciation) allocable to rental use on Schedule E, subject to the I.R.C. § 280A limitations.[147]

Specifically, I.R.C. § 280A limits the rental deductions attributable to the rental unit to the amount of gross income from the rental activity that remains after deducting (1) expenses allocable to the rental activity that would be deductible regardless of the rental use, and (2) expenses allocable to the rental business but not to the rental property itself. So, for example, assume that a taxpayer rents out her condominium for twenty-

143. I.R.C. § 280A(d)(1) (2014).

144. *Id.* § 280A(e)(1). This ratio-based limitation does not apply to the deduction of expenses that would be deductible regardless of whether the unit (or portion thereof) was rented. *Id.* § 280A(e)(2).

145. Because $10,000 of total rental expense x 350 days rented at fair value ÷ 357 days unit is used during the year = $9,804, the total amount of rental expenses permitted under I.R.C. § 280A(e).

146. I.R.C. § 280A(d)(1); *see also supra* note 143 and accompanying text.

147. I.R.C. §§ 280A(c)(5), (e)(1) (2012). If the taxpayer used the dwelling unit as a residence and rented it for *fewer than fifteen days* during the year, then the taxpayer reports neither income nor expenses associated with the rental activity. *Id.* §§ 280A(c)(5), (g).

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eight days and lives in it the remaining 337 days of the year.[148] She earns a total rental income of $5,000, incurs $2,000 worth of expenses that would be deductible regardless of the rental activity (e.g., property tax), and incurs $400 in expenses related to the rental activity, but not to the unit (e.g., a fee to list the property on a home sharing website). Under I.R.C. § 280A(c)(5), this taxpayer is limited to a deduction of $4,446.58 for the expenses attributable to the rental unit use but not otherwise deductible (e.g., utilities, insurance, repairs, etc.).[149] Expenses over this limitation may be carried over to the next taxable year.[150]

To take another example, assume that a taxpayer rents out a room in her home on Airbnb for twenty-eight days a year but uses it for personal purposes on the remaining days. Assume the taxpayer earns $2,000 of rental income. Assume that the taxpayer has a total annual mortgage interest of $15,000 and total property tax liability of $11,000. The portion of mortgage interest related to the rental is $1,200 and the portion of property tax related to the rental is $880.[151] Under these facts, the taxpayer would be able to take zero deduction for rental expenses attributable to the rental unit but not otherwise deductible (e.g., utilities, insurance) because her gross income from home sharing is less than the deductions otherwise allowable by the statute (mortgage interest and property tax).

* * *

In sum, the doctrinal tax rules governing income inclusion and expense deductions in both ridesharing and home sharing are not unclear. These

148. *See id.* § 280A(c)(5).

149. The property is rented for twenty-eight of the 365 days it is used in the year. Thus, deductible rental-related expenses cannot exceed the ratio of 28 days rented/365 days used. Thus, of the $2,000 in property taxes, $153.42 is attributable to the rental; calculated as $2,000 in property taxes multiplied by the ratio of 28 days rented/365 days used. The remaining $1,846.58 of property tax ($2,000 - $153.42) is deductible regardless of rental use. To determine the amount of rental unit expenses deductible (other than those such as interest or taxes which are independently deductible), I.R.C. § 280A(c)(5) specifies the following calculation: $5,000 total rental income - $153.42 (otherwise permitted property deductions, here the portion of property tax, allocable to the days rented - $400 (rental expenses not related to the property, here the listing fee) = maximum of other rental unit costs allowed as deduction. If the taxpayer's deductions exceed this annually calculated limit, the taxpayer may carryover the unused amounts, subject to some limitations. *See* I.R.S Publ'n No. 527, *Residential Rental Property* (2014), at 11; Prop. Treas. Reg. § 1.280A-3(d), 45 Fed. Reg. 52,399, 52,405–06 (Aug. 7, 1980).

150. *See* I.R.C. § 280A(c)(5).

151. The portion of mortgage interest allocable to the days rented is calculated as 28 days rented ÷ 365 days used x $15,000 (total mortgage interest) = $1,200 mortgage interest allocable to rental use. The portion of property tax allocable to days rented is calculated as 28 days rented ÷ 365 days used x $11,000 (total property tax) = $880 property tax allocable to rental use.

rules, which have long applied to other small business owners or landlords, have equal application in the sharing economy. Yet these rules may be complex, and the structure of the sharing economy may exacerbate their complexities and may create compliance difficulties for tax return filers and enforcement difficulties for taxing authorities. We discuss some of these compliance concerns at greater length in Part III. It is important to note for now, however, that complexities in the law are not the same as saying that the tax law does not have an adequate framework for taxing sharing. While they may be less than ideal, the legal rules and frameworks are not inadequate.

### *C. Self-Employment Taxes and Local Occupancy Taxes*

With respect to federal self-employment taxes and local occupancy taxes, the application of the law may be less clear than for federal income taxes. Yet, even here, the tax rules are not inadequate. The ambiguity lies in the question of whether the existing regime applies to sharing.

#### *1. Self-Employment Taxes*

One point of ambiguity is whether, for tax purposes, sharing economy workers are independent contractors who are responsible for paying self-employment taxes.[152] This is more of a concern for ridesharing drivers and other task workers, although the issue may arise for some home sharing landlords as well.

The doctrinal rules regarding how self-employment taxes apply to independent contractors are well established. Essentially, sharing economy earners who are independent contractors would be subject to the same rules that apply to independent contractors in other industries. Amounts earned by such self-employed independent contractors will be subject to self-employment taxes (i.e., social security and Medicare tax at a 15.3%

152. *See* Lauren Weber & Rachel Emma Silverman, *On-Demand Workers: 'We Are Not Robots,'* WALL ST. J. (Jan. 27, 2015, 7:55 PM), http://www.wsj.com/article_email/on-demand-workers-we-are-not-robots-1422406524-lMyQjAxMTE1NDI2ODYyNjgwWj. The classification issue extends beyond taxation. *See, e.g.*, Deepa Das Acevedo, *Regulating Employment Relationships in the Sharing Economy*, EMP. RTS. & EMP. POL'Y J. (forthcoming) (manuscript at 20–24), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657673; Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1513–16 (2016); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, HARV. L. & POL'Y REV. (forthcoming 2016) (manuscript at 2–9), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2641305; Elizabeth Chika Tippett, *Using Contract Terms to Detect Underlying Litigation Risks: An Initial Proof of Concept*, 20 LEWIS & CLARK L. REV. (forthcoming 2016) (manuscript at 7–9), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2675846.

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rate), which the individual will have to pay by filing a Schedule SE.[153] The individual can then deduct half of these taxes on Form 1040, line 27.[154] Because they are independent contractors not subject to withholding, such individuals may also have to pay estimated taxes, depending on their overall tax situation.[155]

What is less clear, however, is whether sharing economy workers are, in fact, independent contractors. As discussed in more detail in Part III, most sharing businesses, including the ridesharing businesses, have taken the position that sharing workers are independent contractors rather than employees.[156] However, the rules for distinguishing employees from independent contractors are complex and may vary depending on the precise work relationship and the specific law at issue.[157] In the tax context, for example, the IRS has developed a 20-factor test to distinguish independent contractors from employees, and courts have considered a number of these factors in classifying workers.[158] In brief, the IRS and courts will normally look at a variety of behavioral, financial, and

153. *See generally Self-Employed Individuals Tax Center*, INTERNAL REVENUE SERV., http://www.irs.gov/Individuals/Self-Employed#obligations (last visited Jan. 6, 2016). For 2015, the 15.3% self-employment tax reflects a social security tax component of 12.4% and a Medicare tax of 2.9%. I.R.C. § 1401(a), (b)(1) (2014). The additional Medicare tax introduced in 2013 imposes an additional 0.9% tax for compensation, including self-employment income above a threshold amount. *Id.* § 1401(b)(2).

154. *See* I.R.C. § 164(f)(1) (2014); I.R.S. Cat. No. 24811V, (Jan. 26, 2015), at 31. Thus, drivers include their net driving income and a deduction for half of the self-employment taxes on Form 1040 along with any other taxable income.

155. *See* I.R.C. § 6654(a), (d) (2014); *see also* I.R.S Publ'n No. 505, *Tax Withholding and Estimated Tax* (2015), at 23–32 (discussing circumstances under which estimated tax payments are required).

156. *See, e.g.*, Brian, *Uber Driver Partner (Full-Time Independent Contractor)*, UBER (Mar. 28, 2014), http://newsroom.uber.com/drive-with-uber-earn-cash-with-your-car-4/; *see also Terms and Conditions*, UBER, https://www.uber.com/legal/usa/terms (last visited Jan. 6, 2016), *archived at* https://perma.cc/A5XU-AQ87?type=source ("The Services constitute a technology platform that enables users of Uber's mobile applications or websites provided as part of the Services (each, an "*Application*") to arrange and schedule transportation and/or logistics services with third party providers of such services, including independent third party transportation providers and third party logistics providers under agreement with Uber or certain of Uber's affiliates . . . ."). Moreover, Uber sends drivers a Form 1099, rather than the Form W-2 used for employees. *About Partner Taxes*, UBER, https://web.archive.org/web/20151008212047/https://help.uber.com/h/1bf76075-7fe3-4c15-ac58-a4bef827e017 ("If you're a partner based in the United States, you will receive a 1099-K and/or 1099-MISC form to report income you earned with Uber.").

157. *See* TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, REF. NO. 2013-30-058, EMPLOYERS DO NOT ALWAYS FOLLOW INTERNAL REVENUE SERVICE WORKER DETERMINATION RULING 2 (2013) ("IRS estimates that employers misclassify millions of workers as independent contractors instead of employees. . . . allow[ing] employers to avoid paying a significant amount of money in employment taxes . . . .").

158. *See, e.g.*, Schramm v. Comm'r, 102 T.C.M. (CCH) 233 (2011); Levine v. Comm'r, T.C.M. (RIA) 2005-86 (2005); Rev. Rul. 87-41, 1987-1 C.B. 296.

relational factors to distinguish employees from independent contractors.[159] Very generally, a worker is an independent contractor if the business paying the worker has the right to control or direct only the result of the work and not what will be done and how.[160]

Because of the unique structures of the sharing economy, some have argued that it is unclear whether sharing workers should be classified as independent contractors or employees, and the issue is a contested and unresolved one across a number of legal fields.[161] The resolution of this issue will vary depending on the area of law. For example, the IRS, the US Department of Labor, and various state agencies will apply their own tests and standards in making the independent contractor vs. employee determination.

In this regard, some lawsuits have recently been filed, arguing that Uber drivers are employees rather than independent contractors.[162] Two California District Court cases went forward after summary judgment was

159. This is often called the 20-factor test. The factors listed in Rev. Rul. 87-41 include: (1) whether the person for whom services are performed has the right to require compliance with that person's instructions; (2) whether there is worker training; (3) whether the worker's services are integrated into business operations; (4) whether the "[s]ervices must be rendered personally"; (5) whether the person for whom services are performed hires assistants; (6) whether there is a continuing relationship; (7) whether set hours are established; (8) whether full time work is required; (9) whether the work must be done on the employer's premises; (10) whether the work must be performed in a specific sequence; (11) whether the worker must submit regular reports; (12) whether the worker is paid by the hour, week, or month; (13) whether the person for whom services are performed pays the workers' business or travel expenses; (14) whether the person for whom services are performed "furnish[es] significant tools, materials, [or] other equipment"; (15) whether the worker invests in facilities used in performance of services that are not furnished by the employer (indicating independent contractor); (16) whether the worker can realize a profit or loss; (17) whether the worker works for more than one firm at the same time; (18) whether the worker makes her services available to the general public; (19) whether there is a right to discharge the worker; and (20) whether the worker can terminate the relationship at any time without incurring liability (indicating employee). Rev. Rul. 87-41, 1987-1 C.B. 296.

160. *See, e.g.*, *Independent Contractor Defined*, INTERNAL REVENUE SERV., http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Defined (last visited Jan. 6, 2016).

161. *See, e.g.*, Weber & Silverman, *supra* note 152.

162. *See, e.g.*, Yucesoy v. Uber Techs., Inc., No. C−15−0262 EMC, 2015 WL 3657656, at *1261–62 (N.D. Cal. June 12, 2015); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069-70 (N.D. Cal. 2015); O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2013 WL 6354534, at *1–3 (N.D. Cal. Dec. 5, 2013); Lavitman v. Uber Techs., Inc., No. SUCV201204490, 2013 WL 6354534, at *1–3 (Mass. Super. Ct. Jan. 26, 2015); *see also* Complaint at 10, Liu v. Uber Techs., Inc., No. CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014); Complaint at 2, Fahrbach v. Gafurov, No. CGC-13-533103 (Cal. Super. Ct. July 25, 2013). For summaries of Uber litigation, see, e.g., Weber & Silverman, *supra* note 152; *Independent Contractors or Employees?*, COMMUNITYENTERPRISELAW.ORG, http://communityenterpriselaw.org/independent-contractors/ (last visited Jan. 6, 2016), *archived at* http://perma.cc/UAK9-N5WV; *Uber Drivers*, UBER LAWSUIT, http://uberlawsuit.com (last visited Jan. 6, 2016), *archived at* http://perma.cc/2AT4-9RX4.

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denied on Uber's and Lyft's motions for rulings that drivers are independent contractors for purposes of California state law.[163] There are now settlement agreements pending court approval in these cases, though both are subject to modification and change.[164] Under both settlements, drivers will continue to be classified as independent contractors. Those agreements, however, do not prevent courts or government regulators from reclassifying drivers as employees in the future. In addition, labor commissions in various states have gone both ways on the issue.[165] While the standards applied by these courts and commissions can differ from the test that would be applied by the IRS and courts for tax purposes, the existence of these rulings shows that the issue is live and contested, and the resolution is far from clear.[166]

With respect to tax law, if ridesharing drivers or other sharing economy workers are found to be employees for tax purposes, then responsibility for collecting the Medicare and social security taxes would rest with the ridesharing businesses themselves, not the individual drivers. Payments to the drivers would be subject to wage withholding, and not just information reporting. Thus, the Form 1099-K information reporting issue discussed below would cease to be an issue.[167] Again, it is important to reiterate that the tax law itself is not inherently inadequate as applied to sharing.[168] The

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163. *See* Cotter, 60 F. Supp. 3d at 1080–81; O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015); *see also Uber Drivers*, *supra* note 162 (reviewing status of Uber driver litigation).

164. *See* sources cited *supra* note 50; *see also* Cotter v. Lyft, Docket No. 3:13-cv-04065 (N.D. Cal.) (various filings dated January 26, 2016, through May 13, 2016).

165. *See, e.g.*, Berwick v. Uber Techs., Inc., No. 11-46739 EK, 2015 WL 4153765, at *6 (Cal. Labor Comm'n June 3, 2015) (ruling that Uber driver was employee), *appeal docketed*, No. CGC-15-546378 (Cal. Super. Ct. June 16, 2015); Alatraqchi v. Uber Techs., Inc., No. C−13−03156 JSC, 2013 WL 4517756, at *4 (N.D. Cal. Aug. 22, 2013) (ruling that Uber driver was independent contractor). We have even seen a single state agency rule and then reverse its position. In May 2015, the Florida Department of Economic Opportunity determined that an Uber XL driver was an employee eligible for unemployment benefits. However, on September 30, 2015, the agency reversed that May decision, and held that the driver was an independent contractor. Final Order, Rasier LLC v. Dep't of Econ. Opportunity, No. 0026 2834 68-02 (Fla. Dep't of Econ. Opportunity 2015), *available at* https://www.documentcloud.org/documents/2447547-mcgillis.html. *See, e.g.*, Davey Alba, *Florida Says Uber Driver Isn't an Employee After All*, WIRED (Oct. 1, 2015, 6:20 PM), http://www.wired.com/2015/10/florida-uber-decision-reversal/.

166. *See* Maya Kosoff, *The California Labor Commission Just Ruled that an Uber Driver is an Employee—Here's Why It Could Dramatically Change Uber's Business Model*, BUS. INSIDER (June 17, 2015, 11:21 AM), http://www.businessinsider.com/uber-and-lyft-employee-lawsuits-could-change-business-models-2015-6, *archived at* http://perma.cc/C6DL-WGMB (considering the possible ramifications of a state labor commission ruling).

167. *See* discussion *infra* Part III.A.

168. *But see* Lauren Weber, *What If There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 28, 2015, 10:28 AM), http://www.wsj.com/articles/what-if-there-were-a-new-type-

question is how sharing economy workers fit into the employee vs. independent contractor distinction created by the law. That question is open but ultimately resolvable. Some commentators have suggested that the worker classification categories of current law are unsatisfactory and that a new category of worker might be necessary to better capture economic relationships in the new "1099 economy."[169] Again, we do not rule out the possibility or advisability of such fundamental legal reform. Rather, our position is that if such fundamental reform is undertaken, it should be done for policy reasons other than the assertion of current law's inability to address the legal question. The independent contractor vs. employee determination is ultimately resolvable within the confines of current law.

### *2. State and Local Hotel Occupancy Taxes*

Another issue that has confronted home sharing businesses and earners is the question of whether hosts are liable for various state and local occupancy taxes, room taxes, or hotel taxes when they rent out properties or rooms, and if so, who is responsible for collecting and paying over the tax.[170] Such occupancy taxes are imposed on rentals (usually short-term rentals) of hotel rooms, on a per night basis.[171] For example, San Francisco's transient occupancy tax is 14%.[172] The occupancy tax issue actually encompasses a number of separate issues, including: (1) whether the transaction gives rise to the occupancy tax at all; (2) if so, whether the guest, the host, or the home sharing business itself (i.e., Airbnb) is responsible for collecting and paying over the tax; and (3) how the tax should be priced or presented to the guest as part of the total rental price.

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of-worker-dependent-contractor-1422405831 (advocating a third, dependent-contractor classification in the labor protection context).

169. *See generally id.* (exploring the idea of dependent contractor as an intermediate category between employee and independent contractor).

170. *See, e.g.*, ERIC T. SCHNEIDERMAN, OFFICE OF THE N.Y. STATE ATT'Y GEN., AIRBNB IN THE CITY 9, App. A (2014), *available at* www.ag.ny.gov/pdfs/Airbnb%20report.pdf; *see also How Does Occupancy Tax Collection and Remittance by Airbnb Work?*, AIRBNB, https://www.airbnb.com/help/article/1036/how-does-occupancy-tax-collection-and-remittance-by-airbnb-work?topic=264 (last visited Jan. 6, 2016) (noting that occupancy taxes may apply to rental of rooms, and noting that generally it is the host's decision and role to collect these taxes except in locations where Airbnb has "made agreements with governments to collect and remit local taxes on behalf of hosts").

171. *See, e.g.*, *Room Occupancy Tax*, DEP'T OF REVENUE, http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/trustee-and-excise-taxes-requiring-registration/room-occupancy-tax.html (last visited Jan. 6, 2016) (imposing tax on rent received from an individual occupying "the lodgings for 90 consecutive days or less").

172. S.F., CAL., BUS. & TAX REGULATIONS CODE art. 7, § 1.504-1 (2003).

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These questions have been under dispute with a number of state and local regulators, and the answers and approaches have varied based on locality.[173] Although various state regulators had taken the position that Airbnb rentals were basically hotel rooms, Airbnb had initially resisted that characterization, and Airbnb hosts had, for the most part, not been collecting and paying over these taxes.[174] This situation created both a substantive and an enforcement issue. The substantive issue was whether Airbnb rentals were in fact hotel rooms subject to the occupancy tax. Assuming the answer to the substantive law question was "yes," an enforcement problem arose because of the difficulty in tracking down individual hosts to enforce compliance. Anecdotally, it seemed that very few hosts actually complied with such hotel tax payment obligations.[175] Relatedly, Airbnb had initially taken the credible position that it does not own the rooms being rented, but functions merely as a middleperson and thus is not liable for collecting (and in some instances is not allowed to collect) the hotel tax.[176]

However, facing potential enactment of less favorable regulatory regimes, Airbnb eventually conceded that Airbnb rentals may be subject to the hotel tax and certain sales taxes and agreed in certain states, cities, and localities (for example, Multnomah County and Portland, Oregon, San Francisco, San Jose, San Diego, Phoenix, Chicago, North Carolina, Rhode Island, and Washington, D.C.) to act as a collection agent for those taxes

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

174. *See* Said, *supra* note 11.

175. *See* Steven T. Jones, *Airbnb Isn't Sharing*, S.F. BAY GUARDIAN (Mar. 19, 2013, 3:54 PM), http://www.sfbg.com/2013/03/19/airbnb-isnt-sharing, *archived at* http://perma.cc/GX9N-7L34; Tuttle, *supra* note 7. In the traditional hotel context, the hotel collects the tax on its rooms and remits the tax to the government.

176. Airbnb's position had been that it operated a new form of economic activity not covered by traditional regulations. Even when Airbnb has agreed to facilitate the collection and remission of these taxes, it continued to maintain that it really was not obligated. *See* Kopytoff, *supra* note 173 (noting that while Airbnb's earlier position was that hotel taxes did not apply to its model, its CEO Brian Chesky has conceded that "We believe it makes sense for our community of hosts to pay occupancy tax to the cities in which they live, with exceptions under certain thresholds, and we are eager to discuss how this might be made possible"); *see also* Sarah Buhr, *Brian Chesky Talks About Just How Different the Hotel Business Is from Airbnb*, TECHCRUNCH (Sept. 9, 2014), http://techcrunch.com/2014/09/09/brian-chesky-hotels-and-airbnb-are-the-same-but-different/, *archived at* http://perma.cc/6S2W-4D5E (quoting Chesky's inconsistent position on whether Airbnb is a hotel); Phillip Matier & Andrew Ross, *Airbnb Pays Tax Bill of 'Tens of Millions' to S.F.*, S.F. CHRON. (Feb. 18, 2015, 8:48 PM), http://www.sfgate.com/bayarea/matier-ross/article/M-R-Airbnb-pays-tens-of-millions-in-back-6087802.php, *archived at* http://perma.cc/V53W-EZMA (noting Airbnb's "concerns" about San Francisco's assessment of back taxes).

owed by the hosts.[177] In these locations, Airbnb began collecting the taxes from renters and paying them over to the appropriate government body. Thus, even though the business structure of the Airbnb model differs from traditional hotels, the net result in some locations has been the creation of a de facto withholding-agent obligation (in some instances, the state, city, or locality has actually changed the regulations to do this) imposed on Airbnb to facilitate otherwise near-impossible compliance. On November 11, 2015, Airbnb released "The Airbnb Community Compact" in which it announced that it would help "ensure the efficient collection of tourist and/or hotel taxes in cities that have such taxes" and that it would "work to implement this initiative in as many communities as possible."[178] Commentators have taken this as a sign that the industry, and in particular Airbnb, has reached a level of maturity that requires it to engage more directly with state and local governments and their laws, but seeks to set the terms of that engagement.[179] Interestingly, Airbnb's release of its "Community Compact" came shortly after a public relations imbroglio in October 2015, following a series of ads released in San Francisco that suggested, in a "flippant tone," how the city could better use the company's hotel tax payments to the city.[180] The controversy over the advertising campaign erupted at an inopportune moment; San Francisco was set to vote on a ballot measure that would limit homesharing rentals

177. *See, e.g.*, Emily Badger, *Airbnb Is About to Start Collecting Hotel Taxes in More Major Cities, Including Washington*, WASH. POST (Jan. 29, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/01/29/airbnb-is-about-to-start-collecting-hotel-taxes-in-more-major-cities-including-washington/; *see also In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, AIRBNB, https://www.airbnb.com/help/article/653 (last visited Jan. 6, 2016), *archived at* http://perma.cc/Z7Y2-CFV3; Taylor Knopf, *Airbnb to Collect and Pay Taxes in North Carolina*, NEWS & OBSERVER (May 18, 2015, 7:40 PM), http://www.newsobserver.com/news/local/counties/wake-county/article21331905.html, *archived at* http://perma.cc/Q6Q3-MKAF; Kate Rogers, *San Francisco Moves Closer to Legalizing Airbnb*, CNBC (Oct. 22, 2014, 9:40 AM), http://www.cnbc.com/id/102102286, *archived at* http://perma.cc/MYY6-YHMY; Ben Trefny, *Airbnb to Start Charging Hotel Taxes in a Handful of Cities*, NPR (Apr. 18, 2014, 5:01 PM), http://www.npr.org/blogs/alltechconsidered/2014/04/18/304564169/airbnb-to-start-charging-hotel-taxes-in-a-handful-of-cities. AirBNB has also agreed to collect taxes with respect to reservations in a number of foreign cities and countries, including India and Paris. *In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, *supra*.

178. AIRBNB, THE AIRBNB COMMUNITY COMPACT 2 (2015), *available at* http://publicpolicy.airbnb.com/wp-content/uploads/2015/11/Airbnb-Community-Compact.pdf; *see also* David McAfee, *Airbnb Broadens Efforts to Collect Hotel, Tourist Taxes*, BNA DAILY TAX REP, No. 47 (Nov. 20, 2015).

179. *See, e.g.*, McAfee, *supra* note 178; Carolyn Said, *Airbnb Will Pay Taxes, Play Nice with Cities—on Its Terms*, S.F. CHRON. (Nov. 12, 2015, 8:05 AM), http://www.sfchronicle.com/business/article/Airbnb-will-pay-taxes-play-nice-with-cities-6626099.php.

180. *See* Sydney Ember & Mike Isaac, *Airbnb Ads Flop in San Francisco*, N.Y. TIMES (Oct. 22, 2015), http://www.nytimes.com/2015/10/23/business/media/airbnb-ads-flop-in-san-francisco.html.

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such as Airbnb.[181] Ultimately, the ballot measure did not pass, but apparently Airbnb sought to temper its somewhat aggressive stance vis-à-vis state and local governments by releasing the Community Compact.[182]

To reiterate, however, it is important to note that what is unclear is how the hotel and occupancy taxes should apply to home sharing businesses and who should collect the tax. These questions depend on whether the home sharing rentals are equivalent to hotel rooms under the applicable tax law. This issue is contested, but clarification is possible within the parameters of current law.

In summary, we have argued in Part II that in many respects, the structures and concepts of current tax law are adequate to the task of taxing sharing economy earners. On the other hand, we concede that on some issues, clarification is required. For example, clarification is required with respect to liability for self-employment taxes and local occupancy taxes. In addition, there are also open questions regarding how and whether other local taxes apply to sharing. For example, one open question is whether Uber rides should be subject to taxes and fees imposed on taxicab rides in certain localities.[183] Furthermore, sharing economy arrangements may also continue to raise questions with respect to tax expenditures, such as exclusions from the income tax base. Jordan Barry and Paul Caron have explored, for example, the application of the I.R.C. § 132 qualified bicycle commuting expense fringe benefit to bicycle sharing programs, and have critiqued the IRS's position that bicycle sharing programs do not qualify for that benefit.[184] Barry and Caron have also pointed out the non-applicability of the I.R.C. § 132(f) transportation fringe benefit to car sharing programs.[185] Similar issues with respect to deductions, exemptions, and other tax expenditures are likely to arise in other contexts.

Yet these types of issues can ultimately be resolved within the framework of existing tax laws. Unlike perhaps some other areas of law and regulation, the challenge for tax lies in clarification of the substantive law and potential incremental modifications, rather than fundamental overhaul. If reform of current law is to be undertaken, it should be

181. *Id.*

182. *See* Mike Isaac, *Airbnb Pledges to Work with Cities and Pay 'Fair Share' of Taxes*, N.Y. TIMES (Nov. 11, 2015), http://www.nytimes.com/2015/11/12/technology/airbnb-pledges-to-work-with-cities-and-pay-fair-share-of-taxes.html.

183. *See* sources cited *infra* note 294 (discussing application of New York City's 50 cent tax per ride to Uber rides).

184. Barry & Caron, *supra* note 12, at 9–12.

185. *Id.* at 12–14.

undertaken for well-reasoned tax policy reasons, and not merely because the sharing sector is "too new" to be governed by current law.

## III. TAX COMPLIANCE AND ENFORCEMENT CHALLENGES IN THE SHARING SECTOR: OPPORTUNISM AND MICROBUSINESS

While the tax rules that apply to sharing are not fundamentally unclear, nor particularly novel, tax compliance and enforcement may present distinctive challenges due to two intersecting features of the sharing economy. First, in determining how and whether to comply with existing laws and regulations, sharing economy businesses have the propensity to pick the more favorable regime if there is any ambiguity as to which regime applies. We call this behavior "tax opportunism." Second, many sharing earners may earn relatively small income amounts, may use otherwise personal property for business purposes, and may be filing and reporting independent contractor business income for the first time. The confluence of these two realities—tax opportunism and the microbusiness characteristics of sharing—may present challenges in ensuring that sharing earners are complying with the tax laws. However, the precise nature of those challenges should be clarified through further empirical study.[186]

In this Part, we describe in greater detail the existence and impact of these two realities in the sharing economy. In Parts III.A and III.B, we discuss the concept of tax opportunism and delineate four examples of the phenomenon: (a) the decision by certain sharing businesses to classify themselves as third party settlement organizations for purposes of the information reporting rules; (b) the sharing businesses' affirmative adoption of independent contractor classification for all drivers and hosts, rather than employee classification; (c) Airbnb's decision out of the gate not to collect local hotel or occupancy taxes; and (d) the decision by ridesharing businesses to operate outside the taxicab medallion system in various localities. Parts III.A and III.B also explain why tax opportunism more accurately captures a distinctive aspect of the conduct of certain sharing economy businesses than either regulatory arbitrage or outright illegality. In Part III.C, we describe the microbusiness character of the sharing economy and the challenges that this creates.

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186. We undertake such study in subsequent work. *See* Oei & Ring, *supra* note 19 (manuscript at 26–55).

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### *A. Tax Opportunism: The Information Reporting Example*

A dominant narrative for describing the regulatory strategies of sharing economy businesses suggests that these businesses possess a flagrant and aggressive disregard for the law, engaging in outright legal violations on the theory that it is better to beg forgiveness later than ask permission in advance.[187] We offer an alternative narrative—tax opportunism—to describe certain aspects of how sharing businesses have dealt with tax laws and regulations.

#### *1. Opportunism, Arbitrage, and Illegality*

##### *a. Tax Opportunism*

Tax opportunism arises when a sharing business, which has features in common with two regimes (A and B) that are subject to different regulatory treatment (with A being more lightly regulated), takes the position that it looks more like A than B. Certain sharing businesses tend to engage in such tax opportunism where there is ambiguity regarding which regime applies. When engaging in opportunistic behavior, the sharing economy business makes a tax reporting or compliance choice for which there is at least some legal basis. That choice provides a regulatory advantage to the sharing business as compared with the (arguably more appropriate) alternative reporting or compliance position.

Of course, taxpayer adoption of favorable reporting positions is not surprising or unusual. Many other taxpayers adopt favorable tax return positions and lobby lawmakers for favorable regulatory treatment. Therefore, in a sense, the opportunism displayed by the sharing businesses is not a new phenomenon. However, sharing does present a unique context in which such behavior arises. First, the sharing sector represents a material shift in the way businesses are structured and workers are hired, and sharing constitutes a notable departure from traditional industries for which it substitutes, such as transportation and lodging. The uniqueness of sharing presents businesses with an opportunity to adopt favorable regulatory positions supported by small gaps and ambiguities in the law.[188]

Second, there are notable aspects of how the sharing industry has exercised opportunism that are peculiar to the sharing sector. For example, unlike some other businesses, sharing businesses have staked out

187. *See, e.g.*, Clampet, *supra* note 8.
188. This is not to say there is not vocal opposition to such displays of opportunism.

potentially aggressive reporting positions without having first sought advance rulings or having consulted with taxing authorities. Additionally, many sharing businesses have taken these actions in plain sight. In other words, the opportunistic behavior of the industry is not hidden on a line of a tax return. The industry's ability to act opportunistically in this manner may be partly due to the uniqueness of sharing as a technology-based sector without large capital outlays upfront.[189] It might also stem from sharing businesses' ability to tap into an enthusiastic demographic of consumers to harness public support for favorable regulatory treatment in a way not available to other nascent industries.

Tax opportunism is a distinct category of behaviors and is best understood in comparison to the two other analytical categories that might describe the sharing economy's regulatory actions: regulatory arbitrage[190] and outright illegality. Tax opportunism's meaningful differences from these two categories suggest different regulatory prescriptions.[191]

### *b. Regulatory Arbitrage*

Regulatory arbitrage can be understood to mean those situations in which a participant pursues a particular transaction form or structure in order to secure identified regulatory benefits, even though that structure may add non-regulatory transaction costs.[192] According to one definition, an actor engages in regulatory arbitrage when it manipulates "the structure of a deal to take advantage of a gap between the economic substance of a transaction and its regulatory treatment."[193] The actor will take this step if

189. For example, Uber did not have to purchase a large, nationwide fleet of vehicles to launch its business.

190. *See* Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 230 (2010); *see also* Jordan Barry, *On Regulatory Arbitrage*, 89 TEX. L. REV. *SEE ALSO* 69, 73–75 (2011) (commenting on Fleischer's regulatory arbitrage analysis).

191. *See* discussion *infra* Part IV.

192. Fleischer, *supra* note 190, at 227–30. Whether the transaction (1) is modified from its original design at some cost to secure the desired regulatory benefits, or (2) was designed at the outset with an eye to the regulatory advantages despite additional costs incurred, is not relevant here. Both cases constitute regulatory arbitrage in that the parties incur extra costs to pursue a design that provides regulatory benefits. The difference between the two scenarios might depend on factors such as the stage at which advisors and lawyers became involved and the degree to which the arbitrage opportunity has become widely known. Both scenarios are distinct from the dynamics that have occurred in the sharing economy, where desirable treatment has become available largely due to the inherent unique business design of the sector. *Cf.* Annelise Riles, *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, 47 CORNELL INT'L L.J. 63, 69, 72 (2014) (describing regulatory arbitrage as containing a "functional similarity" of financial products across different markets paired with a "relatively stable formal *difference*" in laws that "affords some tax or regulatory advantage").

193. Fleischer, *supra* note 190, at 230.

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it determines that the costs of adjusting the plan (including transaction costs and legal constraints such as anti-abuse rules)[194] are outweighed by the regulatory advantages.

The tax opportunism exercised by sharing actors is different from traditional regulatory arbitrage because the sharing businesses have been able to rely on the core feature of their innovative business design—the use of Internet platforms to bring individual producers and consumers together in a manner sufficiently distinct from traditional industry—to take advantage of regulatory gaps. Thus, at least at the outset, the sharing businesses' "first best" business structure provided the basis for the advantageous tax positions they claimed. In contrast, traditional regulatory arbitrage is understood to entail modifying or redesigning business structures at a cost in order to secure such regulatory advantages.

Of course, there will be some overlap between the "opportunism" and "arbitrage" constructs. Some sharing economy business planning may contain components of arbitrage, particularly as the industry evolves. For example, while regulatory opportunities derive from distinct features of the sharing model, sharing economy actors may over time seek to strengthen their regulatory position by making additional business choices that come at some transactional cost. However, because of the unique regulatory opportunities created by their innovative platforms, it is important to distinguish the sharing economy's unique brand of opportunism. As discussed in Part IV, the tax system might pursue distinctive strategies and responses to combat this type of opportunism, as compared with traditional regulatory arbitrage.

#### *c. Illegality*

Tax opportunism is also distinct from a charge of outright illegality or failure to comply with obvious rules. Some commentators have claimed, for example, that sharing businesses regularly flout the law, perhaps with the goal of allowing the industry to take hold before acquiescing to regulation so as to increase their negotiating leverage vis-à-vis regulatory authorities.[195] We think, however, that in a number of cases, the tax rules are not so obvious that failure to embrace the most onerous interpretation can be fairly labeled "illegal." Tax opportunism takes advantage of actual

194. *Id.* at 230, 253.

195. *See, e.g.*, Clampet, *supra* note 8; *see also* Editorial Board, *The Dark Side of the Sharing Economy*, N.Y. TIMES (Apr. 30, 2014), http://www.nytimes.com/2014/05/01/opinion/the-dark-side-of-the-sharing-economy.html?_r=0 (noting that some Airbnb rentals may be illegal).

gaps and inconsistencies in the law, even though such gaps may be small. While taxpayers, tax advisors, and the IRS sometimes disagree on when conduct constitutes intentional noncompliance as compared to viable taxpayer interpretation, both exist, and the law treats intentional disregard differently from plausible interpretation.[196] As was the case with distinguishing tax opportunism from arbitrage, recognizing that tax opportunism may be distinct from illegality may suggest a different set of regulatory strategies for managing such opportunism.[197]

### *2. Tax Opportunism in Information Reporting*

The position taken by some sharing businesses with respect to third-party information reporting represents a key example of tax opportunism. Information reporting and withholding are two mechanisms by which taxing authorities secure taxpayer compliance with tax payment obligations. Information reporting generally refers to a process by which a third-party payor reports to the IRS amounts that the payor paid to a payee. Withholding occurs when a third-party payor withholds a specified amount from a payment made to the payee and remits that amount to the IRS.[198] Third-party information reporting and withholding help the IRS identify income earned by taxpayers and collect income tax due.[199] Studies suggest that in sectors where information reporting and withholding are difficult to impose (e.g., cash businesses), tax compliance declines.[200]

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196. Criminal tax law, for example, treats certain taxpayer conduct as a willful failure to comply with the law, not a plausible disagreement warranting merely back taxes, interest charges, and civil penalties from the errant taxpayer. *See, e.g.*, I.R.C. § 7201 (2012).

197. *See infra* Part IV.

198. *See infra* Part III.B.1 (discussing the employee/independent contractor debate).

199. *See* Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1737–38 (2010) [hereinafter Lederman, *Reducing Information Gaps*]; Slemrod et al., *supra* note 17, at 3–6; *see also* Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 727–28 (2007) (exploring how tax law can employ the incentives of third parties to reduce tax evasion).

200. *See* sources cited *supra* note 199; *see also* James Alm et al., *Do Individuals Comply on Income Not Reported by Their Employer?*, 37 PUB. FIN. REV. 120, 122 (2009) (finding, in part based on experiments, that individuals who have relatively more nonmatched income (i.e., income not subject to third party information reporting) have significantly lower tax compliance rates than those with less nonmatched income); Morse et al., *supra* note 17, at 49 (finding, in part based on field interviews, that almost all interviewees believed that small businesses did not report some cash income; that interviewees frequently opined that such failure was important (sometimes more important) for payroll tax and sales tax evasion, as well as income tax evasion; and that many small businesses that evade taxes do so by "constructing parallel cash economies" (i.e., collecting cash, paying expenses in cash, using cash for purchases without depositing it, hoarding cash, not recording cash transactions, and self-financing)).

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*a. General Information Reporting Rules*

Because most sharing businesses have taken the position that sharing earners are independent contractors, those sharing businesses are not performing tax withholding on amounts paid to sharing earners.[201] Sharing businesses are, however, responsible for information reporting with respect to independent contractor income.[202] There are two primary information reporting regimes that are relevant to the sharing economy: (1) Form 1099-MISC information reporting required under I.R.C. § 6041, and (2) Form 1099-K information reporting required under I.R.C. § 6050W.[203] I.R.C. § 6041 generally requires persons engaged in a trade or business and paying rents, salaries, compensations, remunerations, emoluments, or certain other fixed or determinable gains, profits, and income of $600 or more to report the payment (to the Service and the recipient) on Form 1099-MISC.[204] For tax years before 2011, Form 1099-MISC would have been the form used to report amounts paid to independent contractors.

I.R.C. § 6050W, effective January 2012 for the 2011 tax year, now requires "payment settlement entities" ("PSEs") to report certain credit card payments and third party network transactions on Form 1099-K. The statute divides PSEs into two groups and applies different information reporting obligations to each. First, banks and other "merchant acquiring entities"[205] must report all payments made to payees in settlement of credit card transactions.[206] Second, all "third party settlement organizations"[207] making payments to payees in settlement of third party network transactions must report such payments on Form 1099-K if the payments

201. *See, e.g.*, *Tax Information*, LYFT, https://help.lyft.com/hc/en-us/articles/213582038-Tax-Information (last visited Jan. 6, 2016), *archived at* http://perma.cc/KU4U-JSWV ("[D]rivers . . . . are not . . . employee[s] of [the company].").

202. *See supra* note 201.

203. A different third-party reporting regime, along with special tax burdens, applies to those making payments to employees. *See supra* Part.II.C.1. Because the sharing businesses have classified sharing earners as independent contractors, withholding does not apply. *Id.*

204. *See* DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., 2016 INSTRUCTIONS FOR FORM 1099-MISC (2015), *available at* http://www.irs.gov/pub/irs-pdf/i1099msc.pdf (last visited Jan. 10, 2016).

205. The term is defined to cover entities with a contractual obligation to make payments to participating payees in payment card transactions. I.R.C. § 6050W(b)(2) (2014).

206. Treas. Reg. § 1.6050W-1(a)(4)(A) (2010). These payors are collectively known as "merchant acquiring entities." *Id.* § 1.6050W-1(b)(2).

207. "Third party settlement organizations" are those central organizations with the contractual obligation to make payments to participating payees of third party network transactions. I.R.C. § 6050W(b)(3); Treas. Reg. § 1.6050W-1(c)(2).

to the participating payee exceed $20,000 *and* if there are more than 200 transactions with the participating payee.[208] The term "third party settlement organization" was meant to include services such as PayPal, Amazon, and Google Checkout.[209] Thus, it is clear that "merchant acquiring entities" (such as certain banks) are subject to more stringent information reporting obligations than "third party settlement organizations," because third party settlement organizations need only report when high income and transaction volume thresholds are met.

Two additional rules are significant. First, persons who receive payments from PSEs on behalf of other participating payees and who distribute such payments to those payees are treated as "aggregate payees." An aggregate payee is treated as the payee with respect to the PSE making the initial payment but is itself viewed as the PSE with respect to the participating payees to whom it distributes the aggregated payment.[210] Thus, for example, an aggregate payee receiving payments from a bank in settlement of credit card transactions would receive a Form 1099-K from that bank reporting those payments, and would in turn have to issue a Form 1099-K to each payee to whom it distributed the payments.[211] Presumably, if the originating payor is a bank, then the more stringent "merchant acquiring entity" rule would apply and require the aggregate payee to report all payments, no matter how small.

Second, regulations under I.R.C. § 6050W and the instructions to Form 1099-K clarify the intended coordination between Form 1099-K and Form 1099-MISC issuances. If a payment is made by credit card (or through a third party payment network) *and* that payment would otherwise be subject to reporting on a Form 1099-MISC, no Form 1099-MISC need be issued by the business purchasing the goods or services. Instead, any reporting is done by the PSE on a Form 1099-K, to the extent required by I.R.C. § 6050W.[212] For example, if a business pays a repair person $600 via credit card to fix business equipment, then prior to the new I.R.C. § 6050W rules, the business would have been required to issue a Form

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208. I.R.C. § 6050W(e).

209. *See* Kelly Phillips Erb, *Credit Cards, the IRS, Form 1099-K and the $19,399 Reporting Hole*, FORBES (Aug. 29, 2014, 11:13 AM), http://www.forbes.com/sites/kellyphillipserb/2014/08/29/credit-cards-the-irs-form-1099-k-and-the-19399-reporting-hole/ (using PayPal as an example of the kind of entity classified as a third party settlement organization).

210. *See* Treas. Reg. § 1.6050W-1(d)(1).

211. *See* Treas. Reg. § 1.6050W-1(e), Example 21. The regulations are not entirely clear on the application of the aggregate payee rule where the initial PSE is a third party settlement organization and not a merchant acquiring entity.

212. *See* Treas. Reg. § 1.6041-1(a)(iv) (2014); *see also* DEP'T OF THE TREASURY, *supra* note 204, at 3.

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1099-MISC to the repair person under I.R.C. § 6041. After new I.R.C. § 6050W, however, the business does not issue a Form 1099-MISC. Instead, the bank paying on the credit card issues a Form 1099-K.[213] Both the regulations and the Form 1099-K instructions provide that in determining whether a payment is subject to the Form 1099-K reporting regime rather than the Form 1099-MISC regime, the $20,000/200 transaction threshold is disregarded.[214] A likely interpretation of this language is that I.R.C. § 6050W applies if the payment is made by either category of PSE, and furthermore, that if the payor is a third party settlement organization, then no reporting (under either Form 1099-K or 1099-MISC) would be required for payments below the threshold of $20,000 and 200 transactions.[215] As discussed below, this intersection of the rules gives rise to a potentially large reporting gap in the case of third party settlement organizations.[216] But at least some commentators have proposed an alternative viable interpretation: all payments that are no longer reportable on Form 1099-MISC must now be reported on Form 1099-K, regardless of the de minimis threshold.[217]

#### *b. Information Reporting Positions Taken by Sharing Businesses and Potential Effects*

Against this backdrop, Lyft and Sidecar took the position that, for the 2014 tax year, their drivers (whom they treat as independent contractors) would receive: (1) a Form 1099-K, if the driver provided more than 200 rides and received more than $20,000 for these rides during the year; and (2) a Form 1099-MISC, if the driver earned referral bonuses or other special direct payments from Lyft or Sidecar during the year exceeding

213. *See* Treas. Reg. § 1.6041-1(a)(v), Examples 1 & 2.

214. Treas. Reg. § 1.6041-1(a)(iv); DEP'T OF THE TREASURY, *supra* note 204, at 3.

215. *See* Erik J. Christenson & Amanda T. Kottke, *Guidance Needed to Clarify Reporting Obligations for Online Marketplaces and Peer-to-Peer Platforms*, 55 TAX MGMT. MEMORANDUM 243 (2014).

216. *See* discussion *infra* Part III.A.2.b. If a business makes a payment via a third party network (such as PayPal) of $600 or more that would previously be reported on Form 1099-MISC, the business no longer reports on Form 1099-MISC. Instead, the reporting obligation presumably shifts to the third party settlement organization (in this example, PayPal) under I.R.C. § 6050W. The gap arises because PayPal does not issue a Form 1099-K unless the payments to the payee equal at least $20,000 and there are at least 200 transactions. Therefore, payments of $600 or more that previously would have been reported are unlikely to be reported, except in the case of significant payees (those with high dollar payments and many transactions). *See* Treas. Reg. § 1.6041-(a)(iv); DEP'T OF THE TREASURY, *supra* note 204, at 3; *see also* Erb, *supra* note 209 (noting that the IRS confirmed that there is a notable reporting hole created by the intersection of I.R.C. §§ 6041 and 6050W).

217. *See* Christenson & Kottke, *supra* note 215.

$600.[218] Until early 2015, Uber also took this position.[219] This reporting position indicates that the ridesharing businesses consider themselves "third party settlement organizations" under I.R.C. § 6050W, akin to businesses such as PayPal.[220] As such, they would have no reporting obligations for payments made for rides unless the driver exceeds the reporting threshold of $20,000 and 200 rides.

In early 2015, Uber changed its position and announced that it would issue a Form 1099-K to *all* drivers for their driving income, regardless of thresholds.[221] It is not clear what prompted Uber to embrace a more burdensome reporting policy of issuing a Form 1099-K to each driver, given that its own business practices remained unchanged.[222] It is also not certain how Uber is justifying its shifting position without conceding that it reported improperly in the prior three years.[223]

Uber and Lyft (and Sidecar, when it was in business) also issue drivers a Form 1099-MISC for direct payments made by the platforms to the drivers (e.g., bonuses) of $600 or more because, with respect to those payments, they do not serve as an intermediary of any type between riders and drivers. For such direct payments, the rules of I.R.C. § 6041 apply because the I.R.C. § 6050W rules do not.[224]

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218. *See* Support Center, *Does Driving Incur Any Taxes?*, SIDECAR (Apr. 22, 2014, 5:14 PM), http://support.side.cr/customer/portal/articles/924061; *Tax Information*, *supra* note 201; *see also* Pender, *supra* note 7; Justine Sharrock, *Life Behind the Wheel in the New Rideshare Economy*, BUZZFEED (May 8, 2013, 12:30 PM), http://www.buzzfeed.com/justinesharrock/life-behind-the-wheel-in-the-new-rideshare-economy.

219. *See* Harry Campbell, *All of Your 2015 Rideshare Tax Questions Answered*, RIDESHARE GUY (Feb. 17, 2016), http://theridesharegeuy.com/all-of-your-2014-rideshare-tax-questions-answered-a-turbotax-giveaway/; The Driver, *Uber or Lyft Taxes: What to do Without a 1099 Form*, RIDESHARE DASHBOARD (Jan. 8, 2015), http://ridesharedashboard.com/2015/01/08/uber-lyft-taxes-what-to-do-your-taxes-without-1099/.

220. *See* I.R.C. § 6050W (2014); *see also* Kathleen Pender, *Here's Why Uber and Lyft Send Drivers Such Confusing Tax Forms*, S.F. CHRON. (Feb. 20, 2015, 1:35 PM), http://www.sfgate.com/business/networth/article/Here-s-why-Uber-and-Lyft-send-drivers-such-6092403.php.

221. *See* Pender, *supra* note 220; Tristan Zier, *How to Read Your Uber 1099*, ZEN99 (Feb. 3, 2015), https://web.archive.org/web/20150503200230/http://tryzen99.com/blog_posts/read-uber-1099.

222. It is possible that Uber perceived the importance of relatively lax information reporting at the outset to incentivize drivers to drive for Uber, so as to obtain a first mover advantage and become a market leader in ridesharing. Having cemented its position as a market leader, Uber may have then decided to embrace tighter information reporting standards in order to (1) appease regulators and (2) force competitors such as Lyft and Sidecar to embrace similar tightened information reporting standards (on the theory that if the standards made driving less attractive, such secondary players in the market might suffer more from a smaller pool of willing drivers). Our thanks to Jordan Barry for pointing out this insight.

223. Uber might argue it is merely ensuring that it is providing the fullest information possible to all parties, including the government.

224. The fact that Lyft and Uber plan to issue a Form 1099-MISC for these payments indicates that the payments will not be made by credit card or third party payment network. If the payments

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The Form 1099-K information reporting position taken by some of the ridesharing businesses gives rise to an information-reporting gap because drivers who do not earn ride income exceeding $20,000 through more than 200 rides will not have their income reported to the IRS.[225] Although the absence of third-party reporting does not relieve drivers of the obligation to report all driving-related income on their tax returns, it does make it more difficult for the IRS to track total receipts and ensure gross income inclusions.[226]

The tax information reporting position taken by ridesharing businesses (Lyft to the present, Sidecar while it was in business, and Uber until early 2015) is an instance of tax opportunism in action. When faced with potentially ambiguous third-party reporting obligations under I.R.C. § 6050W, these sharing businesses chose the less burdensome interpretation by identifying themselves as "third party settlement organizations" rather than as "merchant acquiring entities." This position is not wholly unreasonable, yet its correctness is at least debatable. First, it is far from clear that the "third party settlement organization" category was intended to cover Uber, Lyft, and Sidecar as well as Amazon, PayPal, and Google Checkout. There are important differences between ridesharing and these online settlement organizations, such as their relative control over payees' conduct (drivers, in the case of Uber and Lyft).[227] Second, it is possible that a sharing business might be viewed as an "aggregate payee" under I.R.C. § 6050W. Under that theory, the

were so made, a Form 1099-K issued by the PSE would presumably be the appropriate document.

225. Lyft itself has acknowledged the existence of that gap. *See Tax Information*, LYFT, https://web.archive.org/web/20160211181123/https://help.lyft.com/hc/en-us/articles/213582038-Tax-Information (explaining the circumstances under which a driver will receive a Form 1099-K, Form 1099-MISC, or no form at all); *see also supra* note 216 and accompanying text.

226. *But see* discussion *infra* Part III.A.2.d.

227. *See* discussion *infra* Part III.B.1. The IRS recently ruled in Private Letter Ruling 201619006 (modifying Private Letter Ruling 201604003) that a taxpayer that "provides an [Internet] platform and marketplace through which" customers and providers of a service can transact was a "third party settlement organization" for purposes of the I.RC. § 6050W reporting requirements. I.R.S. Priv. Ltr. Rul. 201619006 (May 6, 2016). The IRS noted that the taxpayer requesting the ruling "only provides the platform which allows Providers and Customers to connect and serves as a payment collection agent for purposes of accepting payments from Customers on behalf of Providers." *Id.* It further noted that the service providers decide what amount to charge and that taxpayer "plays no role." *Id.* Thus, the requesting taxpayer was presumably not a ridesharing company actively involved in setting rates. Despite the taxpayer's concession that "payments from Customers to Taxpayer are payment card transactions or third party network transactions subject to [I.R.C. § 6050W] information reporting" and that "the relevant merchant acquiring entity or third party settlement organization issues Forms 1099-K to Taxpayer," the private letter ruling did not consider whether the taxpayer was an "aggregate payee" for purposes of I.R.C. § 6050W. *Id.* The issuance of this Private Letter Ruling demonstrates that the IRS is starting to weigh in on the information reporting question. *See id.*; I.R.S. Priv. Ltr. Rul. 201604003 (Aug. 24, 2015).

ridesharing business itself receives a Form 1099-K from its own PSE (bank) and then would be regarded as a PSE vis-à-vis the drivers, presumably required to "step into the bank's shoes" as an aggregate payee and report all transactions the bank was required to report. The characterization of ridesharing businesses as aggregate payees might call into question the claim that they are "third party settlement organizations." Third, as noted above,[228] the proper relationship between Form 1099-MISC and Form 1099-K reporting may still be ambiguous with respect to the application of the 200 transactions/$20,000 de minimis threshold.[229] The alternative interpretation leaves open the possibility that there is no statutory gap in some cases, and if reporting under I.R.C. § 6041 is not required, then I.R.C. § 6050W (Form 1099-K) reporting might be required regardless of how few transactions occurred or how little was earned.[230]

Finally, it should be noted that this interpretation of information reporting responsibilities has not been universally embraced by all sharing businesses. As discussed, Uber is now filing Forms 1099-K for all drivers. Airbnb, which announced its shift to Form 1099-K reporting for 2013, was initially unclear on whether it would report all payments made to hosts, but eventually clarified that it would only issue Forms 1099-K to hosts earning over the 200 transactions/$20,000 threshhold.[231] Similarly, TaskRabbit appears to be taking the position that unless the Tasker has earned over $20,000 and performed more than 200 tasks, no Form 1099-K will be issued.[232] Moreover, TaskRabbit's website specifies that all tax reporting will not be done by TaskRabbit but rather by Braintree Payments, TaskRabbit's processing partner.[233] Gigwalk, a similar service to TaskRabbit, also will not itself be issuing Forms 1099-K, but rather will

228. *See supra* notes 215–17 and accompanying discussion.

229. *See supra* notes 214–17 and accompanying discussion.

230. *See* Christenson & Kottke, *supra* note 215.

231. *See, e.g.*, *How Do Taxes Work for Hosts?*, AIRBNB, https://www.airbnb.com/help/article/481 (last visited Jan. 7, 2016) ("[W]e may provide hosts who've submitted a W-9 with a Form 1099-K showing their reportable earnings from the previous year."); *What Tax Forms Should I Expect to Receive from Airbnb?*, AIRBNB, https://www.airbnb.com/help/article/414 (last visited Jan. 7, 2016) (noting that "[i]n previous years, we issued 1099-MISC forms to hosts. Starting with the 2013 tax year, we're sending 1099-K forms instead. This shouldn't change the way you file your taxes"); *Should I Expect to Receive a Tax Form from Airbnb?*, AIRBNB, https://www.airbnb.com/help/article/414/should-i-expect-to-receive-a-tax-form-from-airbnb (last visited May 17, 2016) ("The Internal Revenue Service (IRS) requires that all US companies processing payments, including Airbnb, report the gross earnings of US customers that earn over $20,000 and have 200+ transactions in the calendar year. If you cross both IRS thresholds in a calendar year, Airbnb will provide you with a Form 1099-K."); *see also* Pender, *supra* note 7.

232. *Tax Information and FAQs*, TASKRABBIT (Apr. 14, 2016), https://taskrabbit.zendesk.com/entries/61642320-Tax-Information.

233. *Id.*

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be leaving it to PayPal to provide such forms, and PayPal will not provide a Form 1099-K unless the more than 200 transactions/$20,000 threshold is met.[234] The heterogeneity of industry interpretations suggests that the notion that Lyft and Sidecar are "third party settlement organizations" is at least questionable.

*c. Comparison to Taxicab Industry Reporting Positions*

It is instructive to compare the information reporting positions taken by certain ridesharing businesses with the positions taken by a traditional industry with which ridesharing companies compete: the taxicab industry. The usual income and expense tax rules apply to the taxicab industry.[235] However, the types of ownership, leasing, and driving arrangements in the taxicab industry are heterogeneous.[236] Therefore, no single pattern of third party information reporting encompasses all taxicab companies.

According to the IRS taxicab industry audit techniques guide, some 26% of taxi drivers in 2008 were self-employed.[237] Self-employed taxi drivers, who operate with no commercial intermediary between them and the passenger, would presumably receive Form 1099-K from their bank or other credit card settlement entity for payments received by credit card,[238] but not for cash transactions or cash tips.[239] Drivers who work for taxicab companies may be classified as independent contractors or employees.[240] Employees would presumably receive a Form W-2 from the employer

234. Nikki, *Will I Be Receiving a 1099 or Other Tax Form?*, GIGWALK (Sept. 3, 2015, 9:46 AM), https://gigwalk.zendesk.com/hc/en-us/articles/203202350-Will-I-be-receiving-a-1099-or-other-tax-form-.

235. *See, e.g.*, I.R.C. §§ 61, 62, 67, 68, 162, 168, 179 (2014).

236. In New York City, for example, some drivers own individual medallions and own and drive their own taxicabs. *See, e.g.*, DESIGN TRUST FOR PUB. SPACE & N.Y.C. TAXI & LIMOUSINE COMM'N, TAXI 07: ROADS FORWARD 40–51 (Rachel Abrams et al. eds., 2007) [hereinafter TAXI 07: ROADS FORWARD]; N.Y.C. TAXI & LIMOUSINE COMM'N, 2014 TAXICAB FACTBOOK 1, 8 (2014), *available at* http://www.nyc.gov/html/tlc/downloads/pdf/2014_taxicab_fact_book.pdf [hereinafter 2014 TAXICAB FACTBOOK]. Some own the vehicle but lease the medallion from a medallion owner or lease manager. Some drivers lease both cab and medallion from a fleet owner. Thus, the industry encompasses a number of different business relationships.

237. INTERNAL REVENUE SERV., CASH INTENSIVE BUSINESSES AUDIT TECHNIQUES GUIDE—CHAPTER 17—TAXICABS 3 (2010), *available at* http://www.irs.gov/pub/irs-utl/cashchapter17_248965.pdf [hereinafter IRS AUDIT GUIDE].

238. Pursuant to I.R.C. § 6050W (2014).

239. *See* Sarah E. Mooney, *Update on the New Form 1099-K Rules: Q & A*, DISPATCH (Taxicab, Limousine & Paratransit Ass'n, Rockville, Md.), Feb. 2011, at 1, 4, *available at* http://www.stl-taxi.com/documents/1099-k.pdf.

240. *See, e.g.*, IRS AUDIT GUIDE, *supra* note 237, at 3.

setting forth their income and withholding amounts but would have to report tips to the employer per I.R.C. § 6053(a).[241]

Independent contractor drivers who work through a taxicab company and receive payment on non-cash fares through that company would also receive a Form 1099 from the company. Presumably, because the payment is originating with the passenger, the taxicab company would issue Form 1099-K to drivers rather than Form 1099-MISC.[242] At present, the apparent trend among taxicab companies is to consider themselves aggregate payees for Form 1099-K reporting purposes.[243] The taxicab companies would receive a Form 1099-K from banks with respect to credit card payments, and would (as aggregate payee) in turn issue a Form 1099-K to each independent contractor driver.[244] Attorney advisers to taxicab companies seem to be taking the position that all amounts must be reported, no matter how small.[245] Thus, the ridesharing businesses and the taxicab companies appear to have pursued different interpretations of I.R.C. § 6050W, with the ridesharing businesses adopting the less onerous reporting stance, at least at the outset.

#### *d. Potential Tax Compliance Effects of Form 1099-K Reporting*

Despite indications that third-party reporting improves tax compliance, the precise compliance effects of some sharing businesses' decision to rely on the Form 1099-K $20,000/200 rides reporting threshold (by not reporting unless that threshold is crossed) are not entirely clear. Tax compliance research to date indicates that compliance is higher for income subject to information reporting than, say, cash. This evidence would suggest that higher reporting thresholds would have a negative impact on taxpayer compliance.[246]

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241. *See id.* at 7; *see also* I.R.C. § 6053(a) (2014).

242. *See* I.R.C. § 6041 (2014).

243. *See, e.g.*, *2011 Year in Review*, TRANSP. LEADER, Winter 2012, at 26, *available at* http://www.tlpa.org/news/2011_Year_in_Review.pdf (noting that the transportation businesses "will receive a Form 1099-K from the entity that settles electronic payment transactions listing its total gross receipts from credit card transactions processed during the calendar year. . . . [and then] [t]he company must also file a Form 1099-K for each driver to whom it has paid or credited amounts on account of fares and tips paid by credit card").

244. *See* Treas. Reg. § 1.6050W-1(d)(1), (e), Example 22 (2010).

245. *See, e.g.*, CHIP WATKINS, WEBSTER, CHAMBERLAIN & BEAN, LLP, FORM 1099 UPDATE 2 (2011), (advising that "[o]ne credit card transaction is sufficient to trigger the Form 1099-K reporting obligation"), *available at* http://octap.net/form_1099_update.pdf; *2011 Year in Review*, *supra* note 243, at 26; Mooney, *supra* note 239, at 1.

246. *See* Alm et al., *supra* note 200, at 122; Brian Erard & Chih-Chin Ho, *Explaining the U.S. Income Tax Compliance Continuum*, 1 EJOURNAL TAX RES. 93, 97–101 (2003) (finding, based on

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However, the study of Form 1099-K reporting is in its infancy, particularly with respect to the sharing economy. There are reasons to think that the effectiveness of Form 1099-K in ensuring compliance may be limited. For example, Leandra Lederman suggests that the effectiveness of Form 1099-K on tax compliance may be limited due to its inability to track cash and to monitor expenses.[247] A recent study of Form 1099-K reporting suggested that while Form 1099-K might lead to increased reported receipts among certain taxpayers, this increase might be partially offset by increases in reported expenses.[248] That same study suggested, however, that Form 1099-K might incentivize taxpayers who had not previously filed Schedule C to file that form.[249] Yet another study suggests that small business owners might regard credit card payments as reportable (in contrast to cash payments), even in the absence of third-party information reporting.[250] While the study examines a different group of businesses, it does raise the possibility that the electronic nature of amounts earned in ridesharing may incentivize drivers to report such income, regardless of whether Form 1099-K is received.[251]

These studies indicate that the effects of Form 1099-K on tax compliance may be complex. In general, it seems likely that higher

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micro-simulation database encompassing both nonfilers and underreporters, that compliance across thirty-four occupational groups has strong positive association with share of income subject to third-party reporting, but strong negative association with the burden of preparing and filing a tax return); Morse et al., *supra* note 17, at 49–51.

247. Lederman, *Reducing Information Gaps*, *supra* note 199, at 1750–52 (arguing that I.R.C. § 6050W reporting effectiveness may be impacted by the fact that (1) taxpayer basis is not tracked, (2) high reporting thresholds may exclude many taxpayers from reporting, and (3) Form 1099-K amounts cannot be easily matched to tax return amounts).

248. Slemrod et al., *supra* note 17, at 32 (estimating that 1099-K introduction led to a 24% increase in reported receipts for those firms reporting receipts exactly equal to the 1099-K-reported amount, but also estimating that this group of firms also increased reported expenses by 13%, which offsets the impact of Form 1099-K on total tax payments, even in groups most strongly affected by Form 1099-K).

249. *Id*. (finding that of firms reporting receipts within 5% of the Form 1099-K amount, 66% did not file Schedule C in the previous year; of firms reporting exactly the Form 1099-K amount, half did not file Schedule C in the previous year).

250. Morse et al., *supra* note 17, at 50–51 (reporting that most interviewees regarded credit card receipts as taxable and reportable revenue).

251. Increased reporting among drivers could be the result of either (1) knowledge that most rides are paid for by credit card, or (2) the belief that Uber's deposits and payments to drivers are akin to credit cards in their ability to be traced. One caveat in trying to translate the findings of the Morse et al. study to the sharing economy concerns the nature of the taxpayers studied. To the extent the study focused on small, cash-based business owners, such taxpayers may have a different perspective on their likelihood of audit as compared to occasional part-time sharing earners. Thus, the two groups may think about the implications of credit card reporting and the Service's ability and inclination to track and trace payments differently. For example, ridesharing drivers may have devoted less attention to thinking through issues of audit trigger versus audit investigation.

reporting thresholds may adversely affect tax compliance in some respects and that more comprehensive information reporting would facilitate greater degrees of tax compliance (in terms of income inclusion and Schedule C filing). On the other hand, this effect may be partially offset by other factors (such as increased expense taking). The extent to which these effects occur warrants further study.[252]

#### *e. Explaining the Information Reporting Positions of Sharing Businesses*

Why are some sharing businesses embracing high information reporting thresholds? Why are others content to report all income? Why do some change their positions midstream? It is beyond the scope of this Article to set forth a comprehensive theory of why tax opportunism occurs (and why it sometimes does not). Suffice it to say that there are clear regulatory advantages to sharing businesses of embracing less onerous information reporting.

First, there are obvious benefits associated with not having to incur the costs of issuing tax forms to every single driver and the IRS. Second, because information reporting gives the Service an accurate picture of the income received by each ridesharing driver, the absence of information reporting below the threshold may accord low-earning/low-frequency drivers the (illegal) opportunity to not declare income receipts on their tax return. This can effectively lower the tax costs to drivers and may incentivize the marginal driver to engage in ridesharing driving when they otherwise might have been deterred by tax compliance and other tax costs. Regardless of the long-term stability of this information reporting position, it may have had the regulatory advantage of helping draw new drivers to invest in a ridesharing career at the outset with the potential of keeping them in the sector down the road. Again, we do not claim that drivers will definitely take advantage of this opportunity to underreport. As noted, further empirical study is required to ascertain the precise impact of Form 1099-K information reporting.[253] Our point, rather, is that embracing less onerous information reporting thresholds renders these opportunities available.

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252. For recent examples of such inquiry, see Oei & Ring, *supra* note 19 (manuscript at 27–37); Bruckner, *supra* note 19.

253. *See supra* Part III.A.2.d.

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### *B. Other Examples of Tax Opportunism*

Although the tax opportunism described above concerned tax compliance, we anticipate that this phenomenon could also arise with regard to substantive tax rules, or rules that might effectively bridge the two categories. We now discuss three other instances of tax opportunism, some of which might arguably bridge the gap between substantive law and tax compliance. These are: (1) the sharing businesses' decision to classify sharing workers as independent contractors rather than employees; (2) Airbnb's initial position with respect to local occupancy taxes; and (3) the ridesharing businesses' decision to operate outside of the taxicab medallion system.

#### *1. Sharing Economy Businesses and the Employee-Independent Contractor Divide*

As discussed above, classification of a worker as an employee rather than an independent contractor gives rise to disparate employment tax and other obligations.[254] In fact, the threshold determination of independent contractor classification is the feature that gives rise to the issues surrounding Form 1099 reporting described above. Generally speaking, if the individual receiving payment is an employee, then the employer has reporting, withholding, and employment tax payment obligations. Employers would have to withhold federal income taxes, social security taxes, and Medicare taxes from the wages of employees and provide employees with a Form W-2.[255] If the individual is an independent contractor, then the individual herself is responsible for employment taxes, and the business does not have a withholding obligation.[256] The business would then provide the relevant information reporting forms (Forms 1099-K or 1099-MISC), which is what the sharing businesses have done to date. Thus, the ability to classify workers as independent contractors has tangible benefits for the paying entity in terms of administrative costs and burdens, and may lead to a tendency to "overclassify" workers as independent contractors to avoid the additional withholding and other tax burdens associated with having employees.[257]

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254. *See supra* Part II.C.1.

255. *See* I.R.C. §§ 3401, 3402, 3501 (2014); *see also* INTERNAL REVENUE SERV., PUBLICATION 15: (CIRCULAR E), EMPLOYER'S TAX GUIDE 20–24 (2016), *available at* https://www.irs.gov/pub/irs-pdf/p15.pdf.

256. *See* sources cited *supra* note 255; *see also* I.R.C. § 6041 (2014).

257. For a survey of the issues on the employment law side, see Rogers, *supra* note 152

The determination of worker classification, which rests initially in the hands of the paying entity, represents another instance of tax opportunism. As was the case with information reporting, sharing businesses have embraced the less onerous independent contractor classification. The unique structure of sharing businesses offers an opportunity to treat sharing earners (drivers, taskers, etc.) as independent contractors. For example, the fact that ridesharing businesses may be able to claim that they function as matchmakers between buyers and sellers of services through technology platforms may be used to buttress independent contractor classification under the IRS 20-factor test.[258] Such arguments may not be as easily available to traditional industries such as taxicabs.

Yet, as discussed above, the question of whether independent contractor status is the correct classification is an open one. As observed in Part II.C, the line between employees and independent contractors is a long established, though heavily fact-specific and frequently debated, boundary.[259] Commentators have noted that it is possible that Uber drivers are more accurately classified as employees, and there are a number of active lawsuits addressing this question in a variety of legal contexts.[260] Both Uber and Lyft have recently negotiated settlements in lawsuits that will allow drivers to continue to be treated as independent contractors.[261] However, those class action settlements do not eliminate the ability of individuals or the government to challenge that classification in other contexts.

In addition, legal developments regarding worker classification outside of sharing may be relevant. For example, active lawsuits regarding whether FedEx drivers are independent contractors or employees may impact the classification of Uber drivers as employees.[262] Although Uber currently treats its drivers as independent contractors,[263] commentators have recognized that the FedEx litigation may constrain ridesharing

(manuscript at 4, 34–36).

258. *See supra* note 159. The sharing businesses may be drawing an implicit or explicit parallel to Amazon and PayPal.

259. *See supra* Part II.C.1.

260. *See, e.g.*, Farrell, *supra* note 68; *see also* sources cited *supra* notes 162–66.

261. *See supra* notes 50, 164. At the time of this writing, those settlements are still pending court approval.

262. *See, e.g.*, Alexander v. FedEx Ground Package Sys., Inc., 2016 U.S. Dist. LEXIS 49201 (N.D. Cal. Apr. 12, 2016) (conditionally granting approval to a proposed class action settlement); Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 997 (9th Cir. 2014) (ruling that the FedEx drivers were employees under California state law, despite the company's claims that they were independent contractors); Ben Rooney, *The FedEx Driver Who Sued and Won*, CNN MONEY (Nov. 21, 2014, 9:22 AM), http://money.cnn.com/2014/11/20/news/companies/fedex-driver-lawsuit/index.html.

263. *See, e.g.*, *supra* note 156 and accompanying text.

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services' ability to so classify their drivers.[264] More recently, the National Labor Relations Board ruled in a case involving Browning-Ferris, a waste management company, that both Browning-Ferris and a subcontractor were joint employers of the represented workers, notwithstanding a labor services agreement specifying that the subcontractor was the sole employer.[265] While the decision applies to franchising and subcontracting, commentators note that the decision fuels the debate regarding who is an employee in the changing economy and may impact sharing economy platforms.[266]

Of course, the independent contractor versus employee determination will have to be made separately for each discrete business (and possibly for different classes of workers within a business) because the inquiry is necessarily context dependent. It is possible, therefore, that some sharing workers are properly classified as employees while others are properly considered independent contractors.

Even if some sharing earners are subsequently adjudged to be employees, however, the initial embrace of independent contractor classification at the outset holds benefits for sharing businesses. First, it puts the burden of litigating or challenging the independent contractor classification on the shoulders of workers whose interests are dispersed.[267] Second, even if sharing earners are eventually found to be employees, independent contractor classification will have lowered costs for sharing businesses during the time period it is in effect.

Finally, it is likely that even if certain sharing workers were found to be employees based on their current economic relationships with the sharing businesses, the sharing businesses may be able to restructure or tweak

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264. *See, e.g.*, Patrick Hoge, *Independent Contractor Ruling on FedEx Drivers Could Affect "Sharing Economy,"* S.F. BUS. TIMES (Aug. 28, 2014, 3:31 PM), http://www.bizjournals.com/sanfrancisco/blog/techflash/2014/08/independent-contractor-ruling-fedex-uber-lyft.html?page=all; Will Small, *Ninth Circuit Rules FedEx Misclassified Workers*, SMALL & SCHENA LLP (Aug. 29, 2014), http://www.smallschena.com/blog/2014/8/29/ninth-circuit-rules-fedex-misclassified-workers.

265. Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 at 3, 20 (2015).

266. *See, e.g.*, Kimberly Adams, *NLRB Decision Pushes 'Employee' Debate*, MARKETPLACE (Aug. 28, 2015, 11:23 AM), http://www.marketplace.org/2015/08/28/economy/nlrb-decision-pushes-employee-debate; Martha C. White, *NLRB Ruling Redefining 'Employer' Could Have Big Impact If It Stands*, NBC NEWS (Aug. 28, 2015, 2:33 PM), http://www.nbcnews.com/business/business-news/nlrb-ruling-redefining-employer-could-have-big-impact-if-it-n417866.

267. Even if sharing workers were to organize, there would be costs associated with such organization. Nick Wingfield & Mike Isaac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions*, N.Y. TIMES (Dec. 14, 2015), http://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html?_r=0. In December 2015, the Seattle City Council voted to approve a bill permitting ridesharing drivers to form unions. This law has been characterized as "the first legislation of its kind in the country." *Id.*

these relationships so as to more effectively avoid employee classification. Thus, tax opportunism may occur dynamically and iteratively, through a process of trial and error. To the extent these adjustments create new transaction costs for the sharing businesses, the regulatory strategy may be described as occurring at the border of tax opportunism and regulatory arbitrage.

### *2. Airbnb and Local Hotel and Occupancy Taxes*

One of the most volatile tax issues arising in home sharing has been the sector's position on local hotel and occupancy taxes. As discussed above, Airbnb initially adopted the position that it was not responsible for collecting local hotel and occupancy taxes because it did not own the rooms rented and functioned merely as an intermediary.[268] This position actually has two dimensions: First, that Airbnb was not liable for such taxes because the individual hosts were the ones responsible; and second, that Airbnb had no liability as a collection agent for such taxes.[269]

Airbnb's decision to take this position constitutes another example of tax opportunism. Like certain ridesharing businesses' position that they are "third party settlement organizations," Airbnb's unwillingness to collect and remit occupancy taxes provided it with two potential commercial advantages.

First, collection and remittance of the taxes would impose administrative costs on Airbnb, and avoidance of these costs for as long as possible would provide an advantage over competitors (such as the hotel industry) who have to incur the administrative costs of acting as a collection agent. Second, if Airbnb did not collect and remit the tax, it would be unlikely that the hosts would do so, particularly as new, sporadic, nonprofessional entrants into the world of short-term rentals. Thus, non-collection and non-remittance of occupancy taxes could effectively give Airbnb a competitive pricing advantage over hotels and could also help entice more guests and hosts into home sharing by lowering tax-inclusive rental prices and apparent transaction costs, thereby increasing the competitiveness and viability of the new sector.

In sum, even though it is becoming increasingly apparent that Airbnb's initial position might be unsustainable (as Airbnb has agreed to collect taxes in more and more cities, states, and foreign countries), the taking of such a "non-collection" position at the outset has given Airbnb and its

268. *See supra* Part II.C.2.
269. *See, e.g.*, S.F., CAL., BUS. & TAX REGULATIONS CODE art. 7, § 1.504-1 (2003).

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hosts and guests a material short-term advantage.[270] Moreover, Airbnb is still not collecting occupancy taxes in many locations. Furthermore, Airbnb's regulatory strategy has yielded an advantage in that many localities have not been able to obtain payment of back taxes from Airbnb.[271]

As was the case with information reporting, the position taken by Airbnb with respect to occupancy taxes is an instance of tax opportunism. The nature of the Airbnb business model—connecting private hosts with potential renters via an Internet platform—supported Airbnb's claim that it looks sufficiently unlike a traditional hotel that Airbnb itself is not liable for the local occupancy tax. Thus, this is not the same as outright defiance of the law. Rather, Airbnb took advantage of an ambiguity that arose out of its innovative business model. While elements of arbitrage may creep in as sharing businesses start to adjust their business models at the margins to capture regulatory benefits, this has not been the primary dynamic so far. In sum, tax opportunism most accurately characterizes the choices of Airbnb with respect to compliance with local occupancy taxes.

### *3. Ridesharing and Taxicab Medallions*

One final example of tax opportunism in action can be found in the decision by ridesharing businesses not to operate within the taxicab medallion and licensing systems run by various localities. Taxicab companies have been among the most vocal objectors to the ridesharing economy, and among the strongest complaints is that taxicab drivers and companies must pay for expensive licenses, medallions, and other costs in order to operate their business and vehicles, whereas ridesharing competitors operate without such costs.[272] While not a tax in the traditional

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270. As noted in Part II.C.2 above, Airbnb has now entered into agreements with a number of cities and localities, providing that it will be responsible for withholding and paying over the occupancy taxes. *See In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, *supra* note 177; *see also supra* Part II.C.2; sources cited *supra* note 176.

271. In 2015, Airbnb agreed to pay back taxes to San Francisco. *See* Badger, *supra* note 177 (noting that, in negotiations with localities, Airbnb "has not put back taxes on the table anywhere"); Joyce E. Cutler, *Airbnb Pays San Francisco Back Taxes While Opponents Plan Tighter Regulations*, 34 DAILY TAX REP. (BNA) H-1, Feb. 20, 2015; Matier & Ross, *supra* note 176; Carolyn Said, *Airbnb to Collect SF Hotel Tax Oct. 1*, S.F. CHRON. (Sept. 17, 2014, 12:00 PM), http://blog.sfgate.com/techchron/2014/09/17/airbnb-to-collect-sf-hotel-tax-oct-1/.

272. *See, e.g.*, Luz Lazo, *Cab Companies Unite Against Uber and Other Ride-Share Services*, WASH. POST (Aug. 10, 2014), http://www.washingtonpost.com/local/trafficandcommuting/cab-companies-unite-against-uber-and-other-ride-share-services/2014/08/10/11b23d52-1e3f-11e4-82f9-2cd6fa8da5c4_story.html; Maya Rhodan, *Taxi Drivers Protest Uber and Lyft, Stop DC Traffic*, TIME (Oct. 8, 2014), http://time.com/3482420/taxis-uber-lyft-washington-dc/.

sense, taxicab medallion and permitting systems often involve taxes and fees paid directly or indirectly to the licensing governments and are a method of revenue raising in some localities.[273] In addition, depending on the locality, taxicab operators may pay various other types of taxes, fees, and surcharges that are not borne by ridesharing companies. Thus, it is appropriate to include this discussion in our analysis of tax opportunism.[274]

The taxicab industry is highly regulated by local government agencies, particularly by state and local transportation authorities.[275] Depending on the local regulatory body in charge, taxicab drivers and companies may be subject to licensing or franchising requirements, more general business licensing requirements, permitting requirements, and other restrictions on entry.[276] The industry may also be required to comply with certain insurance and safety regulations, rate schedules, and paperwork requirements.[277]

The New York City taxicab medallion system is an example of a regulation system that generates revenue.[278] NYC taxicabs are regulated by the New York Taxi & Limousine Commission ("TLC"), a city agency.[279] TLC is responsible for fare and rate setting and for establishing

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273. *See generally* Ron Sherman, *Yellow Cabs vs. Uber: Tale of the Tax Tape*, N.Y. DAILY NEWS (Aug. 27, 2015, 5:00 AM), http://www.nydailynews.com/opinion/ron-sherman-yellow-cabs-uber-tale-tax-tape-article-1.2338390 (comparing the contribution of New York City taxicabs to state and local tax revenue with Uber's contribution).

274. The dynamic between ridesharing and taxis raises a wide range of other regulatory questions beyond the scope of this Article. *See generally* LISA RAYLE ET AL., UNIV. OF CAL. TRANSP. CTR., APP-BASED, ON-DEMAND RIDE SERVICES: COMPARING TAXI AND RIDESOURCING TRIPS AND USER CHARACTERISTICS IN SAN FRANCISCO 1–2, 19–20 (2014), *available at* http://www.uctc.net/research/papers/UCTC-FR-2014-08.pdf.

275. *See generally* Bruce Schaller, *Entry Controls in Taxi Regulation: Implications of US and Canadian Experience for Taxi Regulation and Deregulation*, 14 TRANSPORT POL'Y 490, 491 (2007) (analyzing taxicab regulation and deregulation in 43 US and Canadian cities and counties).

276. One commentator has grouped such "entry controls" into the taxicab sector into four prototype systems: (1) "open entry" systems that regulate at the individual taxicab driver level (i.e., individuals may satisfy the regulation requirements by meeting certain licensing and/or background check requirements); (2) "limited entry" systems that regulate at the individual driver level but that cap the number of licenses or medallions available to those individuals; (3) "open entry" systems that regulate at the entity or company level but that do not cap the number of entity licensees; and (4) "limited entry" systems that regulate at the entity-level but that also cap the number of franchises available to those entities. Schaller, *supra* note 275, at 3–5. In reality, of course, the actual regulatory architecture is likely to be a hybrid. *Id.* at 4–5 (noting that "[i]n practice, entry controls and qualifications for entry occupy a spectrum of policies rather than a set of binary choices").

277. *See generally* RAYLE ET AL., *supra* note 274, at 2–3 (studying the role of ridesourcing and that of taxis in urban transportation, through rider surveys); *see also* 2014 TAXICAB FACTBOOK, *supra* note 236, at 1–2, 13 (noting TLC regulation of cab leases, fares, and vehicle inspections).

278. *Cf.* Schaller, *supra* note 275, at 6 (classifying the New York City taxicab industry as a limited-entry system that regulates on the individual level).

279. *See generally* 2014 TAXICAB FACTBOOK, *supra* note 236, at 1–2, 12–13; N.Y.C. TAXI & LIMOUSINE COMM'N, http://www.nyc.gov/html/tlc/html/home/home.shtml (last visited Feb. 11, 2016);

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vehicle safety and other rules that owners and drivers must follow.[280] New York City currently has both yellow (medallion) taxicabs and boro taxicabs.[281] This discussion focuses on regulation of the yellow taxicabs, which predominantly service Manhattan and NY airport pickups.[282] The yellow taxicabs are regulated under a medallion system, which dates back to 1937.[283] The medallion is essentially a license to operate the vehicle, and the medallion system was enacted to curb cab numbers and bolster driver incomes.[284] There are two types of medallions—corporate (or "mini-fleet") medallions and individual medallions.[285] Individual medallion holders may not hold more than one medallion, and individual owners are subject to certain shift minimum and driving requirements.[286]

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*see also* TAXI 07: ROADS FORWARD, *supra* note 236, at 56–69 (describing function and role of the TLC). TLC also regulates other industries, including for-hire vehicles, street-hail liveries, commuter vans, paratransit vehicles, and certain limousines. *See Licensing/Industry Information*, N.Y.C. TAXI & LIMOUSINE COMM'N, http://www.nyc.gov/html/tlc/html/industry/industry.shtml (last visited Jan. 7, 2016).

280. *See* 2014 TAXICAB FACTBOOK, *supra* note 236, at 1; TAXI 07: ROADS FORWARD, *supra* note 236, at 57. TLC interventions include: setting standards for drivers, regulating and inspecting vehicles, imposing caps and restrictions on taxi medallions, auctioning off medallions, setting fares and rates, and coordinating with other agencies. *See* TAXI 07: ROADS FORWARD, *supra* note 236, at 57; *see also Licensing/Industry Information*, *supra* note 279.

281. *See* 2014 TAXICAB FACTBOOK, *supra* note 236, at 1–2; *see also Your Guide to Boro Taxis*, N.Y.C. TAXI & LIMOUSINE COMM'N, http://www.nyc.gov/html/tlc/html/passenger/shl_passenger.shtml (last visited Jan. 7, 2016) (describing boro taxis).

282. *See* 2014 TAXICAB FACTBOOK, *supra* note 236, at 5 (noting that 90.3% of yellow taxi pickups occur in Manhattan and that the next highest percentage of pickups (3.5%) happens at the airports).

283. *See id.* at 12; *see also* Lawrence Van Gelder, *Medallion Limits Stem from the 30's*, N.Y. TIMES, May 11, 1996, http://www.nytimes.com/1996/05/11/nyregion/medallion-limits-stem-from-the-30-s.html. In contrast, the boro taxis are regulated under a separate "street hail livery" permitting system. *Street Hail Livery*, N.Y.C. TAXI & LIMOUSINE COMM'N, http://www.nyc.gov/html/tlc/html/industry/shl.shtml (last visited Jan. 7, 2016). Medallions are not the only regulatory requirement imposed by TLC and bodies like it. NYC drivers also need to obtain a NYC taxicab driver's license (hack license), which in turn requires that the driver meet a number of requirements. *See* N.Y.C., N.Y., RULES tit. 35, § 54-04 (2016); *see also Steps to Get a New York City Taxi Hack License*, NY CITYCAB.COM, http://nycitycab.com/HackLicense.aspx (last visited Jan. 7, 2016). Taxicabs are also subject to numerous other TLC rules and regulations. *See generally TLC Rules and Local Laws*, N.Y.C. TAXI & LIMOUSINE COMM'N, http://www.nyc.gov/html/tlc/html/rules/rules.shtml (last visited Jan. 7, 2016) (listing TLC rules). For example, yellow cabs must undergo a "hack up" conversion (installation of roof light, meter, medallion, security cameras, partitions, etc.) in order to be driven as a taxicab. N.Y.C. TAXI & LIMOUSINE COMM'N, MEDALLION LICENSING INFORMATION GUIDE 8–9 (2015), *available at* http://www.nyc.gov/html/tlc/downloads/pdf/medallion_licensing_guide.pdf (describing hack-up process); TAXI 07: ROADS FORWARD, *supra* note 236, at 22–27 (same).

284. *See* 2014 TAXICAB FACTBOOK, *supra* note 236, at 12.

285. *Id.*

286. *See* N.Y.C., N.Y., RULES tit. 35, § 58-20 (2016); *see also* N.Y.C. TAXI & LIMOUSINE COMM'N, NOTICE OF PROMULGATION OF RULES 1–3 (2010), *available at* http://www.nyc.gov/html/tlc/downloads/pdf/owner_must_drive_version_10.pdf; 2014 TAXICAB FACTBOOK, *supra* note 236, at 12;

Corporate medallions may be owned by non-driver (nonfleet) owners and fleet owners.[287] These tend to be consolidated in relatively few hands.[288] Taxi Licensing Commission rules mandate that corporate medallion vehicles must be operated for two shifts a day.[289]

Medallions are originally auctioned off by the city, and the city raises revenue from medallion sales.[290] Medallions can also be sold and transferred between private parties, and transfers are subject to a tax on 5% of the purchase price.[291] These revenues are paid into the city treasury and credited to the general fund.[292] New York City also imposes a 50-cent tax on taxicab rides starting in New York City and ending in the city or in certain counties.[293] Uber cars do not charge this tax,[294] but Uber drivers in New York City (and their vehicles) must be licensed by the TLC.[295] Like New York City, there are other local taxicab licensing systems that generate revenue through various fees and taxes.[296]

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*Medallion Sale Information*, N.Y.C. TAXI & LIMOUSINE COMM'N, http://www.nyc.gov/html/tlc/medallion/html/background/types_owner.shtml (last visited Jan. 7, 2016).

287. *See* 2014 TAXICAB FACTBOOK, *supra* note 236, at 12; *see also Medallion Sale Information*, *supra* note 286. Non-fleet corporate medallion owners lease out their corporate medallions through TLC-licensed agents. *See Medallion Sale Information*, *supra* note 286.

288. *See* 2014 TAXICAB FACTBOOK, *supra* note 236, at 12.

289. N.Y.C., N.Y., RULES tit. 35, § 58-20; 2014 TAXICAB FACTBOOK, *supra* note 236, at 8; *Medallion Sale Information*, *supra* note 286.

290. *See* N.Y.C. OFFICE OF MGMT. & BUDGET, FOUR YEAR FINANCIAL PLAN REVENUES AND EXPENDITURES (2014), *available at* http://www.nyc.gov/html/omb/downloads/pdf/fp11_14.pdf (forecasting revenues from medallion sales); *Medallion Auction Homepage*, N.Y.C. TAXI & LIMOUSINE COMM'N, http://www.nyc.gov/html/tlc/html/industry/medallion_auction.shtml (last visited Jan. 7, 2016); *see also* Kristen Meriwether, *Hailing Higher Tax Revenue, City Lowers Expected Taxi Haul*, GOTHAM GAZETTE (Nov. 26, 2014), http://www.gothamgazette.com/index.php/government/5449-hailing-higher-tax-revenue-city-lowers-expected-taxi-haul.

291. *See* N.Y.C., N.Y., ADMIN. CODE tit. 11, ch. 14, §§ 11-1401–11-1417 (New York Legal Publishing 2015); *see also* N.Y. TAX LAW § 1201(j) (McKinney 2015); N.Y.C., N.Y., RULES tit. 35, § 58-43(b)(3).

292. N.Y.C., N.Y., ADMIN. CODE tit. 11, ch. 14, §§ 11-1417.

293. *See* N.Y. TAX LAW §§ 1280–1290; *see also Information on the Taxicab and Hail Vehicle Trip Tax*, N.Y. DEP'T OF TAXATION & FIN., http://www.tax.ny.gov/bus/mctmt/taxi.htm (last visited Jan. 7, 2016).

294. *See* Editorial, *Tax Uber So Car Service Supports the MTA*, N.Y. DAILY NEWS (Jan. 20, 2015, 4:10 AM), http://www.nydailynews.com/opinion/editorial-tax-uber-article-1.2081971; Editorial, *What Uber Owes Subways*, N.Y. DAILY NEWS (Feb. 24, 2015, 4:05 AM), http://www.nydailynews.com/opinion/editorial-uber-owes-subways-article-1.2126649; Sherman, *supra* note 273.

295. *Get a TLC License*, UBER, http://driveubernyc.com/#driving-with-uber (last visited May, 19, 2016); *For-Hire Vehicles*, N.Y.C. TAXI & LIMOUSINE COMM'N, http://www.nyc.gov/html/tlc/html/industry/for_hire.shtml (last visited May 19, 2016). The requirement that Uber driver vehicles be licensed with the TLC is not a medallion requirement. *The TLC Process*, UBER, http://driveubernyc.com/tlc-process/ (last visited May 19, 2016).

296. *See, e.g.*, S.F., CAL., TRANSP. CODE § 1116 (Lexis 2016) (imposing transfer fee); SANTA MONICA, CAL., CODE § 6.49.040(i) (Quality Code Publishing 2016) (imposing franchise and permitting fees on taxicabs); *see also* OFFICE OF THE INDEP. BUDGET ANALYST REPORT, CITY OF SAN

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The failure of ridesharing services to embrace and operate under medallion licensing systems at the outset has been subject to much critique.[297] We argue that such failure is another instance of tax opportunism at work. In effect, the unique business model of ridesharing companies has enabled them to argue that, unlike taxicabs, they are not subject to medallion licensing and the other fees and taxes imposed on taxicabs. The argument, in essence, is that ridesharing businesses are simply middlemen who bring private riders and drivers together, or alternatively, that they are some sort of limousine company. Some might argue that the ridesharing services' failure to secure a medallion is simply illegal. However, at least some localities have signed off on this practice.[298] Furthermore, tax avoidance does not appear to be the motivation behind the ridesharing industry's underlying structure. Thus, it is more appropriate to view the ridesharing sector's position on the medallion and fee system as taking advantage of an ambiguity that arose, rather than a carefully crafted regulatory arbitrage strategy involving costly structuring and modification of a transaction. Once again, tax opportunism is the better lens.

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DIEGO, TAXICAB PERMITTING POLICY & REVENUE GENERATION 2–5 (2012), *available at* http://www.sandiego.gov/iba/pdf/12_10.pdf (discussing San Francisco, New York, and Chicago as examples of cities with revenue raising taxicab regulatory systems).

297. *See, e.g.*, sources cited *supra* note 272; *see also* Gregory Wallace, *Uber CEO Charged with Operating Illegal Taxi Service in South Korea*, CNN MONEY (Dec. 24, 2014, 5:17 PM), http://money.cnn.com/2014/12/24/technology/uber-south-korea/. In Summer 2015, the mayor of New York City proposed a plan to temporarily cap the number of Uber cars in the city while studying the impact of Uber and other forces on traffic in the city. The proposal generated significant backlash and ultimately the mayor agreed to forgo caps for the moment while pursuing a four-month study of the impact of Uber and other ride-for hire businesses on New York City traffic. As part of this revised plan, Uber agreed to provide data that the city had been seeking. *See* Matt Flegenheimer, *De Blasio Administration Dropping Plan for Uber Cap, for Now*, N.Y. TIMES (July 22, 2015), http://www.nytimes.com/2015/07/23/nyregion/de-blasio-administration-dropping-plan-for-uber-cap-for-now.html?_r=1. The study, released in January 2016, noted that "E-dispatch" vehicles (such as Uber) contributed to overall congestion in Manhattan's Central Business District, "but did not drive the recent increase in congestion." OFFICE OF THE MAYOR, CITY OF NEW YORK, FOR-HIRE VEHICLE TRANSPORTATION STUDY 5 (2016), *available at* http://www1.nyc.gov/assets/operations/downloads/pdf/For-Hire-Vehicle-Transportation-Study.pdf.

298. In January 2015, Massachusetts enacted regulations governing businesses such as Lyft and Uber (designated a "Transportation Network Company" in the regulations). *See* 540 MASS. CODE REGS. 2.05 (2015); *see also* 1278 MASS. REG. 101 (Jan. 16, 2015). In early 2015, the New Orleans City Council considered a proposal to allow ridesharing app-based transportation using personal vehicles. *See* Robert McClendon, *Uber Legalization Ordinances Proposed by New Orleans City Council Members*, TIMES-PICAYUNE (Jan. 24, 2015, 1:14 AM), http://www.nola.com/politics/index.ssf/2015/01/uber-legalization_ordinance_pr.html. The ordinance was passed in April 2015. *See* Press Release, Mitchell J. Landrieu, Mayor, City of New Orleans, Mayor Signs Ordinance Permitting Ridesharing Operations in New Orleans (Apr. 15, 2015), *available at* http://www.nola.gov/mayor/press-releases/2015/201504015-uber/?feed=8aebddb2-1189-4016-8192-75f1533b5229.

Regardless of whether the position taken by ridesharing businesses with respect to medallions and licensing is sustainable, the decision to operate outside the medallion system has yielded tremendous benefits for ridesharing. It has lowered entry costs for drivers and the ridesharing companies themselves, and has helped ridesharing put pressure on the taxicab sector.

*4. Caveats*

A few concluding caveats: We do not claim that tax opportunism is the only regulatory response available to and undertaken by sharing actors. We expect that, depending on context, sharing economy actors will exhibit a range of responses to regulation, including both arbitrage and intentional noncompliance with the law.[299] We also anticipate that there may be mixed or ambiguous cases of tax opportunism: In some cases, it may be questionable whether the transaction should be viewed as arbitrage (i.e., one that has been deliberately structured, in a manner that incurs some transaction costs, to secure larger regulatory benefits) or opportunism (i.e., taking advantage of an existing gap in the law available due to inherent features of the new sharing model).[300] Sometimes, more than one motivation may be in play.

The possibility that arbitrage and illegal conduct may also be part of the equation does not undermine the power of the tax opportunism frame, because tax opportunism highlights a number of salient features of the sharing economy that are not captured by either arbitrage or illegality. With respect to information reporting opportunism, the rise of the sharing economy follows on the heels of predecessor transactions and services, such as PayPal and Amazon. The recently enacted Form 1099-K reporting regime for "third party settlement organizations" was designed with businesses like PayPal and Amazon in mind, but perhaps did not envision subsequent business innovations such as Uber and Airbnb. This has presented a unique opportunity for sharing businesses to piggyback on this information reporting regime. The irony, of course, is that at the time of its enactment, Form 1099-K reporting was generally viewed unfavorably by

299. Subsequent scholarship has begun to build off these insights regarding tax opportunism, exploring, for example, the strategies that sharing and related businesses have adopted to create desired legal and regulatory environments. *See, e.g.*, Jordan M. Barry & Elizabeth Pollman, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. (forthcoming 2017), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741987.

300. *See supra* note 192 and accompanying text.

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many businesses as an onerous imposition.[301] In the context of sharing businesses like Lyft (and Sidecar, when it was in business), however, embracing the most favorable interpretation of that regime has given such sharing businesses an advantage over traditional industry competitors.

Finally, it is important to highlight that there is inherent messiness in all analysis of business design and regulatory strategy in the sharing economy. The very heart of sharing—the commercialization of often small-scale excess capacity services—involves individuals not otherwise engaged in commerce entering industries that in some cases have traditionally been subject to significant regulation. If those sharing earners had to comply with a high degree of regulation, they might be unable and unwilling to enter into sharing. It is likely that the designers of sharing platforms and business models understood that the entry barriers for small-scale, periodic earners would need to be low in order to attract participation. Thus, though arguably not the prime driver of the design, regulatory realities were presumably not absent entirely from initial business conversations either. It is possible, even likely, that such regulatory realities have affected various aspects of how sharing has been set up, albeit not to the extent associated with traditional regulatory arbitrage.

### *C. The New Microbusiness Economy*

Tax opportunism aside, a second potential barrier to tax compliance in the sharing economy is the "microbusiness" nature of many sharing economy earners.[302] There are several different aspects to the characterization of sharing workers as microbusinesses, and this characterization is intended to reflect a group of characteristics, rather than an analytically precise delineation. The sharing economy has attracted many individuals who previously were not "in business," and who are now barely in business, but have to file tax returns as small-business operators. A study commissioned by Uber found, based on drivers surveyed, that 52% of Uber drivers drive part-time for UberX for less than 30 hours a

301. *See, e.g.*, Amy S. Elliott, *Credit Card Reporting Rules Could Burden Chain Firms*, 128 TAX NOTES 1028, 1029 (2010); Amy S. Elliott, *Final Credit Card Reporting Regs Disappoint Practitioners*, 128 TAX NOTES 820, 821 (2010).

302. More generally, almost 40% (or $179 billion) of the gross tax gap for 2006 (the latest year for which figures are available) was due to the business income and activities of individuals. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-651T, TAX GAP: SOURCES OF NONCOMPLIANCE AND STRATEGIES TO REDUCE IT 4–5 (2012). This 40% represented the estimated underreporting of business income and corresponding self-employment tax by individuals. *Id.*

week. Of this 52%, 44% drove for less than 12 hours a week, 35% drove for 12–19 hours a week, and 21% drove for 20–29 hours a week.[303] Also of this 52%, 6 out of 10 started driving for Uber within the last three months leading up to the study.[304] It seems likely that many, possibly even the majority, of Lyft drivers also drive part-time, and the part-time demographic is likely to be significant in other sharing sectors as well.

*1. New Microbusiness Earners*

These demographic characteristics give rise to unique compliance challenges. First, because many sharing workers may be relatively new to reporting business income and expenses, they may be unfamiliar with keeping track of such income and expenses and may ignore or understate income earned or track expenses inadequately. The risk of this occurring is especially great in the absence of corroborative information reporting. In large part, we think that the "confusion" that has been expressed about tax issues raised by sharing earners has to do with the fact that people who are unfamiliar with the process of accounting for business income and expenses on their personal tax returns are now engaging in sharing economy microbusiness activity. Even if they possess accurate information about the applicable tax rules, taxpayers engaged in sharing may nonetheless find it difficult to apply the rules and to maintain the required documentation.

*2. Part-Time Nature of the Work*

Relatedly, the fact that much of sharing economy work is part time raises unique compliance challenges. The part-time nature of the work means that dollar amounts of income are likely to be low. This raises three related risks. First, depending in part on the information reporting position taken by the sharing businesses, the income may escape reporting. For example, as discussed in Part III.A, the reporting positions taken by some sharing businesses mean than any worker earning amounts short of the 200

303. UBER DRIVER ROADMAP, *supra* note 108, at 3; *see also generally* Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 8 (Princeton Univ., Working Paper No. 587, 2015), *available at* http://dataspace.princeton.edu/jspui/bitstream/88435/dsp010z708z67d/5/587.pdf (providing a study drafted under contract with Uber but prepared independently, drawing upon the UberDriver Roadmap research and additional data to assess the labor market for Uber drivers).

304. UBER DRIVER ROADMAP, *supra* note 108, at 3–4.

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transaction/$20,000 threshold will not be reported.[305] Second, it is possible that the low dollar amounts may also cause sharing workers to pay less attention to accuracy than might otherwise be the case. Finally, it may not be worth the IRS' effort to audit multiple, low dollar amount, individual returns of these microbusiness earners in order to determine compliance. Thus, traditional audit strategies may not be cost effective.

Again, in some ways, these problems are not new. These concerns have been raised elsewhere in the small business sector and also in areas such as Earned Income Tax Credit compliance.[306] In addition, these concerns may arise in traditional sectors with which the sharing sector competes. The taxicab industry, for example, arguably presents some of the same issues with respect to compliance and enforcement that we have discussed here, though there are some differences.[307] The question of exactly how the sharing economy changes the tax compliance calculus as compared to its traditional-industry substitutes deserves further investigation. However, to the extent sharing is essentially the informal or small business sector writ widespread as a result of technological capabilities and the changing nature of work, and to the extent the new modes of production and consumption erode the traditional tax base, greater policy attention and new compliance solutions may be required.

### *3. Mixed-Use, Excess-Capacity Property*

Another feature of the sharing sector that might raise compliance issues derives from the nature of the property used. One of the foundations of sharing, at least at its outset, was the excess capacity monetization of personal property, such as homes, cars, bicycles, driveways, toilets, or other assets. As such, a complexity that might be somewhat unique to this sector, at least in terms of intensity or frequency, is the extent to which the property used in the sharing activity is subject to substantial personal use. For example, it is likely that ridesharing drivers may make more extensive personal use of their cars than, say, taxicab drivers who rent a hacked up taxicab from a taxicab company. In the home sharing sector, too, there is

305. *See supra* Part III.A.

306. *See, e.g.*, Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 585–89 (1995); *see also* Leigh Osofsky, *Concentrated Enforcement*, 16 FLA. TAX REV. 325, 363–66, 380 (2014).

307. *See, e.g.*, IRS AUDIT GUIDE, *supra* note 237, at 6–12 (discussing taxicab industry audit issues).

likely to be substantially more very short term rental of real property that might be used for personal purposes the rest of the time.[308]

The excess-capacity use of such mixed-used property raises particular tax compliance challenges and may require more intensive policing of the business-personal borderline. As illustrated in Part II.B, the rules regarding part-time rentals of real estate are very complex and require extensive expense tracking by hosts. In the ridesharing sector, the standard mileage method may provide some relief; however, business mileage must still be tracked. As a matter of compliance and enforcement, verification of expense and depreciation amounts and application of expense limitations may prove difficult.

Again, we do not claim that these issues occur only in the sharing sector. Mixed-use property is a feature of traditional businesses as well, with vacation homes, personal vehicles used for business, and home offices raising specific concerns.[309] Our point is that in a sector largely premised on excess capacity use of personal property and skills, delineation of business versus personal expenses is likely to be a particular challenge, especially as such mixed usage becomes more widespread.

#### *4. The Role of Paid Preparers and Other Advising Platforms*

Another aspect of tax compliance in sharing that needs to be investigated is the role that paid preparers and other advisors are playing in the industry.[310] For many sharing earners, the 2014 or 2015 tax year may be the first tax year in which they are filing returns reflecting income and expenses from sharing. The same issues of unfamiliarity with the rules, inability to procure documentation, and failure to investigate positions taken may also apply to paid preparers.

In addition to traditional paid preparers, other sources of advice for sharing earners include websites such as 1099.is and the now defunct Zen99.com,[311] as well as various forums and discussion threads that touch

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308. *See* Press Release, Airbnb, *supra* note 131.

309. *See, e.g.*, James Alm & Jay A. Soled, *The Internal Revenue Code and Automobiles: A Case Study of Taxpayer Noncompliance*, 14 FLA. TAX REV. 419, 424–38 (2013).

310. The impact of tax preparers on taxpayer attitude and compliance has been the subject of some inquiry outside the sharing economy. *See, e.g.*, James Andreoni et al., *Tax Compliance*, 36 J. ECON. LITERATURE 818, 846–47 (1998) (reviewing studies of the influence of tax practitioners on compliance); Morse et al., *supra* note 17, at 42–43.

311. As noted earlier, Zen99.com announced that it was closing down on August 25, 2015. Kokalitcheva, *supra* note 13.

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on how to comply with the tax laws.[312] More investigation is needed to determine the accuracy of these sources of advice and their impacts on taxpayer reporting and compliance.

### *5. Attitudes Towards Tax Compliance*

A final tax compliance issue that ought to be considered is the effect of sharing economy earner attitudes on tax compliance. Some commentators have noted that some sharing earners may feel or believe that their income from car or home sharing should not be taxed.[313] This belief may stem, in part, from the idea that (1) the transactions are informal, based in "sharing or generosity," and are not truly business transactions, or (2) a more generalized sensibility that the sharing economy should be exempt from traditional regulation. In any event, such attitudes and beliefs may prove to be a barrier to tax compliance and enforcement and should be closely monitored.

## IV. TAX ENFORCEMENT STRATEGIES FOR SHARING AND BEYOND

We have argued in this Article that tax compliance and enforcement in the sharing sector may present unique challenges, due to two related features of the sector. First, the sharing businesses themselves engage in opportunistic regime selection in matters such as information reporting and worker classification. Second, many sharing workers are newly engaged in the sector at a microbusiness level; this presents challenges such as audit ineffectiveness, challenges associated with mixed-use property, and taxpayer unfamiliarity with independent contractor tax filing. The confluence of these two features means that sharing is likely to present unique and potentially serious tax compliance and enforcement complications.

How should these tax compliance and enforcement challenges be handled? Are our current structures of compliance adequate, or will new approaches to compliance and enforcement become necessary going forward? If new compliance rules are needed, how can we be sure such reforms will be effective? In this Part, we explore the policy questions surrounding tax enforcement and compliance in the sharing economy and

312. For an investigation of the content and dynamics of such Internet discussion forums, see Oei & Ring, *supra* note 19 (manuscript at 21–64).

313. *See, e.g.*, Dean Baker, *Don't Buy the 'Sharing Economy' Hype: Airbnb and Uber Are Facilitating Rip-Offs*, THE GUARDIAN (May 27, 2014, 7:30 AM), http://www.theguardian.com/commentisfree/2014/may/27/airbnb-uber-taxes-regulation; Pender, *supra* note 7.

suggest strategies that a taxing authority might use to manage the unique issues raised by sharing. In Part IV.A, we discuss some of the longer term and more theoretical policy issues that are raised and the broader takeaways that may be gleaned from the rise of sharing. In Parts IV.B and IV.C, we examine specific strategies that might be adopted in managing the challenges raised by the sharing economy, assuming that we are operating within the confines of current law. In Part IV.B, we consider short-term, concrete strategies that might be effective in enhancing federal income and employment tax compliance. In Part IV.C, we discuss medium- to long-term strategies and approaches that might be employed by federal, state, and local taxing authorities in confronting sharing's challenges.

### *A. Policy Issues Raised by Sharing*

Before probing the specific strategies that might be used to address sharing's challenges within the confines of current law, the broader tax policy and tax compliance issues raised by sharing merit discussion. To reiterate, our position in this Article is that current substantive tax law contains the concepts and categories necessary to tax sharing. However, compliance and enforcement may present challenges and, moreover, current law is by no means perfect. Over the longer term, and depending on how markets and participant behaviors evolve, the sharing economy may raise broader tax policy questions that may need to be addressed.

#### *1. Tax Base Evolution and Changing Labor Markets*

First, some commentators have pointed out that sharing reflects a broad change in the ways in which labor markets are structured and operate.[314] In this framing, the advent of sharing represents the independent contractor economy writ large, an economy in which we see a "parcelization" of labor and where there are fewer traditional full-time employees, a large number of part-time workers, and less permanence and job security overall.[315] These changes have been driven, in part, by the changing role of

314. *See, e.g.*, Anne-Marie Slaughter, *How the Future of Work May Make Many of Us Happier*, HUFFINGTON POST (Mar. 23, 2015), http://www.huffingtonpost.com/annemarie-slaughter/future-of-work-happier_b_6453594.html; Weber, *supra* note 168; Weber & Silverman, *supra* note 152.

315. *See, e.g.*, Weber & Silverman, *supra* note 152; *see also* Mary Louise Fellows & Lily Kahng, *Costly Mistakes: Undertaxed Business Owners and Overtaxed Workers*, 81 GEO. WASH. L. REV. 329, 387–91 (2013) (arguing that disparate treatment of business owners and workers is particularly problematic given demands of the twenty-first century economy, in which business owners

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technology in facilitating businesses and intermediary relationships. Such relationships and intermediaries are now possible on a scale and with a rapidity that was not possible in the past, and may signal a shift away from traditional employment arrangements.

If sharing reflects a broader shift in market and industry structures and labor arrangements, we might eventually question our ability to effectively tax these new market relationships as a matter of tax administration and procedure. For example, will our current Form 1099 reporting rules be adequate to ensure compliance in this sector? Should the IRS test for distinguishing independent contractors from employees be revised? Will the diffuse, part-time, independent contractor economy adversely impact the IRS's ability to effectively audit? Are there lessons from taxation of the informal sector and cash businesses that might be brought to bear in taxing these new economic arrangements? Relatedly, these developments raise potential tax base erosion issues. For example, will the rise of the independent contractor economy erode other sources of tax revenue (such as withheld-upon employee income)? Will there be base erosion caused by declining tax revenues from sectors with which sharing competes, such as the hotel and taxicab industries?[316]

A full analysis of these issues is beyond the scope of this Article. Suffice it to say that the rise of sharing is not only about sharing. Rather, it also implicates changing economic relationships and structures and raises questions about how the tax system must adjust and adapt in order to continue to be effective.

### *2. Unintended Applications of Newly Enacted Rules*

A second broad issue highlighted by sharing is the potential for tax rules adopted to facilitate tax administration and enforcement to be subsequently used in unexpected ways, and the importance of caution in enacting new rules. As discussed, one of the biggest potential challenges to the effective taxation of sharing has been the information reporting positions taken by sharing businesses that have adopted high reporting thresholds. These thresholds, enacted with intermediaries like Amazon and PayPal in mind, have now been embraced by some new sharing businesses as applicable to themselves. Relatedly, the rule providing that amounts subject to Form 1099-K reporting (irrespective of meeting the threshold)

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increasingly use independent contractors and temporary workers and business investment in workers is declining).

316. *See, e.g.*, Zervas et al., *supra* note 5.

are no longer subject to Form 1099-MISC reporting has been used to justify not reporting at all.

This experience with Form 1099-K reporting illustrates the impacts of evolving and shifting business models, changes in technology, and the strategic application of favorable existing legislation arguably intended for different types of payment entities. At the broadest level, the Form 1099-K experience suggests that regulatory regimes applicable to emerging industries should be closely considered and circumscribed with care. Legislators and regulators must act quickly to close loopholes as they arise. They should also be alert to the rise of new industries whose structure and design might create these types of opportunities.

### *3. Designing Tax Policy for an Emerging Sector in a "First-Best" World*

Third, faced with a potentially evolving tax base, the possibility of a sea change in the nature of work relationships, and a host of interesting questions about the relationship between law and technology,[317] it is worth considering how a "first-best" tax regime might be designed that would most effectively deal with this emerging sector.

For example, some might argue that tax authorities should deliberately underenforce the tax obligations of sharing economy earners, or even tax them at differential (lower) rates, in order to facilitate the development of a new industry.[318] Underenforcement might seem particularly warranted if one believes that the part-time, microbusiness nature of the sharing sector means that participation by workers is more elastic than in traditional industries. For example, if sharing workers are, in fact, quicker than other workers or business owners to substitute leisure over labor and exit the sector (as opposed to, say, driving more hours to compensate for higher tax and administrative costs), underenforcement may be advisable.[319] However, differential taxation would demand a threshold determination that facilitating development of sharing platforms is in fact a desirable goal. Moreover, such differential taxation has the potential to create inequities between sharing workers and other taxpayers, such as those working in more traditional sectors.

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317. *See* Barry & Caron, *supra* note 12, at 70–75.

318. *See, e.g.*, Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 74–81 (2015) (exploring the legitimacy implications of categorical nonenforcement).

319. We are indebted to Daniel Shaviro for pointing out these policy issues. Note that it might also be argued that it is unfair, or at least ill-advised, to specifically target sharing economy micro-earners who may not be earning very much.

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It might also be argued that one way to deal with the administrability issues raised by part-time microbusinesses with mixed use property is to implement a separate tax regime that is better tailored to enforcement and collection in this sector.[320] For example, if one thinks that accurate tracking of expenses is likely to be an issue in tax reporting by sharing businesses, a possible solution might be implementation of a gross tax at lower rates, in order to obviate the expense-taking issue. Of course, such an approach would create line-drawing issues and possible accompanying distortions as between sharing workers and other taxpayers and business owners. It would also not necessarily be effective if one thinks that accurate reporting of gross income, rather than accurate tracking of expenses, is the problem.

In sum, viewing things from a first-best perspective, some might argue that current tax rules should be overhauled to accommodate the rise of a new sector and to tax it more optimally. On the other hand, the notion that sharing might be treated differentially raises classic issues of tradeoffs between efficiency, equity, and administrability.

A full treatment of "first best" tax policy for the sharing sector—that is, the ideal level of tax enforcement for this sector, or the mix of policy choices that would lead to an optimal tax regime for sharing—is beyond the scope of this Article.[321] We do not take a position on those questions but simply point out the normative issues that may arise over the longer term. We now turn to the "second best" question of what can be done in response to the unique tax compliance issues raised by sharing. Our aim is simply to set forth the types of solutions and approaches that are likely to be effective in increasing compliance, given the tax laws that we currently have.

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320. Our thanks to Daniel Shaviro and the participants of the NYU Tax Policy Colloquium for helping us develop this line of analysis.

321. *See, e.g.*, James Alm, *What Is an "Optimal" Tax System?*, 49 NAT'L TAX J. 117, 124 (1996) (citation omitted) ("[O]ptimal enforcement should not eliminate all tax evasion."); Frank A. Cowell, *The Economic Analysis of Tax Evasion*, 37 BULL. ECON. RES. 163, 183 (1985) (footnote omitted) (suggesting that the "utilitarian approach to evasion policy does *not* imply that it is socially beneficial to reduce tax evasion wherever this can be done without resource cost"); Louis Kaplow, *Optimal Taxation with Costly Enforcement and Evasion*, 43 J. PUB. ECON. 221, 222–23 (1990) (discussing raising tax rates versus increasing enforcement activity in determining optimal enforcement policy); Joram Mayshar, *Taxation with Costly Administration*, 93 SCANDINAVIAN J. ECON. 75, 77 (1991) (noting possibility that "the social costs of raising marginal tax revenue by expanding administrative effort may significantly exceed the social cost of raising marginal tax revenue by increasing the tax rate"); A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89, 90 (1984) (noting that under some conditions, underdeterrence may be optimal).

### *B. Short-Term Strategies for Managing Sharing's Challenges*

While Part IV.A touched on some "first-best" design issues and broader policy concerns raised by sharing going forward, we now discuss some strategies that may be pursued to strengthen tax compliance and enforcement in the sharing sector under current law.

#### *1. Clarify Worker Classification*

One threshold issue that needs to be clarified is whether sharing workers should be classified as independent contractors or as employees. As discussed in Parts II.C.1 and III.B.1, the sharing businesses have embraced independent contractor classification, but the issue is a quickly developing one before the courts. The question of classification needs to be decided as an initial matter, because if some sharing earners are more accurately classified as employees, this would significantly change the withholding, information reporting, and other substantive tax obligations of the sharing businesses.[322]

#### *2. Lower Information Reporting Thresholds*

Assuming that the independent contractor classification of sharing earners is determined to be correct, then other measures can be implemented. Most importantly, to the extent that the information reporting positions taken by some sharing businesses are leading to non-reporting of sums earned below the 200 transaction/$20,000 threshold, a simple solution might be to lower the Form 1099-K information reporting threshold for third party settlement organizations or to clarify that the 200 transactions/$20,000 rule does not apply to sharing businesses.[323] Lower reporting thresholds could help ensure that micro-earners earning lower income amounts cannot avoid having such amounts reported to the IRS. As we discussed in Part III.A.2.d, the precise impact of more complete

322. *See supra* Part III.B.1.

323. *See, e.g.*, Jeffrey H. Kahn & Gregg D. Polsky, *The End of Cash, the Income Tax, and the Next 100 Years*, 41 FLA. ST. U. L. REV. 159, 160, 165 (2013) (arguing that it is possible that developments in payment systems technology may "fortify" the income tax by reducing the tax gap attributable to unreported cash income; arguing that "[t]he demise of cash should have positive ramifications for the income tax" because "[e]-payments automatically leave an electronic trail for every transaction, which decreases the risk of non-reporting of income"; and also arguing that § 6050W has expanded third-party reporting by third party settlement organizations such as PayPal and that "[s]ection 6050W could easily be expanded to cover the information-reporting regime; the $20,000/200 transaction floor could be lowered to cover nearly all e-payment transactions").

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Form 1099-K reporting is somewhat open to question, given the newness of both Form 1099-K and of the sharing economy.[324] However, there are reasons to think that clarifying that sharing businesses are not "third party settlement organizations" or simply lowering the reporting thresholds will improve tax reporting and compliance to some degree.

Of course, lowering reporting thresholds would generate higher costs for sharing businesses required to report. We tend to think that such cost increases will be small. Given the technology-based nature of these businesses, it is likely that the businesses already have ready access to the information they would need. Lowering the information reporting thresholds will likely not drive up costs too significantly.

### *3. Use of Safe Harbors and Advance Rulings*

While lower information reporting thresholds may help with information corroboration, this reporting only provides data regarding gross income receipts. It does not help in determining whether expenses have been accurately deducted and business and personal use of property correctly apportioned. There are reasons to think that excessive expense taking might detract from tax collection in this sector.[325] In order to ensure the accuracy of expense taking, other measures might need to be adopted.

One such group of measures is the enactment of safe harbors or advance rulings regarding what magnitude of expense taking is reasonable. This can be done within the confines of current law. We already see this type of approach, for example, in the use of the standard mileage method for vehicles.[326] Although standard mileage still requires computation of miles driven, the relatively convenient cents-per-mile safe harbor may serve as a de facto cap on excessive expense taking, by signaling what is reasonable and by making it easy to opt for the standard mileage amount. Revenue Procedure 2013-13 offers a similar simplified method for calculating the home office deduction.[327]

It is also worth considering what types of strategies would likely not be effective in this area. The opportunistic behaviors of the sharing businesses discussed here involve the choosing of a more favorable regime

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324. *See supra* Part III.A.2.d.

325. *See, e.g.*, Slemrod et al., *supra* note 17, at 2.

326. *See supra* Part II.A.2 (describing the standard mileage method).

327. Rev. Proc. 2013-13, 2013-1 C.B. 478. The optional safe harbor provided in Revenue Procedure 2013-13 allows a taxpayer to determine the permitted deduction for business use of the residence by "multiplying a prescribed rate by the square footage of the portion of the taxpayer's residence that is used for business purposes." *Id.* at 3.

over a less favorable one in situations where there is arguably a case to be made that either regime might apply. They do not, at least at the moment, involve deliberate structuring of the transactions and the industry in order to take advantage of a loophole in the law while retaining the substance of the activity regulated. Thus, doctrines that have traditionally applied to tax shelters and other deliberately constructed transactions—such as the economic substance, step transaction, substance over form, and sham transaction doctrines—are unlikely to prove effective in addressing the challenges raised by sharing.[328]

*4. Sector-based Crackdowns*

Another strategy that may be effective in managing sharing's challenges to federal tax compliance is the focusing of enforcement resources on the sharing economy in order to incentivize compliance. As discussed, one of the enforcement realities for microbusinesses is that any individual audit is unlikely to yield a high dollar amount of collection. However, if enforcement resources were to be concentrated, at least for short bursts, on the sharing sector, this might encourage self-monitoring and voluntary compliance on the part of sharing earners.

Leigh Osofsky has argued for just such an approach in contexts where enforcement resources are scarce.[329] Osofsky has argued that such "project-based" or "concentrated enforcement" may yield higher levels of compliance by virtue of increasing marginal returns to enforcement and psychological benefits than traditional worst-first methods.[330] This type of concentrated enforcement may be particularly beneficial in a sector like sharing, where dollar amounts per audit might be low, but where there are reasons to think that psychological effects of targeted enforcement might be particularly pronounced by virtue of Internet-based communication within the community of sharing earners. The IRS has used just such a concentrated enforcement strategy by disproportionately publicizing tax

328. For a further discussion of economic substance and related doctrines, see, e.g., Noël B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1, 23–32 (2004); Leandra Lederman, *W(h)ither Economic Substance?*, 95 IOWA L. REV. 389, 416–42 (2010); David A. Weisbach, *An Economic Analysis of Anti-Tax Avoidance Doctrines*, 4 AM. L. & ECON. REV. 88, 88–91 (2002).

329. Osofsky, *supra* note 306, at 326–29; Leigh Osofsky, *Concentrated Enforcement in a Best-Case Tax Enforcement Regime*, 2014 IRS RES. BULL. 99, 101–05 (2014).

330. Osofsky, *supra* note 306, at 344–62; Osofsky, *supra* note 329, at 99, 101–05, 107–09.

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criminal convictions and civil injunctions in the weeks preceding the April income tax filing deadline.[331]

#### 5. *Taxpayer Education*

Finally, another strategy to enhance compliance is taxpayer education, particularly through the Internet. The sharing sector earners are, in general, an Internet-savvy population, since much of sharing is based on Internet and smartphone platforms. Thus, the concern that web-based outreach will not reach certain taxpayers (for example, elderly or less educated taxpayers)[332] is less likely to be a concern here. To the extent some commentators contend that sharing earners are confused about their tax reporting obligations, targeted taxpayer education using Internet-based platforms might prove effective in this sector.

### C. *Medium- to Long-Term Approaches*

Part IV.B discussed some relatively obvious strategies that might be employed to facilitate compliance in the sharing sector. These are strategies that are attainable and compatible with the structures of tax law and procedure as it currently exists. In addition to those relatively easy strategies and fixes, there are certain features of the sharing economy that the IRS and other state and local tax authorities might consider harnessing in the medium- to long-term.

#### 1. *Harnessing Technology to Facilitate Compliance*

First, the tax law could evolve to make better use of the technologies upon which these new industries are based and to harness these technologies in assisting with tax compliance. The fact that sharing is so technology based yields benefits with respect to tax compliance, particularly as compared with traditional industries. For example, the mobile phone application used by ridesharing drivers tracks miles driven

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331. Joshua D. Blank & Daniel Z. Levin, *When Is Tax Enforcement Publicized?*, 30 VA. TAX REV. 1, 2–6 (2010) (studying IRS publicity releases and concluding that the disproportionately large number of releases in the weeks preceding April 15 is statistically significant).

332. *See* TAXPAYER ADVOCATE SERV., LOW INCOME TAXPAYER CLINICS: PROGRAM REPORT 9 (2015), *available at* https://www.irs.gov/pub/irs-pdf/p5066.pdf (citing Pew Study research of adults from 2000–2015); *see also* THOM FILE & CAMILLE RYAN, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2013, at 3 (2014) (reporting household Internet use by income).

on each trip with a passenger. This tracking of mileage may be used by the IRS in verifying accurate mileage reporting.[333]

The idea that technology may be better harnessed to facilitate tax compliance is not new. James Alm and Jay Soled have argued that GPS technology may be more effectively used in ensuring accuracy of automobile deductions.[334] Indeed, many traditional businesses are relying increasingly on technology-based tools and tracking in running their operations. Thus, while the use of technology is more pronounced in the sharing sector, consideration of how growing technological capabilities might impact the way we do tax compliance is important in other industries as well. Of course, such uses of technology raise privacy concerns.[335] In designing new ways to harness technology, privacy concerns must be carefully weighed against the interests of tax enforcement.

### *2. Harnessing the Sharing Businesses Themselves*

Harnessing technological capabilities almost by definition means harnessing the sharing businesses themselves as information strongholds. While our suggested changes to the design and enforcement of Form 1099 information reporting represent one aspect of harnessing the sharing businesses, this is not the only option. In addition to gross income receipts, the sharing businesses have access to a wide range of information, including miles driven with a passenger (in ridesharing), number of days a property is rented (in home sharing), what amenities are included in a home sharing rental (which gives some sense of expenses incurred), and number of days worked (for tasksharing, dogsitting, and related activities). These types of information can be sought in helping promote compliance in the sharing sector. Furthermore, the sharing businesses are few and centralized enough that they have the ability to help facilitate compliance for vast swaths of sharing economy workers.[336]

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333. For example, if they are using the standard mileage method. Of course, this would not record and track miles driven while looking for customers, so this solution has its limitations.

334. Alm & Soled, *supra* note 309, at 456–57.

335. *See, e.g.*, Michael Hatfield, *Taxation and Surveillance: An Agenda*, 17 YALE J.L. & TECH. 319, 350–60 (2015).

336. However, just as in other sectors of the economy, some sharing economy workers may engage in unreported cash transactions. For example, an Uber driver might make initial contact with a rider through the Uber platform, but then attempt to negotiate future transactions directly with the rider, thereby eliminating Uber's commission, as well as Uber's ability to provide tax documentation.

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This approach has already been taken, for example, with respect to hotel taxes, in the form of agreements designating Airbnb as responsible for collecting local occupancy taxes in certain locations.[337] Such arrangements effectively capitalize on the centralized nature of sharing businesses and their ability to ensure compliance from a large number of sharing earners. Again, the collection and use of this information may raise privacy concerns, requiring a balancing of privacy against the enforcement gains that such information might generate.

*3. Utilizing Uniformity of the Sector*

The promise of harnessing both technology and the sharing businesses themselves as information strongholds in tax enforcement is bolstered by certain features of the sharing sector. We suggest that the IRS closely consider these industry characteristics in designing an approach to compliance and enforcement.

First, at least as currently evolved, the sharing industry is relatively uniform and there are not that many major players. For example, with respect to ridesharing, Uber and Lyft (and Sidecar, when it was in business) operate on essentially the same model using similar technologies, and there are only a few major ridesharing companies.[338] The same is true for the home sharing sector and other sharing sectors. Securing cooperation from these businesses would facilitate compliance and enforcement for a large number of sharing economy workers. It would also be relatively easy to liaise with the limited number of sharing businesses in procuring information. This is in contrast to, say, the taxicab sector, where there are many different taxicab companies in many different localities.

Second, within the sharing sector, the ownership and economic arrangements are relatively uniform. For example, in the case of ridesharing, Uber classifies all drivers the same way.[339] Many own their own cars. Many home sharers own their homes and rent them on an excess capacity business. Thus, there is arguably less heterogeneity of economic arrangements for a taxing authority to accommodate, as compared perhaps with traditional sectors, such as the taxicab industry.

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337. *See In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, *supra* note 177.

338. *See supra* Part I.A.

339. Whether the classification is correct is a different question. *See supra* Part III.B.1.

In sum, the relative uniformity of economic relationships in the sharing sector may make it easier for tax authorities to design compliance and enforcement measures for the sector.

*4. Third-Party Partnerships and Providers*

Finally, an emerging feature of the sharing landscape is the role that parties other than the sharing businesses or sharing earners themselves are increasingly playing in promoting or facilitating tax compliance. As discussed, websites such as 1099.is and Zen99.com have been active in advising sharing earners on how to report income and expenses.[340] Uber, for example, has partnered with Intuit to provide its drivers with help—in the form of access to QuickBooks Online with capability of TurboTax integration—in complying with their tax obligations.[341] Furthermore, many sharing earners are technologically savvy enough to go online to discuss tax issues with peers and tax advising professionals on various discussion forums and websites.[342] Such online forums may generate communities of compliance or non-compliance, depending on the prevailing norms in such forums.[343]

These third-party initiatives and interactions are still in the early stages of development and evolution, and it is possible, even likely, that they may evolve as the sharing sector evolves. What is clear is that, like the sharing businesses themselves, these initiatives and actors may prove to be influential contributors to taxpayer compliance or noncompliance, and may also serve as information sources for tax enforcement. Taxing authorities should thus pay attention to the evolution of these initiatives and interactions to evaluate how they might be harnessed in the tax compliance context.

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340. *See About Us*, ZEN99, https://web.archive.org/web/20150911102904/https://tryzen99.com/about (last visited May 31, 2016) ("Zen99 provides the support services that contractors need in the growing 1099 economy"); *About*, 1099.IS, https://web.archive.org/web/20151009014215/http://1099.is/about/ (describing itself as "a crowd-sourced repository of tax and accounting information for self-employed workers and folks getting side income").

341. Press Release, Intuit, *supra* note 13. In January 2015, H&R Block, a nationwide tax preparation service, announced it was offering tax preparation discounts for Uber drivers. Press Release, H&R Block, H&R Block Offers Tax Preparation Discount to Drivers Who Partner with Uber (Jan. 28, 2015), *available at* http://newsroom.hrblock.com/hr-block-offers-tax-preparation-discount-to-drivers-who-partner-with-uber.

342. *See, e.g.*, *TurboTax AnswerXchange*, INTUIT.COM, https://ttlc.intuit.com/questions/2640713-duplicate-today-i-rec-d-a-1099-k-from-uber-they-reported-to-the-irs-that-i-earned-approx-8k-more-than-i-actually-rec-d-in-my-direct-deposit-should-i-contact-the-irs (last visited May 31, 2016).

343. For a study of the impact of online forums in establishing a culture of compliance among ride-share drivers, see Oei & Ring, *supra* note 19 (manuscript at 54–63).

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## CONCLUSION

The advent of the sharing economy has raised questions about the adequacy and application of current legal regimes in regulating sharing. These questions have arisen with respect to tax laws and regulations as well. We anticipate that such questions will only become more salient as the sharing sector develops and grows. In this Article, we closely examined the question of whether existing tax laws are sufficient to regulate sharing. What we found was that the answer is complicated. Contrary to the claims of some commentators, the application of significant portions of substantive tax law to sharing is not actually unclear. While the law itself might be complex and imperfect, in many cases it is clear what rule applies. In a couple of respects—employment taxes and local occupancy taxes—the applicable substantive tax law is less clear, and such lack of clarity may result in tax compliance challenges. Even in these areas, however, we argue that the law has sufficient analytical categories to govern sharing transactions. What is needed is *clarification* of which regime applies, rather than completely new categories.

On the other hand, even though the tax law is, for the most part, sufficiently developed to address the new wave of sharing transactions, tax compliance and enforcement in the sharing economy may prove problematic. Two features of the sharing economy are particularly likely to generate tax compliance and enforcement issues: First, the opportunism displayed by some sharing businesses in claiming the application of the more favorable regulatory regime where ambiguity exists puts the onus on the taxing authority to take corrective action. Opportunistic embracing of favorable regulatory regimes allows the sharing businesses to obtain first mover regulatory advantages, even though corrective action might subsequently occur. Second, the microbusiness character of sharing transactions raises tax compliance and enforcement difficulties for taxing authorities, particularly given scarce administrative resources. While we noted the types of tax compliance and enforcement issues that are expected to arise, we are aware that the sharing sector requires further study. We anticipate that this Article's analysis will be a useful roadmap for such inquiry.

In the face of the likely compliance and enforcement obstacles created by sharing, we recommended in this Article a number of steps and strategies that ought to be pursued in order to effectively confront these challenges. Some of our suggestions are medium- to long-term strategies. However, particularly with respect to federal tax compliance, even

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incremental changes such as lowering and clarifying information reporting thresholds and adopting easy-to-apply safe harbors may go a long way toward managing this new wave of economic relationships.

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