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**“Can Sharing Be Taxed?”**

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## **SCHEDULE FOR 2015 NYU TAX POLICY COLLOQUIUM**

(All sessions meet on Tuesdays from 4-5:50 pm in Vanderbilt 208, NYU Law School)

1. January 20 – Brigitte C. Madrian, Harvard Kennedy School. “Does Front-Loading Taxation Increase Savings? Evidence from Roth 401(k) Introductions.”
2. January 27 – David Kamin, NYU Law School. "In Good Times and Bad: Designing Legislation That Responds to Fiscal Uncertainty."
3. February 3 – Kimberly Blanchard, Weil, Gotshal & Manges. "The Tax Significance of Legal Personality: A U.S. View."
4. February 10 – Eric Toder, Urban Institute. “What the United States Can Learn From Other Countries’ Territorial Tax Systems.”
5. February 24 - Linda Sugin, Fordham University, School of Law. “Invisible Taxpayers.”
6. March 3 – Ruth Mason, University of Virginia Law School. “Citizenship Taxation.”
7. March 10 – George Yin, University of Virginia Law School. “Protecting Taxpayers from Congressional Lawbreaking.”
8. March 24 – Leigh Osofsky, University of Miami School of Law, “The Case for Categorical Nonenforcement.”
9. **March 31 – Shu-Yi Oei, Tulane University Law School. “Can Sharing Be Taxed?”**
10. April 7 – Lillian Mills, University of Texas Business School. “Managerial Characteristics and Corporate Taxes.”
11. April 14 – Lawrence Zelenak, Duke University School of Law. “Up in the Air over the Taxation of Frequent Flyer Benefits: the American, Canadian, and Australian Experiences.”
12. April 21 – David Albouy, University of Illinois Economics Department. “Should we be taxed out of our homes? Leisure and housing as complements and optimal taxation.”
13. April 28 – David Schizer, Columbia Law School. “Tax and Energy Policy.”
14. May 5 – Gregg Polsky, University of North Carolina School of Law, "Private Equity Tax Games and Their Implications for Tax Practitioners, Enforcers, and Reformers."

## CAN SHARING BE TAXED?

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### ABSTRACT

The past few years 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 the Internet 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 information reporting thresholds, safe harbors and advance rulings to simplify tax reporting, and targeted enforcement efforts.

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## INTRODUCTION

The past few years have seen the rise of a new mode 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 help from peers via the internet or a mobile app, in exchange for payment.<sup>1</sup> On the supply side, these models enable owners of homes, apartments or vehicles, or those who possess certain skills (such as house painting, home organization, or dogsitting) to monetize those assets or skills.<sup>2</sup> The technological platforms employed by these startups enable individual producers and consumers to transact with each other with unprecedented ease.<sup>3</sup>

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.<sup>4</sup> Commentators note that sharing arrangements have the potential to significantly affect traditional industries such as taxicabs, limousine services, and the hotel industry.<sup>5</sup> As such, the sharing economy

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<sup>1</sup> See generally UBER, <https://www.uber.com>, AIRBNB, <https://www.airbnb.com>, TASKRABBIT, <https://www.taskrabbit.com>.

<sup>2</sup> THE PEOPLE WHO SHARE, <https://web.archive.org/web/20140318160538/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.”); *The Rise of the Sharing Economy*, THE ECONOMIST, Mar. 9, 2013 (print edition) available at <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

<sup>3</sup> See sources cited note 2.

<sup>4</sup> See, e.g., Pricewaterhouse Coopers, “*The sharing economy: how will it disrupt your business?*” (August 2014), [http://pwc.blogs.com/files/sharing-economy-final\\_0814.pptx](http://pwc.blogs.com/files/sharing-economy-final_0814.pptx) (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.”); NPR Special Series: *The Sharing Economy: A Shift Away From Ownership*, <http://www.npr.org/series/244583579/the-sharing-economy-a-shift-away-from-ownership> (exploring different aspects of the sharing economy). 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.

<sup>5</sup> See, e.g., Georgios Zervas, Davide Proserpio & John Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* (Feb. 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2366898](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366898).

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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> Such questions have permeated the tax field as well.<sup>9</sup> Some commentators claim that new sharing economy earners<sup>10</sup> do

<sup>6</sup> See, e.g., Christopher Koopman et al, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change* (Dec. 8, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2535345](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535345); Stephen Miller, *First Principles for Regulating the Sharing Economy* (Feb. 20, 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2568016](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568016); Stephen Miller, *Transferable Sharing Rights: A Theoretical Model for Regulating Airbnb and the Short-Term Rental Market* (Oct. 24, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2514178](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514178); Sofia Ranchordas, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy* (forthcoming, Minnesota Journal of Law, Science & Technology), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2492798](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492798); Sofia Ranchordas, *Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation* (Nov. 1, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2544291](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2544291).

<sup>7</sup> Brad Tuttle, *The Other Complication for Airbnb and the Sharing Economy: Taxes*, TIME (Jun. 15, 2013), <http://business.time.com/2013/06/15/the-other-complication-for-airbnb-and-the-sharing-economy-taxes/>; *All Eyes on the Sharing Economy*, THE ECONOMIST (Mar. 9, 2013) (print edition) available at <http://www.economist.com/news/technology-quarterly/21572914-collaborative-consumption-technology-makes-it-easier-people-rent-items>; Mike LaBoissiere, *The Sharing Economy II: Taxes*, TALKING PHILOSOPHY (July, 26, 2014), <http://blog.talkingphilosophy.com/?p=8067>; Kathleen Pender, *If you make money in the sharing economy the IRS will know*, SFGate (Feb. 22, 2014 at 2:43pm), <http://www.sfgate.com/business/networth/article/If-you-make-money-in-the-sharing-economy-the-IRS-5258941.php>; 1099.IS, <http://1099.is>; Joyce E. Cutler, *Cities Grappling with Challenges of How to Tax, Regulate Short-Term Rentals*, BLOOMBERG BNA DAILY TAX REPORT, Oct. 21, 2014. Some commentators suggest that new legal and regulatory regimes or categories may be required to address the challenges raised by sharing. Abbey Steimer, *Betwix and Between: Regulating the Sharing Economy*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2535656](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535656); see also Daniel E. Rauch & David Schleicher, *Like Uber, But for Local Government Policy: The Future of Local Regulation of the 'Sharing Economy'*, (Jan. 14, 2015) at <http://ssrn.com/abstract=2549919>.

<sup>8</sup> See, e.g., Jason Clampet, *Sharing homes, cars—and lawsuits*, BBC, <http://www.bbc.com/travel/feature/20140501-sharing-homes-cars-and-lawsuits> (describing sharing economy “sin-first, ask-forgiveness-later” strategy).

<sup>9</sup> See Tuttle, *supra* note 7; Cutler, *supra* note 7. See also UBER, <http://blog.uber.com/davidplouffe> (announcing hiring of political strategist David Plouffe); Emily Badge & Zachary Goldfarb, *Uber hired David Plouffe when it realized ‘techies’ can’t do politics* WASH. POST, (Aug. 19, 2014),

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

Given the growth of sharing arrangements, we think it is important to be clear at the outset about whether and which of these claims are accurate, so as to 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 tax law is adequate to the task of taxing sharing economy earners, or whether new tax rules and regulations are required.<sup>14</sup> We argue that the application of substantive and doctrinal tax laws to

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<http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/19/uber-hired-david-plouffe-when-it-realized-techies-cant-do-politics/>.

<sup>10</sup> 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.”

<sup>11</sup> See Tuttle, *supra* note 7 (“it 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., Dara Kerr, *Airbnb Begins Collecting 14% Hotel Tax in San Francisco*, CNET (Sept. 17, 2014), <http://www.cnet.com/news/airbnb-begins-collecting-14-hotel-tax-in-san-francisco/>; Carolyn Said, *S.F. could get \$11 million year when Airbnb collects hotel tax*, SFGATE (Sept. 18, 2014), <http://www.sfgate.com/business/article/S-F-could-get-11-million-a-year-when-Airbnb-5762838.php>.

<sup>12</sup> See, e.g., Jordan M. Barry and Paul L. Caron, *Tax Regulation, Transportation Innovation, and the Sharing Economy*, 81 CHI. L. REV. DIALOGUE (forthcoming 2015) (examining sharing economy under the fringe benefit rules of I.R.C. § 132).

<sup>13</sup> Lyft Drivers Frequently Asked Tax Questions, at <http://lyfttaxfaqs.wordpress.com/>; Charles R. Goulding, Raymond Kumar, & Jack Goldman, *Fast growth of sharing impacts tax reporting*, AIPCA TAX INSIDER, (Oct. 16, 2014), [http://www.cpa2biz.com/Content/media/PRODUCER\\_CONTENT/Newsletters/Articles\\_2\\_014/Tax/Sharing-Economy-Impact.jsp](http://www.cpa2biz.com/Content/media/PRODUCER_CONTENT/Newsletters/Articles_2_014/Tax/Sharing-Economy-Impact.jsp); Cutler, *supra* note 7; 1099.is, <http://1099.is:ZEN99>, <https://www.tryzen99.com/>; THE SHARED ECONOMY CERTIFIED PUBLIC ACCOUNTANT, <http://www.sharedeconomycpa.com/>; INTUIT, <http://www.intuit.com/company/press-room/press-releases/2015/Intuit-Uber-partner-QBO-Self-Employed/>.

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

sharing is generally (though not completely) clear and not particularly novel.<sup>15</sup> 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 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 entities" such as Amazon and PayPal, and thus must comply with less onerous reporting thresholds.<sup>16</sup> 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 that different regulatory responses are appropriate for each.

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" characteristics may make compliance difficult 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.<sup>17</sup>

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<sup>15</sup> *But see* Barry & Caron, *supra* note 12.

<sup>16</sup> *See infra* Part III.A.2.

<sup>17</sup> *See, e.g.*, Susan Cleary Morse, Stuart Karlinsky, Joseph Bankman, *Cash Businesses and Tax Evasion*, 20 STAN. L. & POL'Y REV.37 (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* Joel Slemrod, Brett Collins, Jeffrey Hoopes, Daniel Reck, & Michael Sebastiani, *Does Credit-card Information Reporting Improve Small-business Tax Compliance?* (February 5, 2015) available at <http://ssrn.com/abstract=2515630>; Internal Revenue Service, *Tax Gap for Tax Year 2006* (2012) available at [www.irs.gov/pub/newsroom/overview\\_tax\\_gap\\_2006.pdf](http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf).

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 fulltime 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 parameters of 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 suggest strategies for addressing sharing’s challenges. In Part IV.A, we consider relatively simple strategies that may help improve compliance and enforcement with federal tax laws. These include lowering information reporting thresholds, use of safe harbors and advance rulings to simplify expense taking, targeted enforcement efforts, and taxpayer education. In Parts IV.B. and IV.C, we review longer-term solutions and broader insights 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 tax law, this Article is part of a broader conversation about the adequacy and appropriateness of existing legal structures and regimes when it comes to the regulation of the emerging sharing economy. This conversation confronts issues such as how the law might have to develop in light of changing economic arrangements, creative uses of technology, and innovation. While these issues are broad and somewhat generalized, 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,<sup>18</sup> 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 is so new, the tax return filing and compliance behaviors of sharing earners have not been subject to empirical study. 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.

Finally, our inquiry takes place in a dynamic economic climate in which business models, practices, industries, and technologies are changing and evolving.<sup>19</sup> Given this dynamism, it is possible that the tax strategies employed by the sharing businesses will change over time.<sup>20</sup> It is also 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 a peer-to-peer

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<sup>18</sup> See, e.g., Ranchordas, *supra* note 6; Rauch & Schleicher, *supra* note 7.

<sup>19</sup> See, e.g., Deven Desai, *The New Steam: On Digitization, Decentralization, and Disruption*, 65 HASTINGS L.J. 1469 (2014) (hypothesizing that established players will eventually adapt to the new decentralized sharing marketplace).

<sup>20</sup> In fact, sharing businesses have already changed some of their reporting positions. See *infra* Part III.A.2.

arrangement.<sup>21</sup> For example, a homeowner or car owner might rent out a room or car she is not using.<sup>22</sup> A car owner might offer rides in her personal vehicle in her free time.<sup>23</sup> A person with a certain skill (such as computer repair or dogsitting) might provide that service sporadically to peers for a fee.<sup>24</sup>

Such peer-to-peer sharing is facilitated by a number of companies, such as Uber, Airbnb, and TaskRabbit. A distinctive feature of these sharing economy businesses is the use of technology 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.<sup>25</sup> With the ease provided by such technology, almost anything—bicycles, wifi, clothing, or even kittens—can be shared.<sup>26</sup>

While informal pooling, renting, and borrowing arrangements are not new, access to Internet and mobile technology means that the scale, scope, frequency, and transformative potential of such sharing transactions has reached an unprecedented degree.<sup>27</sup> The global sharing market is valued in

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<sup>21</sup> See, e.g., THE PEOPLE WHO SHARE, *supra* note 2 (“The Sharing Economy is a socio-economic ecosystem built around the sharing of human and physical resources.”).

<sup>22</sup> AIRBNB, <https://www.airbnb.com/>; RELAYRIDES, <https://relayrides.com/>; GETAROUND, <https://www.getaround.com/>.

<sup>23</sup> UBER, <https://www.uber.com/>; LYFT, <https://www.lyft.com/>.

<sup>24</sup> TASKRABBIT, <https://www.taskrabbit.com/>; ZARLY, <https://www.zaarly.com/>; DOGVACAY, <http://dogvacay.com/>.

<sup>25</sup> *The Rise of the Sharing Economy*, THE ECONOMIST, Mar. 9, 2013 (print edition) available at <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

<sup>26</sup> See, e.g., SPINLISTER, <https://www.spinlister.com/> (bicycles); FON, <https://corp.fon.com/en> (wifi); POSHMARK, <https://poshmark.com/> (fashion); NEIGHBORGOODS, <http://neighborgoods.net/> (household and related goods); see also Dan Hedgpath, *Need. 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> (sharing of leftover food).

<sup>27</sup> See PWC Study, *supra* note 4 (estimating that potential revenue from five sharing sectors could potentially be \$335bn by 2025); see also Sarah Cannon & Lawrence Summers, *How Uber and the Sharing Economy Can Win Over Regulators* (Oct. 13, 2014), <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.”);

the billions, and the valuation of sharing businesses like Airbnb and Uber has surpassed that of some hotel and car rental competitors.<sup>28</sup> The impact of sharing has been so significant that commentators frequently refer to sharing-based consumption and production as “disruptive” of traditional industries such as hotels and taxicabs.<sup>29</sup>

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.<sup>30</sup> The service is available in over 140 U.S. cities and 52 foreign countries.<sup>31</sup> 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 does not own cars. The drivers themselves decide whether and when to open up the application and accept requests for rides from customers. Thus, Uber regards itself as a marketplace for provision of services by these individual drivers, and treats the drivers as independent contractors.<sup>32</sup>

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Kathleen Kusek, *The Sharing Economy Goes Five Star*, FORBES (July 15, 2014), <http://www.forbes.com/sites/kathleenkusek/2014/07/15/the-sharing-economy-goes-five-star/> (also noting Forbes’ estimate).

<sup>28</sup> See sources cited *supra* note 27; see also Dan Primack, *Uber Now Worth More than Hertz*, FORTUNE (Jun. 6, 2014), <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* (Jun. 9, 2014), <http://aswathdamodaran.blogspot.com/2014/06/a-disruptive-cab-ride-to-riches-uber.html> (disputing Uber’s \$17 million valuation as of June 2014); Aswath Damodaran, *Up, up, and away! A crowd-valuation of Uber!* (Dec. 2, 2014), <http://aswathdamodaran.blogspot.com/2014/12/up-up-and-away-crowd-valuation-of-uber.html>.

<sup>29</sup> Ryan Smith, *Sharing Economy Fuels Spirit of Disruption*, WALL ST. J., (May 5, 2014 at 2:44pm), <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”); Andrew Hawkins, *More Evidence Uber is Wiping Out City Taxi Industry’s Value*, CRAINS N.Y. (Feb. 22, 2015), <http://www.craigslist.com/article/20150222/TRANSPORTATION/150229973/more-evidence-uber-is-wiping-out-city-taxi-industrys-value>.

<sup>30</sup> UBER, <https://www.uber.com/>; Erin Griffith, *Uber v. Lyft: The Credit Cards Don’t Lie*, FORTUNE (Sept. 11, 2014), <http://fortune.com/2014/09/11/uber-vs-lyft-the-credit-cards-dont-lie/>.

<sup>31</sup> UBER, <https://www.uber.com/cities>.

<sup>32</sup> UBER, <https://get.uber.com/drive/>; UBER, <https://www.uber.com/legal/usa/terms>.

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 to customers at fares often significantly lower than taxi fares for comparable trips.<sup>33</sup> To apply to become an UberX driver, all that is required is a driver’s license, ownership of one’s own car (2005 or newer), proper insurance, and clearing a DMV and background check.<sup>34</sup>

Uber also 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 option of UberLUX,<sup>35</sup> a luxury car service; UberSUV,<sup>36</sup> a full-sized luxury SUV; UberTAXI,<sup>37</sup> a licensed taxicab; UberXL,<sup>38</sup> a non-luxury SUV; and UberPool, a reduced-fare pooled ride service.<sup>39</sup> Although the scope and increasing variety of Uber services offers 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.<sup>40</sup> 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 Friday or Saturday night. Other times, they can occur because of special

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<sup>33</sup> Additionally, Uber charges a \$1/trip “safe rides fee.” See Olivia Nuzzi, *Uber’s “Safe Rides Fee” Too Little, Too Late*, THE DAILY BEAST (April 22, 2014), <http://www.thedailybeast.com/articles/2014/04/22/uber-s-safe-rides-fee-is-too-little-too-late.html>; UBER, <https://support.uber.com/hc/en-us/articles/201950566-What-is-the-Safe-Rides-Fee->, Leena Rao, *Uber Brings Its Disruptive Car Service to Chicago*, TECH CRUNCH (Sept. 22, 2011), <http://techcrunch.com/2011/09/22/uber-brings-its-disruptive-car-service-to-chicago/>; Alex Wilhem, *In Another Strike Against The Competition, Uber Lowers UberX Prices in San Diego, LA, and DC*, TECH CRUNCH (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/>.

<sup>34</sup> UBER, <http://blog.uber.com/partnersfulltime>.

<sup>35</sup> Michael Carney, *Uber Launches Uberlux Services in LA, Offers High-priced Rides in Teslas, Mercedes, and BMWs*, PANDO DAILY (Dec. 19, 2014), <http://pando.com/2014/12/19/uber-launches-uberlux-service-in-la-offers-high-priced-rides-in-teslas-mercedes-and-bmws/>.

<sup>36</sup> UBER NYC, <http://www.driveubernyc.com/cars/>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> UBER, <https://blog.uber.com/uberpool> (describing UberPool as “a bold social experiment”).

<sup>40</sup> UBER, <https://support.uber.com/hc/en-us/articles/201836656-What-is-surge-pricing-and-how-does-it-work->.

conditions,<sup>41</sup> such as a holiday or inclement weather.<sup>42</sup> Uber's "surge pricing" has triggered significant public reaction<sup>43</sup> and has even given rise to competing applications such as Gett.<sup>44</sup> Uber fares include an automatic 20% tip, and Uber tells customers that there is no need to give drivers an additional tip.<sup>45</sup> This tip policy has created some dissatisfaction among drivers, leading to litigation.<sup>46</sup> Uber also charges a \$1 "safes ride" fee.<sup>47</sup>

In exchange for creating and providing the app-based marketplace for rides, Uber takes a portion of the gross fares (20%) generated by drivers.<sup>48</sup> There is some suggestion that Uber may also be keeping a percentage of its automatic tip amount as well, and there is an active lawsuit over this issue.<sup>49</sup>

<sup>41</sup> David Streitfeld, *As It Shakes Up the Taxi Business, Uber's a Target*, BOSTON GLOBE (Jan. 27, 2014), <http://www.bostonglobe.com/business/2014/01/27/uber-hits-rough-patch/2zON2vyXha5AVhs5N15csI/story.html>.

<sup>42</sup> Douglas Macmillan, *Uber CEO: Surge Pricing Is Here to Stay*, WALL ST. J. (Jan. 7, 2014), <http://online.wsj.com/articles/SB10001424052702304887104579306622013546350>.

<sup>43</sup> *Uber Rage: Bostonians Irate Over Price Surge in Snow Rides*, METRO (Dec. 14, 2013), <http://www.metro.us/local/uber-rage-bostonians-irate-over-price-surge-in-snow-rides-metro-us/tmWmlo---21bnYkB3zwpZk/>.

<sup>44</sup> Seth Porges, *Tired of Uber's Unpredictable Surge Pricing? This Car-hailing App Hopes You'll Switch*, FORBES (Mar. 30, 2014 at 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/>.

<sup>45</sup> UBER, <https://support.uber.com/hc/en-us/articles/202290128-Do-I-have-to-tip-my-driver->. *But see* Jay Barmann, *Now Uber Drivers Want You To Tip*, SFIST (Feb. 2, 2015), [http://sfist.com/2015/02/17/now\\_uber\\_drivers\\_want\\_you\\_to\\_tip.php](http://sfist.com/2015/02/17/now_uber_drivers_want_you_to_tip.php).

<sup>46</sup> Bob Egelko, *Uber Drivers' Suit Over Tips Clears Hurdle*, SFGATE (Dec. 7, 2013 at 4:16pm), <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. 7, 2014 at 3:09pm), <http://www.businessinsider.com/ubers-drivers-say-they-dont-get-any-tip-money-from-all-inclusive-fares-2014-9>; 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](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).

<sup>47</sup> UBER, <https://support.uber.com/hc/en-us/articles/201950566-What-is-the-Safe-Rides-Fee-> (fee supports local background checks and related safety measures). *But see* litigation regarding this fee, Ellen Huet, *Uber Fades Class-Action Lawsuit Over \$1 'Safe Rides Fee'*, FORBES (Dec. 27, 2014, 2:14am), <http://www.forbes.com/sites/ellenhuet/2014/12/27/uber-class-action-lawsuit-safe-rides-fee/>.

<sup>48</sup> David Fagin, *Life as An Uber Driver: It's Just Not Fare*, HUFF. POST (Feb. 2, 2014 at 3:47pm), [http://www.huffingtonpost.com/david-fagin/life-as-an-uber-driver\\_b\\_4698299.html](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, though the 20% rate seems more prevalent. UBER, <https://www.uber.com/en-US/driver-referral/uberx>.

<sup>49</sup> Maya Kosoff, *Here's How Uber's Tipping Policy Puts Drivers at a Disadvantage*,

Uber also charges drivers a \$10 per week fee for the drivers' use of the Uber-ready smartphone application. Drivers are responsible for their own expenses, including gas, equipment maintenance, and repairs.

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.<sup>50</sup> The policy covers both driver liability as well as uninsured motorists, and also includes contingent comprehensive and collision insurance.<sup>51</sup> Uber has also instituted a "gap" insurance policy to cover accidents happening when UberX drivers are not ferrying customers but are logged onto the Uber application and accepting customers.<sup>52</sup> This contingent policy covers driver liability in the event that the driver's personal insurance policy will not cover a "gap" period accident.

## 2. Lyft and Sidecar

In addition to Uber, other peer-to-peer ride services have also arisen in various markets. Lyft is probably Uber's foremost competitor in the ridesharing market.<sup>53</sup> UberX and Lyft are similar services<sup>54</sup> and have nearly identical business models.<sup>55</sup> Like Uber, Lyft connects passengers and drivers through Lyft's smartphone application.<sup>56</sup> Like Uber, Lyft offers a basic service (Lyft), a shared ride service (Lyft Line) and a six-passenger premium ride service (Lyft Plus).<sup>57</sup> Like Uber, Lyft also elevates fares during periods when demand is high;<sup>58</sup> and like Uber, Lyft provides a liability insurance policy for periods when a Lyft driver is ferrying a customer.<sup>59</sup> There are some differences, however. For example, Lyft customers are prompted to pay within the app after the ride, and are able to

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BUS. INSIDER (Oct. 29, 2014 at 2:26pm), <http://www.businessinsider.com/uber-tipping-policy-2014-10>; Elko, *supra* note 46.

<sup>50</sup> UBER, <https://blog.uber.com/uberXridesharinginsurance>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., Mike Isaac, *Accusations Fly Between Uber and Lyft*, NY TIMES BITS, (August 12, 2014), [http://bits.blogs.nytimes.com/2014/08/12/accusations-fly-between-uber-and-lyft/?\\_r=0](http://bits.blogs.nytimes.com/2014/08/12/accusations-fly-between-uber-and-lyft/?_r=0).

<sup>54</sup> Farhad Manjoo, *Uber and Lyft Have Become Indistinguishable Commodities*, N.Y. TIMES BITS (Aug. 28, 2014 at 2:27 pm), [http://bits.blogs.nytimes.com/2014/08/28/uber-and-lyft-have-become-indistinguishable-commodities/?\\_php=true&\\_type=blogs&\\_r=0](http://bits.blogs.nytimes.com/2014/08/28/uber-and-lyft-have-become-indistinguishable-commodities/?_php=true&_type=blogs&_r=0).

<sup>55</sup> *Lyft v. Uber: What's the Difference Between These Two Dueling Apps*, INQUISITR (Aug. 14, 2014), <http://www.inquisitr.com/1409677/lyft-vs-uber-whats-the-difference-between-these-dueling-apps/>.

<sup>56</sup> See, e.g., LYFT, <https://www.lyft.com/help/article/1450425>.

<sup>57</sup> LYFT, <https://www.lyft.com>

<sup>58</sup> LYFT, <https://www.lyft.com/help/article/1353884>.

<sup>59</sup> LYFT, <https://www.lyft.com/drive/help/article/1229170>.

tip the driver using the Lyft application, though a tip is not required.<sup>60</sup> The Uber application currently does not allow additional tipping, although a petition is underway to change this.<sup>61</sup> Lyft, like Uber, takes a 20% cut of the base fare; however, Lyft drivers keep 100% of all tips.<sup>62</sup>

Sidecar represents yet another variant of a peer-to-peer ride service.<sup>63</sup> Unlike Uber and Lyft, Sidecar gives drivers and passengers more flexibility in setting terms – for example, in choosing rides based on drivers, car types, and fares.<sup>64</sup> Sidecar operates in fewer cities than either Uber or Lyft, but markets itself based on its greater flexibility and lower prices.

Finally, it is important to note in describing these ridesharing services that there are regional differences in how the businesses are structured. For example, commentators have noted regional differences between driving for these services in the New York versus the San Francisco market.<sup>65</sup>

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

Related to peer-to-peer ride services, the sharing economy has also facilitated the emergence of peer-to-peer car rentals, provided by companies such as RelayRides, Getaround and Buzzcar.<sup>66</sup> Car owners create a car profile and 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. RelayRides, for example, covers the car owner for \$1,000,000 in liability

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<sup>60</sup> LYFT, <https://www.lyft.com/help/article/1003538>; Uber's tipping policy was one of the factors that contributed to a recent strike and lawsuit by Uber drivers. See Maya Kosoff, *Uber Drivers Across the Country Are Protesting Tomorrow – Here's Why*, BUS. INSIDER (Oct. 22, 2014 at 8:10am), <http://www.businessinsider.com/uber-drivers-across-the-country-are-protesting-tomorrow--heres-why-2014-10>; Michael B. Farrell, *New Lawsuit Claims Uber Exploits Its Drivers*, BOSTON GLOBE (June 26, 2014), <http://www.bostonglobe.com/business/2014/06/26/uber-hit-with-class-action-lawsuit/JFITJLMuBoXuEmMU3elTAI/story.html>.

<sup>61</sup> Dana Kerr, *To tip or not to tip drivers, that is Uber's question*, CNET MAG. (Feb. 16, 2015), <http://www.cnet.com/news/to-tip-or-not-to-tip-drivers-that-is-ubers-question/>.

<sup>62</sup> LYFT, <https://www.lyft.com/help/article/1003538>.

<sup>63</sup> SIDECAR, <http://www.side.cr/>.

<sup>64</sup> *Id.*

<sup>65</sup> See, e.g., Eric Markowitz, *Word on the Street: What My Lyft Drivers Told Me About Uber*, VOCATIV (Aug. 14, 2014 at 10:11am), <http://www.vocativ.com/money/business/lyft-uber/> (Cab license is required to drive for Lyft and Uber in NY); LYFT, <https://www.lyft.com/drive/help/article/1695469> (regional variations for Lyft drivers)

<sup>66</sup> RELAYRIDES, <https://relayrides.com/>; GETAROUND, <https://www.getaround.com/>; BUZZCAR, <http://www.buzzcar.com/en/>.

insurance, offers 24/7 customer service, and allows the car owners to ultimately decide whether or not they will allow the customer to rent the vehicle.<sup>67</sup> Getaround also insures rentals up to \$1 million.<sup>68</sup> If the renter has not paid for tickets or tolls during their reservation, RelayRides will reimburse the car owner for those charges,<sup>69</sup> and has additional policies for smoke fees, pet fees, cleaning fees, gas fees and late return fees.<sup>70</sup>

In exchange for providing the application or marketplace for these rentals, the companies take a percentage of the rental price and additional charges. For example, RelayRides car owners receive 75% of the rental price and excess mileage charges.<sup>71</sup> 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 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<sup>72</sup> and Roomorama,<sup>73</sup> operate marketplace platforms that connect landlords (called “hosts” by Airbnb) and travelers, enabling these transactions without owning any rooms itself.<sup>74</sup> 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.<sup>75</sup> Hosts decide on the price they will charge and manage their own personal rental calendar.<sup>76</sup> Hosts can set custom prices for individual nights and weekends, special events, and monthly stays. Renters, either via smartphone application or the

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<sup>67</sup> RELAYRIDES, <https://relayrides.com/trust-and-safety>.

<sup>68</sup> GETAROUND, <https://www.getaround.com>.

<sup>69</sup> RELAYRIDES, <http://support.relayrides.com/entries/21078886-What-will-I-earn-How-do-I-get-paid->.

<sup>70</sup> RELAYRIDES, <http://support.relayrides.com/entries/23144270-Fees-Fines>.

<sup>71</sup> RELAYRIDES, <https://support.relayrides.com/hc/en-us/articles/203992000-What-will-I-earn-How-do-I-get-paid->.

<sup>72</sup> AIRBNB, <https://www.airbnb.com/>.

<sup>73</sup> ROOMORAMA, <https://www.roomorama.com>.

<sup>74</sup> Sangeet Paul Choudary, *The Airbnb Advantage: How to Avoid Competition and become a Multi-billion Dollar Startup*, THE NEXT WEB (Mar. 10, 2013 at 5:00pm), <http://thenextweb.com/insider/2013/03/10/the-airbnb-advantage-how-to-avoid-competition-and-become-a-multi-billion-dollar-startup/>. See also ROOMORAMA, <https://www.roomorama.com/>; WIMDU, <http://www.wimdu.com/>; BEDYCASA, <http://www.bedycasa.com/>; and HOMEAWAY, <http://www.homeaway.com/>.

<sup>75</sup> AIRBNB, <https://www.airbnb.com/help/article/5>.

<sup>76</sup> AIRBNB, <https://www.airbnb.com/help/getting-started/how-to-host>.

website, input their travel dates and then can search through host sites based upon pricing, location and amenities. Thus, home sharing services allow hosts to monetize unutilized space and provide renters a cheaper alternative to standard hotel accommodations.<sup>77</sup>

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 their website to cover the cost of processing guest payments.<sup>78</sup> In addition, the guest pays a 6-12% guest service fee<sup>79</sup> every time a reservation is booked. The percentage charged depends on the subtotal of the reservation and declines as the reservation amount increases. Similar to other economic sharing companies, Airbnb provides insurance to hosts,<sup>80</sup> a guest refund policy,<sup>81</sup> and customer support.<sup>82</sup>

### 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.<sup>83</sup>

One prominent example, TaskRabbit,<sup>84</sup> allows users to outsource freelance services to others in their local neighborhood using an online marketplace model. Recently, TaskRabbit shifted their business from a freewheeling auction model to a more controlled web site.<sup>85</sup> Prospective employers, or “Clients,” choose from one of four broad categories:

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<sup>77</sup> Tomio Geron, *Airbnb and the Unstoppable rise of the Sharing Economy*, FORBES (Feb. 11, 2013), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/>.

<sup>78</sup> AIRBNB, <https://www.airbnb.com/help/article/63>.

<sup>79</sup> AIRBNB, <https://www.airbnb.com/help/article/104>.

<sup>80</sup> AIRBNB, <https://www.airbnb.com/help/article/937>.

<sup>81</sup> AIRBNB, <https://www.airbnb.com/help/article/324>.

<sup>82</sup> AIRBNB, <https://www.airbnb.com/help/article/9>.

<sup>83</sup> See *supra* note 26 and accompanying text.

<sup>84</sup> TASKRABBIT, <https://www.taskrabbit.com/>

<sup>85</sup> Adrienne Raphel, *Taskrabbit Redux*, NEW YORKER (Jul. 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. Harrison Weber, *TaskRabbit Users Revolt as the Company Shuts Down Its Bidding System*, VENTURE BEAT (Jul. 10, 2014 at 2:34pm), <http://venturebeat.com/2014/07/10/taskrabbit-users-revolt-as-the-company-shuts-down-its-bidding-system/>.

“Cleaning,” “Handyman,” “Personal Assistance,” and “Moving Help.” After this selection, clients receive a choice of a small 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.<sup>86</sup> TaskRabbit utilizes a transparent system where clients see the hourly rates for the Taskers. TaskRabbit requires a minimum payment of one hour per task and a Tasker’s rate can never be lower than the highest minimum wage in the cities in which TaskRabbit is active. TaskRabbit takes a 20% service fee on each task.<sup>87</sup> By using TaskRabbit, clients and Taskers receive 24/7 Members Services support and an insurance policy, which guarantees a million dollars of coverage per task.<sup>88</sup>

In addition to tasks and chores, the sharing economy has also reached numerous other industries, including dog boarding,<sup>89</sup> clothing, bicycles, and wifi.<sup>90</sup> 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.<sup>91</sup> 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 to tax sharing. In a few respects, particularly employment taxes, local occupancy and other local taxes, and certain tax expenditures, the applicable law is less clear. But the conceptual framework and categories of current tax law

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<sup>86</sup> The top five per cent of earners with approval ratings of 4.9 out of five get a special badge on their profiles and are featured more prominently in search results TASKRABBIT, <https://www.taskrabbit.com/taskrabbit-elite>.

<sup>87</sup> TASKRABBIT, <https://www.taskrabbit.com/how-it-works>.

<sup>88</sup> *Id.*

<sup>89</sup> See DOGVACAY, <http://dogvacay.com/>; ROVER, <http://www.rover.com/>.

<sup>90</sup> See *supra* note 26.

<sup>91</sup> See sources cited *supra* note 7.

should continue to be adequate once clarification is provided regarding the law's application. In short, perhaps in contrast to other regulatory spheres, fundamental substantive overhaul or introduction of new rules is not required. On the other hand, as further discussed in Part III, the sharing economy may raise fresh issues with respect to tax compliance.<sup>92</sup>

The tax issues at stake in the sharing economy vary depending on 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.<sup>93</sup> 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 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 is that ridesharing drivers are taxed on a net basis on their income earned from driving activities minus allowable expenses.<sup>94</sup> 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.<sup>95</sup>

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<sup>92</sup> See *infra* Part III.

<sup>93</sup> See *infra* Part II.A.2 and B.2.

<sup>94</sup> See I.R.C. §§ 61, 162, 212.

<sup>95</sup> 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.

As further discussed below, drivers may choose to either deduct actual expenses or use the standard mileage method.<sup>96</sup>

## 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.<sup>97</sup> Furthermore, the vehicle they use for ridesharing may also be driven for personal use, sometimes predominantly for personal use.<sup>98</sup> 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.

Most but not all expenses of ridesharing drivers will pertain to the vehicle they operate. Vehicle-related expense identification and tracking may be done using two methods: Drivers may either (1) deduct the actual business expenses that they incur or (2) they may use the standard mileage method.<sup>99</sup>

*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.”<sup>100</sup> If the vehicle serves both personal and business use, then the

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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 unrelated persons services consisting of the transportation of persons or property for compensation or hire. I.R.C. § 280F(d)(4)(C).

<sup>96</sup> See *infra* text accompanying note 104.

<sup>97</sup> 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 part-time drivers with no previous driving experience who drove fewer than 30 hours a week. Benenson Strategy Group, *Uber the Driver Road Map* (2015) available at <http://www.bsgco.com/insights/uber-the-driver-roadmap>; see also UBER, <http://blog.uber.com/partner-experience> [hereinafter Uber Study] (describing the decision to commission the study and outlining some of the findings).

<sup>98</sup> The typical Uber driver is using his or her own car. See UBER, [blog.uber.com](http://blog.uber.com) (requirements include a 4-door vehicle model year 2005 or later). As noted, other Uber services coordinate with local licensed livery and taxicab services. See, e.g., UBERTAXI, at Uber.com. See also UBER, <http://blog.uber.com/2012/07/03/choice-is-a-beautiful-thing/> (riders in Chicago are able to hail and automatically pay for a taxicab using the UberTAXI app); UBER, [https://partners.uber.com/signup/san\\_francisco/](https://partners.uber.com/signup/san_francisco/) (vehicles under the UberTAXI program in San Francisco are commercial taxis driven by an individual licensed and certified by the city of San Francisco).

<sup>99</sup> Treas. Reg. § 1.274-5(j)(2). Notice 2014-79 (Sec.3), 2014-53 I.R.B. 1001; IRS News Release 2014-114.

<sup>100</sup> IRS Publication 463 “Travel, Entertainment, Gift, and Car Expenses” (2013) at 17. See also Rev. Proc. 2010-51.

taxpayer 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.<sup>101</sup> For example, if two-thirds of the miles driven in the vehicle are business use (e.g., driving with Uber) then two-thirds of the actual 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.<sup>102</sup> For vehicles for which business use does not exceed 50%, ridesharing drivers may be forced to use the alternative depreciation system, rather than MACRS depreciation, and may not be able to make the I.R.C. § 179 election to expense certain car costs.<sup>103</sup>

*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 can deduct a certain number of cents per mile driven.<sup>104</sup> For 2015, the allowable standard mileage deduction is 57.5 cents per mile.<sup>105</sup> If the driver uses standard mileage, then she cannot deduct her actual car expenses (e.g., lease payments, maintenance, repairs, gasoline, oil, insurance, vehicle registration).<sup>106</sup> The standard mileage rate cannot be used in certain circumstances.<sup>107</sup> 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 MACRS depreciation under I.R.C. § 168 or bonus depreciation under I.R.C. § 168(k) with respect to that automobile.<sup>108</sup>

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<sup>101</sup> See Pub. 463, *supra* note 100.

<sup>102</sup> *Id.* at 17.

<sup>103</sup> I.R.C. § 280F; Pub. 463, *supra* note 100.

<sup>104</sup> Treas. Reg. § 1.274-5(j)(2). Notice 2014-79, *supra* note 99; IRS News Release 2014-114. 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). <http://www.irs.gov/taxtopics/tc510.html>. Other restrictions apply to the use of the standard mileage rate. See also Rev. Proc. 2010-51, 2010-2 C.B. 883; Pub. 463, *supra* note 100 at 16-23.

<sup>105</sup> Notice 2014-79, *supra* note 99; IRS News Release 2014-114.

<sup>106</sup> Rev. Proc. 2010-5, *supra* note 104, at Sec. 4; Publication 463, *supra* note 100 at 16.

<sup>107</sup> Pub. 463, *supra* note 100, at 16 (standard mileage cannot be used if you (1) use five or more cars at the same time (such as in fleet operations), (2) claimed a depreciation deduction for the car using any method other than straight line, for example, MACRS, (3) claimed an I.R.C. § 179 deduction on the car (4) claimed the special depreciation allowance on the car, (5) claimed actual car expenses after 1997 for a car you leased, or (5) are a rural mail carrier who received a qualified reimbursement.

<sup>108</sup> Rev. Proc. 2010-51, *supra* note 104.

Generally, this means that the taxpayer cannot switch to the standard mileage method after having used actual operating costs.<sup>109</sup>

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, in order to boost her driver rating.<sup>110</sup> 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.<sup>111</sup> 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 person 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.<sup>112</sup> 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).<sup>113</sup>

To be clear, we do not claim that the tax law and 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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<sup>109</sup> RIA Checkpoint Federal Tax Coordinator Analysis at ¶ L-1903 (RIA Caution).

<sup>110</sup> Jeff Bercovici, *Uber's Ratings Terrorize Drivers And Trick Riders. Why Not Fix Them?*, FORBES (Aug. 14, 2014), <http://www.forbes.com/sites/jeffbercovici/2014/08/14/what-are-we-actually-rating-when-we-rate-other-people/>.

<sup>111</sup> See, e.g., Rev. Proc. 2010-51, *supra* note 104, at sec. 4.03 (noting that even if standard mileage method is selected, taxpayer may also deduct, as separate expenses, items such as parking fees and tolls); I.R.C. §§ 162, 274.

<sup>112</sup> See, e.g., RIDESHAREDASHBOARD, <http://ridesharedashboard.com/2014/01/28/salary-and-tax-rates-for-uber-and-lyft-drivers/> (“it 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”).

<sup>113</sup> 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, e.g., *Homobiles: Transportation with a Social Mission*, NATIONAL PUBLIC RADIO, October 5, 2014, available at [npr.org](http://npr.org). (Describing a “non commercial, 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 significant new 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 regulate the new filers from the ridesharing sector.<sup>114</sup>

### *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; 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.<sup>115</sup>

#### 1. General Rules for Income Inclusions and Deductions

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 borderline by imposing limitations on a taxpayer's deductions in connection with rental of a "dwelling unit which is used by the taxpayer during the taxable year as a residence."<sup>116</sup> However, to the extent home sharing deductions are not limited by I.R.C. § 280A, taxpayers can proceed to make a standard business expense analysis and report all otherwise qualified deductions on

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<sup>114</sup> Other commentators have explored potential I.R.C. § 132 questions. *See* Barry & Caron, *supra* note 12.

<sup>115</sup> *See infra* Part II.C.2.

<sup>116</sup> I.R.C. § 280A(a).

their tax returns.<sup>117</sup>

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).<sup>118</sup> 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 deducted 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.<sup>119</sup> In that case, the I.R.C. § 280A limitations would apply.<sup>120</sup>

## 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 reason to think that these mixed-use properties may be a significant portion of home sharing rentals.<sup>121</sup> In the case of such properties, the following rules may limit the taxpayer's ability to deduct home sharing expenses.

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<sup>117</sup> Rental expenses on generally reported on I.R.S. Schedule E (Form 1040).

<sup>118</sup> Prop. Reg. § 1.280A-1(c)(1). I.R.C. § 280A defines a "dwelling unit" as a property that contains basic living accommodations, such as sleeping space, toilet, and cooking facilities. I.R.C. § 280A(f)(1).

<sup>119</sup> For example, Airbnb encourages prospective "hosts" to consider "rent[ing] out extra space effortlessly." AIRBNB, [https://www.airbnb.com/info/why\\_host](https://www.airbnb.com/info/why_host). The Airbnb site also lists the possibility of offering "an air mattress in the corner of your living room." An October 2013 NYC Airbnb study found that 87% of hosts rent out the property where they actually live. See AIRBNB, <http://blog.airbnb.com/wp-content/uploads/Airbnb-economic-impact-study-New-York-City.pdf> (hereinafter Airbnb Study); AIRBNB, <https://www.airbnb.com/press/news/new-study-airbnb-generated-632-million-in-economic-activity-in-new-york>; see also AIRBNB, <https://www.airbnb.com/help/getting-started/how-to-host>.

<sup>120</sup> Neither I.R.C. § 280A(c)(3) and (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.

<sup>121</sup> Airbnb Study, *supra* note 119.

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 the term “dwelling unit” “does not include that portion of a unit used exclusively as a hotel, motel, inn, or similar establishment.”<sup>122</sup> 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 rules of this section to have used the unit as a residence during the taxable year.”<sup>123</sup> 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 such case, however, costs associated with common spaces and the building exterior, and not related to the business, cannot be deducted.<sup>124</sup>

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.<sup>125</sup> So, for 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.<sup>126</sup>

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<sup>122</sup> I.R.C. § 280A(f)(1)(B).

<sup>123</sup> Prop. Treas. Reg. § 1.280A-1(c)(2). *See, e.g.*, IRS Publication 527 (2013) “Residential Rental Property” at 17.

<sup>124</sup> Priv. Ltr. Rul. 8732002 (Apr. 2, 1987).

<sup>125</sup> Case law and ruling suggests that the “used ... as a residence” requirement is interpreted narrowly and that any personal use of the space by taxpayer will take it outside of the hotel exception. *See, e.g.*, Priv. Ltr. Rul. 8518003 (Jan. 18, 1985); *Byers v. Commissioner*, 82 TC 919 (1984); *Fine v. US*, 493 F. Supp. 540 (ND Ill 1980), *aff’d* 647 F.2d 763 (7<sup>th</sup> Cir. 1981); *Grigg v. Commissioner*, 62 TCM 465 (1991), *aff’d* 979 F. 2d 383 (5<sup>th</sup> Cir 1992).

<sup>126</sup> *See, e.g.*, AIRBNB, <https://www.airbnb.com/help/article/899> (“you can tell any guest that your listing is unavailable for a trip they’ve asked about.”). *See also* AIRBNB,

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.<sup>127</sup> 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. "Any reasonable method" may be used to divide expenses between rental and personal.<sup>128</sup> Certain allowable personal use expenses may continue to be deducted on Schedule A.<sup>129</sup>

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 exclusively for business use, 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.

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 apply. Personal use will only arise to the level of a "residence" if the use is (1) more than 14 days or (2) 10% of the number of days for which the unit is rented at fair rental.<sup>130</sup> If the personal use does not rise to the level of "residence," the taxpayer's deduction for expenses attributable to the rental of the unit is limited to Y, where<sup>131</sup>

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

Thus, consider a case in which a home sharing host rents a unit to various guests for 50 weeks in a year and uses it personally for one week. If the total expenses associated with the unit were \$10,000 for the year, the

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<https://www.airbnb.com/help/article/259> ("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.").

<sup>127</sup> I.R.C. §§ 61, 162, 212, 183.

<sup>128</sup> IRS Publication 587 "Business Use of Your Home" (2013) at 10 (square footage or number of rooms, where rooms are all about the same size, are two commonly used methods).

<sup>129</sup> For example, home mortgage interest may be deducted. I.R.C. § 163(h)(3).

<sup>130</sup> I.R.C. § 280A(d)(1).

<sup>131</sup> I.R.C. § 280A(e)(1). This ratio-based limitation does not apply to deduction of expenses that would be deductible regardless of whether the unit (or portion thereof) was rented. I.R.C. § 280A(e)(2).

rule provides the deductible expenses may not exceed \$9,804.<sup>132</sup>

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.<sup>133</sup> If the taxpayer uses the dwelling unit as a residence and rented it out for 15 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.<sup>134</sup>

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 taxpayer rents out her condominium for 4 weeks and lives in it the remaining 48 weeks of the year.<sup>135</sup> She earns total rental income of \$5,000, incurs \$2,000 of expenses that would be deductible regardless of the rental activity (e.g., property tax) and incurs \$400 of 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), the 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).<sup>136</sup> Expenses over this limitation may be carried over to the next taxable

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<sup>132</sup> Because  $\$10,000 \times 350/357 \text{ days} = \$9,804$ .

<sup>133</sup> See sources cited *supra* note 130.

<sup>134</sup> I.R.C. § 280A(c)(5), and § 280A(e)(i). If the taxpayer used the dwelling unit as a residence and rented it for fewer than 15 days during the year, then the taxpayer reports neither income nor expenses associated with the rental activity. I.R.C. §§ 280A(c)(5), (g).

<sup>135</sup> I.R.C. § 280A(c)(5).

<sup>136</sup> The property is rented for 28 of the 365 days it is used this year. Thus, deductible rental-related expenses of the property cannot exceed  $28/365$ . Of the \$2000 in property taxes, \$153.42 is attributable to the rental (the remaining \$1846.58 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 rental income – \$153.42 (otherwise permitted property deductions, here the portion of property tax) – \$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 Pub. 527, *supra* note 123 at 11; Prop. Treas. Reg. § 1.280A-3(d).

year.<sup>137</sup>

To take another example, assume that taxpayer rents out a room in her home on Airbnb for 4 weeks a year but uses it for the remaining 48 weeks for personal purposes. Assume taxpayer earns \$2,000 of rental income. Assume that the taxpayer has 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.<sup>138</sup> 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).

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In sum, the doctrinal tax rules governing income inclusion and expense taking in both ridesharing and home sharing are not unclear. These rules, which have long applied to other small business persons or landlords, have equal application in the sharing economy. On the other hand, 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 having 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 in question applies to sharing.

#### 1. Self-Employment Taxes

One point of ambiguity is whether sharing economy workers are independent contractors for tax purposes who are responsible for paying self-employment taxes. This is more of a concern for ridesharing drivers

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<sup>137</sup> I.R.C. § 280A(c)(5).

<sup>138</sup> Calculated as  $28/365 \times \$15,000 = \$1200$  and  $28/365 \times \$11,000 = \$880$ .

and other task workers, although the issue may arise for some home sharing landlords as well.<sup>139</sup>

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% rate), which the individual will have to pay by filing Schedule SE.<sup>140</sup> The individual can then deduct half of these taxes on Form 1040, line 27.<sup>141</sup> Because they are independent contractors not subject to withholding, such individuals may also have to pay estimated taxes, depending on their overall tax situation.<sup>142</sup>

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.<sup>143</sup> However, the rules for distinguishing employees from

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<sup>139</sup> See Lauren Weber, *On-demand Workers: We Are Not Robots*, WALL ST. J. (Jan. 27, 2015 at 7:55pm), [http://www.wsj.com/article\\_email/on-demand-workers-we-are-not-robots-1422406524-1MyQjAxMTE1NDI2ODYyNjgwWj](http://www.wsj.com/article_email/on-demand-workers-we-are-not-robots-1422406524-1MyQjAxMTE1NDI2ODYyNjgwWj).

<sup>140</sup> See generally IRS Self-Employed Individuals Tax Center, <http://www.irs.gov/Individuals/Self-Employed#obligations>. For 2014, 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). The additional Medicare tax introduced in 2013 imposes an additional 0.9% tax for compensation including self-employment income above a threshold amount. I.R.C. § 1401(b)(2).

<sup>141</sup> I.R.C. § 164(f)(1), and Instructions to IRS Form 1040 (2014) at 30. 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.

<sup>142</sup> I.R.C. § 6654(a), (d); see also IRS Publication 505, *Tax Withholding and Estimated Tax*, available at [www.irs.gov](http://www.irs.gov) (discussing circumstances under which estimated tax payments are required).

<sup>143</sup> See UBER, <https://support.uber.com/hc/en-us/articles/201955457-Who-are-the-drivers-on-the-Uber-system> (stating that “Uber’s technology connects people with cars to people who need rides, meaning drivers on the Uber system are independent contractors.”). See also Uber Terms and Conditions available at UBER, <https://www.uber.com/legal/usa/terms> (last updated November 10, 2014) (“The Services constitute a technological 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 and third party logistics providers under agreement with Uber or certain Uber subsidiaries.”). Uber sends drivers a Form 1099, rather than the Form W-2 used for employees. See UBER, [https://get.uber.com/drive-uber/boston/p2p/?utm\\_source=bsbanneronline&utm\\_campaign=boston](https://get.uber.com/drive-uber/boston/p2p/?utm_source=bsbanneronline&utm_campaign=boston) (“We’ll send you a 1099 form that you will use to report the income you made driving with Uber.”).

independent contractors are complex and may vary depending on the precise work relationship and the specific law at issue.<sup>144</sup> 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.<sup>145</sup> In brief, the IRS and courts will normally look at a variety of behavioral, financial, and relational factors to distinguish employees from independent contractors.<sup>146</sup> 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.<sup>147</sup>

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.<sup>148</sup> The resolution of this issue will vary depending on the area of law at issue. For example, the I.R.S., the U.S. Department of Labor, and various state laws will apply different tests and standards in making the independent contractor vs. employee determination.

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<sup>144</sup> See Treasury Inspector General for Tax Administration, *Employers Do Not Always Follow Internal Revenue Service Worker Determination Ruling*, (June 14, 2013), Ref. No.:2013-30-058 at 2 (“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”).

<sup>145</sup> Rev. Rul. 87-41, 1987-1 C.B. 296; *Levine v. Commissioner*, T.C. Memo 2005-86; *Schramm v. Commissioner*, T.C. Memo 2011-212.

<sup>146</sup> 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 services 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 furnishes significant tools, materials, or 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 work 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.

<sup>147</sup> IRS, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Defined>.

<sup>148</sup> Weber, *supra* note 139.

In this regard, a number of lawsuits have recently been filed arguing that Uber drivers are employees rather than independent contractors.<sup>149</sup> Most recently, two California District Court rulings denied summary judgment on Uber's and Lyft's motions for rulings that drivers are independent contractors for purposes of California state law.<sup>150</sup> While the standards applied by these courts differs from the test that would be applied by the IRS and courts for tax purposes, the existence of these rulings suggest that the issues is live and contested, and the resolution is far from clear.

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.<sup>151</sup> Again, it is important to reiterate that the tax law itself is not necessarily inadequate as applied to sharing.<sup>152</sup> The 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.

## 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

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<sup>149</sup> *Lavitman v. Uber Technologies*, 2015 WL 728187 (Mass. Superior Ct., Jan. 26, 2015); *Douglas O'Connor, et al. v. Uber Technologies, Inc., et al.*, Case number: 4:2013cv03826EMC, filed August 16, 2013 (N.D. California); *Patrick Cotter, et al. vs. Lyft, Inc.*, Case number: 3:2013cv04065VC, Doc. 94; *Hakan Yucesoy v. Uber Technologies, Inc., Travis Kalanick, and Ryan Graves*, Case number: 14-0576 C, filed June 26, 2014 (Mass. Superior Ct.); *see also* *Ang Jiang Liu et al. v. Uber Technologies, Inc.*, Case number: CGC 14 536979, filed January 27, 2014 (San Francisco); *Claire Fahrback v. Djamol Gafurov, et al*, Case number: CGC 13 533103, filed July 23, 2013 (Superior Ct. of California, SF County). For summaries of Uber litigation *see, e.g.*, COMMUNITY ENTERPRISE LAW.ORG, <http://communityenterpriselaw.org/independent-contractors/>; <http://uberlawsuit.com>; Weber, *supra* note 139.

<sup>150</sup> *Douglas O'Connor, et al. v. Uber Technologies, Inc., et al.*, Case number: 4:2013cv03826EMC, Doc. 251 (Order Denying Defendant Uber Technologies, Inc.'s Motion for Summary Judgment); *Patrick Cotter, et al. vs. Lyft, Inc.*, Case number: 3:2013cv04065VC, Doc. 94 (Order Denying Cross-Motions for Summary Judgment).

<sup>151</sup> *See* discussion *infra* Part III.A.

<sup>152</sup> *But see* Lauren Weber, *What If There Were A New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 28, 2015, at 10:28am), <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831> (advocating a third, dependent contractor classification in the labor protection context).

rooms, and if so, who is responsible for collecting and paying over the tax.<sup>153</sup> Such occupancy taxes are imposed on rentals (usually short-term rentals) of hotel rooms, on a per night basis.<sup>154</sup> For example, San Francisco's transient occupancy tax is approximately 14%.<sup>155</sup> 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) relatedly, how the tax should be priced or presented to the guest as part of the total rental price.

These questions have been under dispute with a number of state and local regulators, and the answers and approaches have varied based on locality.<sup>156</sup> In some localities, Airbnb has conceded that the rentals are subject to the local hotel and occupancy tax, and has agreed to collect and pay over the tax.<sup>157</sup> 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.<sup>158</sup> 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 seems that very few hosts actually complied with such hotel tax payment obligations.<sup>159</sup> Airbnb

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<sup>153</sup> See, e.g., Office of the New York State Attorney General, "AirBNB in the city" (October 2014) at 9 and Appendix A, available at [www.ag.ny.gov/pdfs/Airbnb%20report.pdf](http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf); see also AIRBNB <https://AirBNB.com/help/article/481> (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 government officials to collect and remit local taxes on behalf of hosts").

<sup>154</sup> See, e.g., Massachusetts Room Occupancy Tax <http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/trustee-and-excise-taxes-requiring-registration/room-occupancy-tax.html> (imposed on rent received from an individual occupying "the lodgings for 90 consecutive days or less").

<sup>155</sup> San Francisco Business and Tax Regulations, Art. 7, 1.504-1.

<sup>156</sup> See, e.g., Verne Kopytoff, *Airbnb's Woes Show How Far the Sharing Economy Has Come*, TIME TECHN. & MEDIA (October 7, 2013), <http://business.time.com/2013/10/07/airbnbs-woes-show-how-far-the-sharing-economy-has-come/>.

<sup>157</sup> AIRBNB, <https://www.airbnb.com/help/article/653>.

<sup>158</sup> Said, *supra* note 11.

<sup>159</sup> See, e.g., Tuttle, *supra* note 7; Steven Jones, *Airbnb isn't sharing*, SAN FRAN. BAY GUARD. ONLINE (March 19, 2013 at 3:54pm), <http://www.sfbg.com/2013/03/19/airbnb->

had initially taken the credible position that it does not own the rooms being rented, but functions merely as a go-between and thus is not liable for collecting (and in some instances is not allowed to collect) the hotel tax.<sup>160</sup>

However, facing potential enactment of less favorable regulatory regimes, Airbnb eventually conceded that Airbnb rentals may be subject to the hotel tax and has agreed in certain cities (Multnomah County and Portland, Oregon, San Francisco, San Jose, Chicago, and Washington DC) to act as a collection agent for those taxes owed by the hosts.<sup>161</sup> In these cities, Airbnb is now collecting the tax from renters and paying them over to the cities. Thus, even though the business structure of the Airbnb model differs from traditional hotels, the net result in some localities has been the creation of a de facto withholding-agent obligation (in some instances, the locality has actually changed the regulations to do this) imposed on Airbnb to facilitate otherwise near-impossible compliance.

Again, 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. This issue is contested, but clarification is possible within the parameters of current law.

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In summary, we have argued in Part II that in many respects, the

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isnt-sharing. In the traditional hotel context, the hotel collects the tax on its rooms and remits the tax to the government.

<sup>160</sup> 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, e.g.,* Kopytoff, *supra* note 156 (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/> (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.*, SFGATE (Feb. 18, 2015), <http://www.sfgate.com/bayarea/matier-ross/article/M-R-Airbnb-pays-tens-of-millions-in-back-6087802.php> (noting Airbnb's "concerns" about San Francisco's assessment of back taxes).

<sup>161</sup> *See* Ben Trefny, *Airbnb to Start Charging Hotel Taxes in a Handful of Cities*, NPR (April 18, 2014), at <http://www.npr.org/blogs/alltechconsidered/2014/04/18/304564169/airbnb-to-start-charging-hotel-taxes-in-a-handful-of-cities>; Kate Rogers, *San Francisco moves closer to legalizing Airbnb*, CNBC (Oct. 22, 2014), <http://www.cnn.com/id/102102286>.

structures and concepts of current tax law are adequate to the task of taxing sharing economy earners. On the other hand, we conceded 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.<sup>162</sup> 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.<sup>163</sup> Barry and Caron have also pointed out the non-applicability of the I.R.C. § 132(f) transportation fringe benefit to car sharing programs.<sup>164</sup> Similar issues with respect to deductions, exemptions, and other tax expenditures are likely to arise in other contexts.

Yet, all of these sorts 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.

### 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

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<sup>162</sup> See sources cited *infra* note 262 (discussing application of New York City's 50 cent tax per ride to Uber rides).

<sup>163</sup> Barry & Caron, *supra* note 12, at 9-12.

<sup>164</sup> Barry & Caron, *supra* note 12, at 12-14.

challenges should be clarified through further empirical study.

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 the tax opportunism characterization 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.

#### *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.<sup>165</sup> 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

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<sup>165</sup> See, e.g., Clampet, *supra* note 6.

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 represents a notable departure from traditional industries for which it substitutes, such as transportation and housing. The uniqueness of sharing presents businesses with an opportunity to adopt favorable regulatory positions supported by small gaps and ambiguities in the law.<sup>166</sup>

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 potentially aggressive reporting positions without having first sought advance rulings or having consulted with taxing authorities. 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.<sup>167</sup> 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<sup>168</sup> and outright illegality. Tax opportunism's meaningful differences from these two categories suggest different regulatory prescriptions.<sup>169</sup>

#### b. Regulatory Arbitrage

Regulatory arbitrage can be understood to mean those situations in which a participant pursues a particular transaction form or structure in

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<sup>166</sup> This is not to say there is not also vocal opposition to the opportunism exhibited by sharing.

<sup>167</sup> For example, Uber did not have to purchase a large, nationwide fleet of vehicles to launch its business.

<sup>168</sup> See Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 230 (2010); Jordan M. Barry, *On Regulatory Arbitrage*, 89 TEX. L. REV. SEE ALSO 69 (2010) (commenting on Fleischer's regulatory arbitrage analysis).

<sup>169</sup> See discussion *infra* Part IV.

order to secure identified regulatory benefits, even though that structure may add non-regulatory transaction costs.<sup>170</sup> 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.”<sup>171</sup> The actor will take this step if it determines that the costs of adjusting the plan (including transaction costs and legal constraints such as anti-abuse rules)<sup>172</sup> 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, the sharing businesses’ “first best” business structure provides the basis for the advantageous tax positions they claim. 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 innovating 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.

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<sup>170</sup> Fleischer, *supra* note 168. 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 as we understand it 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.

<sup>171</sup> Fleischer, *supra* note 168, at 230.

<sup>172</sup> *Id.* at 230, 253.

c. Illegality

Our framing of sharing actor behavior as tax opportunism is also distinct from a claim 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 in order to pressure the government for a preferable regulatory treatment.<sup>173</sup> 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 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.<sup>174</sup> 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.<sup>175</sup>

2. Tax Opportunism in Information Reporting

A key instance of sharing businesses engaging in tax opportunism is the position taken by some of these businesses with respect to third-party information reporting. 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.<sup>176</sup> Third-party information reporting and withholding help the IRS identify income earned by taxpayers and collect income tax due.<sup>177</sup> Studies suggest that in sectors where information reporting and withholding

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<sup>173</sup> See, e.g., Clampet, *supra* note 6.

<sup>174</sup> 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.

<sup>175</sup> See *infra* Part IV.

<sup>176</sup> See *infra* Part III.B.1, discussing the employee/independent contractor debate.

<sup>177</sup> See, e.g., Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733 (2010); Joel Slemrod, *supra* note 17.

are difficult to impose (e.g., cash businesses), tax compliance declines.<sup>178</sup>

a. General Information Reporting Rules

Because the sharing businesses have taken the position that sharing earners are independent contractors, the sharing businesses are not withholding on amounts paid to sharing earners.<sup>179</sup> Sharing businesses are, however, responsible for information reporting with respect to independent contractor income.<sup>180</sup> 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.<sup>181</sup> 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.<sup>182</sup> 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

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<sup>178</sup> *Id.*; see also James Alm, John Deskins, Michael McKee, *Do Individuals Comply on Income Not Reported by their Employer?* 39(2) PUB. FIN. REV. 120 (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 (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)).

<sup>179</sup> See, e.g., LYFT, <https://www.lyft.com/drive/help/article/1229158> (“drivers . . . are not employees of the company”); LYFT <https://www.lyft.com/drive/help/article/1229066> (explaining that as non-employees, drivers may receive information returns (a Form-1099-MISC or a Form 1099-K) or nothing at all, depending on the driver’s income and activities).

<sup>180</sup> See *supra* sources cited in note 179.

<sup>181</sup> A different third party reporting regime, along with special tax burdens, apply 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.*

<sup>182</sup> See IRS 2015 Instructions for Form 1099-MISC, at <http://www.irs.gov/pub/irs-pdf/i1099msc.pdf>.

divides PSEs into two groups and applies different information reporting obligations to each. First, banks and other “merchant acquiring entities”<sup>183</sup> must report all payments made to payees in settlement of credit card transactions.<sup>184</sup> Second, all “third party settlement organizations”<sup>185</sup> making payments to payees in settlement of third party network transactions must report such payments on Form 1099-K if the payments to the participating payee exceed \$20,000 *and* if there are more than 200 transactions with the participating payee.<sup>186</sup> The term “third party settlement organization” was meant to include services such as PayPal, Amazon, and Google Checkout.<sup>187</sup> 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.<sup>188</sup> 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.<sup>189</sup>

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

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<sup>183</sup> 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).

<sup>184</sup> Treas. Reg. § 1.6050W-1(a)(4)(A). These payors are collectively known as “merchant acquiring entities.” Treas. Reg. § 1.6050W-1(b)(2).

<sup>185</sup> “Third party settlement organizations” are those central organizations with the contractual obligation to make payment to participating payees of third party network transactions. I.R.C. § 6050W(b)(3); Treas. Reg. § 1.6050W-1(c)(2).

<sup>186</sup> I.R.C. § 6050W(e).

<sup>187</sup> See Kelly Phillips Erb, *Credit Cards, The IRS, Form 1099-K and the \$19,399 Reporting Hole*, FORBES (Aug. 29, 2014), <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 organizations).

<sup>188</sup> Treas. Reg. § 1.6050W-1(d)(1).

<sup>189</sup> See, e.g., 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.

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 made by the PSE on a Form 1099-K, to the extent required by I.R.C. § 6050W.<sup>190</sup> 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 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.<sup>191</sup> 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.<sup>192</sup> 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.<sup>193</sup> As discussed below, this intersection of the rules gives rise to a potentially large reporting gap in the case of third party settlement organizations.<sup>194</sup> But at least one commentator has proposed an alternative viable interpretation: all payments that are now not reportable on Form 1099-MISC must now be reported on Form 1099-K, regardless of the de minimis threshold.<sup>195</sup>

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<sup>190</sup> Treas. Reg. § 1.6041-1(a)(iv). *See also* IRS Instructions for Form 1099-K (2015) at 3.

<sup>191</sup> Treas. Reg. § 1.6041-1(a)(v) examples 1 and 2.

<sup>192</sup> Treas. Reg. § 1.6041-1(a)(iv); Form 1099-K instructions at 3.

<sup>193</sup> Eric Christenson & Amanda Kottke, *Guidance Needed to Clarify Reporting Obligations for Online Marketplaces and Peer-to-Peer Platforms* (July 14, 2014), TM Memorandum (BNA).

<sup>194</sup> *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 volume and many transactions). *See* Treas. Reg. § 1.6041-(a)(iv); Instructions for Form 1099-K (2015) at 3. *See also* Erb, *supra* note 187 (IRS confirmed that there is a notable reporting hole created by the intersection of I.R.C. §§ 6041 and 6050W).

<sup>195</sup> *See* Christianson & Kottke, *supra* note 193.

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

Against this backdrop, Lyft and Sidecar have taken the position that, for the 2014 tax year, their drivers (whom they treat as independent contractors) will receive: (1) 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 \$600.<sup>196</sup> Until early 2015, Uber also took this position.<sup>197</sup> This reporting position indicates that the ridesharing businesses consider themselves each a “third party settlement organization” under I.R.C. § 6050W, akin to businesses such as PayPal.<sup>198</sup> 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.<sup>199</sup> 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.<sup>200</sup> It is also not certain how Uber is justifying its shifting position without conceding that it reported improperly in the prior three years.<sup>201</sup>

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<sup>196</sup> LYFT DRIVER CENTER, <https://drivers.lyft.com/customers/portal/articles/1229066>; SIDECAR, <http://support.side.cr/customer/portal/articles/924061>; SIDECAR, <http://support.side.cr/customer/portal/articles/924061-does-driving-incur-any-taxes->. See also Justine Sharrock, *Life Behind The Wheel In The New Ridesharing Economy*, BUZZFEED NEWS (May 8, 2013), <http://www.buzzfeed.com/justinesharrock/life-behind-the-wheel-in-the-new-rideshare-economy>; Pender, *supra* note 7.

<sup>197</sup> THE RIDESHARE GUY, <http://therideshareguy.com/all-of-your-2014-rideshare-tax-questions-answered-a-turbotax-giveaway/>; RIDESHAREDASHBOARD, <http://ridesharedashboard.com/2015/01/08/uber-lyft-taxes-what-to-do-your-taxes-without-1099/>.

<sup>198</sup> I.R.C. § 6050W; see also, generally, Kathleen Pender, *Here's Why Uber and Lyft Send Drivers Such Confusing Tax Forms*, SFGATE (Feb. 20, 2015), <http://www.sfgate.com/business/networth/article/Here-s-why-Uber-and-Lyft-send-drivers-such-6092403.php>.

<sup>199</sup> *Id.*; ZEN99, [https://tryzen99.com/blog\\_posts/read-uber-1099](https://tryzen99.com/blog_posts/read-uber-1099).

<sup>200</sup> We speculate that perhaps Uber perceived the importance of relatively lax information reporting at the outset in order 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 (A) appease regulators and (B) make it more difficult for competitors such as Lyft or Sidecar to recruit drivers by forcing them to embrace similar tightened information reporting standards.

<sup>201</sup> It is possible that Uber would argue it is merely insuring that they are providing the

Uber, Lyft and Sidecar will also issue drivers a Form 1099-MISC for their own direct payments (e.g., bonuses) of \$600 or more because in that facet of the relationship, 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.<sup>202</sup>

The Form 1099-K information reporting position taken by 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.<sup>203</sup> While 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.<sup>204</sup>

The tax information reporting position taken by ridesharing businesses (Lyft and Sidecar to the present, and Uber till 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 various controls over driver conduct. Second, it is possible that a sharing business might be viewed as an “aggregate payee” under I.R.C. § 6050W. Under that theory, the 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. 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,<sup>205</sup> the proper relationship between Form 1099-MISC and Form 1099-K reporting may still be ambiguous

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fullest information possible to all parties, including the government.

<sup>202</sup> 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 were so made, a Form 1099-K issued by the PSE would presumably be the appropriate document.

<sup>203</sup> Lyft itself has acknowledged the existence of that gap. LYFT DRIVER CENTER, <https://drivers.lyft.com/customers/portal/articles/1229066> (“Drivers who do **not** meet either of the above criteria in the last year will not receive a tax form.”); *see also supra* note 194 and accompanying text.

<sup>204</sup> *But see* discussion *infra* Part III.A.2.c.

<sup>205</sup> *See supra* notes 193-195 and accompanying discussion.

regarding application of the 200 transactions/\$20,000 de minimis threshold.<sup>206</sup> The alternative interpretation leaves the possibility that there is no statutory gap, 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 or how little earned.<sup>207</sup>

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, is also apparently taking the position that it is a merchant acquiring entity obligated to report all payments made to hosts regardless of size.<sup>208</sup> On the other hand, TaskRabbit appears to be taking the position that unless the Tasker has earned over \$20,000, no Form 1099-K will be issued.<sup>209</sup> Gigwalk, a similar service to TaskRabbit, will not itself be issuing Forms 1099-K but rather will 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.<sup>210</sup> 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.<sup>211</sup> However, the types of ownership, leasing, and driving arrangements in the taxicab industry are heterogeneous.<sup>212</sup> Therefore, no single pattern of third

<sup>206</sup> See *supra* notes 192-195 and accompanying discussion.

<sup>207</sup> Christianson & Kottke, *supra* note 193.

<sup>208</sup> See, e.g., AIRBNB, <https://www.airbnb.com/help/article/414> (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.”)); AIRBNB, <https://www.airbnb.com/help/article/481> (“[W]e’ll provide hosts who’ve submitted a W-9 with a Form 1099-K showing their reportable earnings from the previous year.”); see also Pender, *supra* note 7.

<sup>209</sup> TASKRABBIT, <https://taskrabbit.zendesk.com/entries/61642320-Tax-Information>.

<sup>210</sup> GIGWALK, <https://gigwalk.zendesk.com/hc/en-us/articles/203202350-Will-I-be-receiving-a-1099-or-other-tax-form->.

<sup>211</sup> See I.R.C. §§ 61, 62, 67, 68, 162, 168, 179.

<sup>212</sup> In New York City, for example, some drivers own individual medallions and own and drive their own taxicabs. See 2014 TAXICAB FACT BOOK, NEW YORK CITY TAXI & LIMOUSINE COMMISSION at 1, 8 (2014), available at [http://www.nyc.gov/html/tlc/downloads/pdf/2014\\_taxicab\\_fact\\_book.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/2014_taxicab_fact_book.pdf); Design Trust

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.<sup>213</sup> Self-employed taxi drivers, for whom there is no commercial intermediary between them and the passenger public, would presumably receive Form 1099-K from their bank or other credit card settlement entity for payments received by credit card,<sup>214</sup> but not for cash transactions or cash tips.<sup>215</sup> Drivers who work for taxicab companies may be classified as independent contractors or employees.<sup>216</sup> Employees would presumably receive a Form W-2 from the employer setting forth their income and withholding amounts but would have to report tips to the employer per I.R.C. § 6053(a).<sup>217</sup>

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.<sup>218</sup> At present, the apparent trend among taxicab companies is to consider themselves aggregate payees for Form 1099-K reporting purposes. 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.<sup>219</sup> Attorney advisers to taxicab companies seem to be taking the position that all amounts must be reported, no matter how small.<sup>220</sup> Thus, the ridesharing businesses and the taxicab companies appear

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for Public Space and New York City Taxi & Limousine Commission, TAXI 07: ROADS FORWARD at 40-51 (2007) available at [http://www.nyc.gov/html/tlc/downloads/pdf/taxi\\_book.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/taxi_book.pdf). 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.

<sup>213</sup> INTERNAL REVENUE SERVICE CASH INTENSIVE BUSINESSES AUDIT TECHNIQUES GUIDE (revised April 2010), Chapter 17, at 3 [hereinafter IRS AUDIT GUIDE] available at [http://www.irs.gov/pub/irs-utl/cashchapter17\\_248965.pdf](http://www.irs.gov/pub/irs-utl/cashchapter17_248965.pdf).

<sup>214</sup> Pursuant to I.R.C. § 6050W.

<sup>215</sup> <http://www.stl-taxi.com/documents/1099-k.pdf>

<sup>216</sup> IRS AUDIT GUIDE, *supra* note 213, at 3.

<sup>217</sup> *Id.* at 7; *see also* I.R.C. § 6053(a).

<sup>218</sup> I.R.C. § 6041.

<sup>219</sup> Treas. Reg. § 1.6050W-1(d)(1), (e), Example 22.

<sup>220</sup> Chip Watkins, *Form 1099 Update*, available at [http://octap.net/form\\_1099\\_update.pdf](http://octap.net/form_1099_update.pdf); Sarah E. Mooney, *Update on the New Form 1099-K Rules: Q & A*, DISPATCH (Taxicab, Limousine, and Paratransit Association) (Feb. 2011) available at <http://www.stl-taxi.com/documents/1099-k.pdf>; *2011 Year in Review*, TRANSPORTATION LEADER (2012), [http://www.tlpa.org/news/2011\\_Year\\_in\\_Review.pdf](http://www.tlpa.org/news/2011_Year_in_Review.pdf) (advising that “One credit card transaction is sufficient to trigger the Form 1099-K reporting obligation).

to have pursued different interpretations of I.R.C. § 6050W, with many of the ridesharing businesses tending to adopt the less onerous reporting stance.

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

Despite the general expectation that third party reporting improves tax compliance, the precise compliance impacts of some sharing businesses' decision to embrace the Form 1099-K \$20,000/200 rides reporting threshold (and 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.<sup>221</sup>

On the other hand, the study of Form 1099-K reporting is in its infancy and studies of the impact of Form 1099-K on the sharing economy are nonexistent. 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.<sup>222</sup> 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.<sup>223</sup> That same study suggested, however, that Form 1099-K might incentivize taxpayers who had not previously filed Schedule C to file that form.<sup>224</sup> Yet another

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<sup>221</sup> See Morse et al., *supra* note 17; Alm et al., *supra* note 178; Brian Erard & Chih-Chih Ho, *Explaining the U.S. Income Tax Compliance Continuum*, 1(2) EJOURNAL OF TAX RESEARCH 93 (2003), <http://www.austlii.edu.au/au/journals/eJITaxR/2003/5.html> (finding, based on micro-simulation database of encompassing both nonfilers and underreporters, that compliance across 34 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.).

<sup>222</sup> Lederman, *supra* note 177 (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).

<sup>223</sup> Slemrod et al., *supra* note 17 (Estimating that 1099-K introduction led to 24% increase in reported receipts for those firms reporting receipts exactly equal the 1099-K-reported amount. However, this group of firms also increased reported expenses 13%, which offsets the impact of Form 1099-K on total tax payments, even in groups most strongly affected by Form 1099-K).

<sup>224</sup> *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 previous year).

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.<sup>225</sup> 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.<sup>226</sup>

These studies indicate that the effects of Form 1099-K on tax compliance are likely to be complex. In general, it seems likely that higher 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 would warrant further study.

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 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, accords low-earning/low-frequency drivers the (illegal) opportunity to not declare income receipts on their tax return.

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<sup>225</sup> Morse, *supra* note 17 (reporting that most interviewees regarded credit card receipts as taxable and reportable revenue).

<sup>226</sup> Increased reporting among drivers could be the result of either (1) knowing 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.

This can effectively lower the tax costs to marginal drivers and may incentivize such drivers to engage in ridesharing driving when they otherwise might have been deterred by the tax compliance and other tax costs. Regardless of the long-term stability of this information reporting position, it may have the regulatory advantage of helping draw new drivers to invest in a ridesharing career at the outset in the hope 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.<sup>227</sup> Our point, rather, is that embracing less onerous information reporting thresholds renders these opportunities available.

### *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.<sup>228</sup> 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.<sup>229</sup> If the individual is an independent contractor, then the individual herself is responsible for employment taxes, and the business does not have a

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<sup>227</sup> See *supra* Part III.A.2.c.

<sup>228</sup> See *supra* text accompanying notes 145-146.

<sup>229</sup> I.R.C. §§ 3401, 3402, 3501 et seq.; see generally IRS Publication 15, "Employer's Tax Guide," <http://www.irs.gov/publications/p15/ar02.html>.

withholding obligation.<sup>230</sup> 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, 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.

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 buyer and seller of services through technology platforms may be used to buttress independent contractor classification under the IRS 20-factor test.<sup>231</sup> Such arguments may not be as easily available to traditional industries such as taxicabs.

Yet, as discussed, the of question whether independent contractor status is the correct classification is an open one. As noted in Part II.C, the line between employees and independent contractors is a long established, though heavily fact-specific and frequently debated, boundary.<sup>232</sup> 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.<sup>233</sup> In addition, tax law 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.<sup>234</sup> Although Uber currently treats its drivers as independent contractors,<sup>235</sup> commentators have observed that the FedEx litigation may constrain ridesharing services’ ability to so classify their drivers.<sup>236</sup> Of course, the independent contractor versus

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<sup>230</sup> See sources *supra* note 229; see also I.R.C. § 6041.

<sup>231</sup> See *supra* note 146. The sharing businesses may be drawing an implicit or explicit parallel to Amazon and PayPal.

<sup>232</sup> See *supra* note II.C.1.

<sup>233</sup> Farrell, *supra* note 60.

<sup>234</sup> See, e.g., *Alexander v. FedEx Ground Packaging System, Inc.*, 765 F.3d 984 (2014); Ben Rooney, *The FedEx driver who sued and won*, CNN (Nov. 21, 2014), <http://money.cnn.com/2014/11/20/news/companies/fedex-driver-lawsuit/index.html>.

<sup>235</sup> See, e.g., *supra* footnote 143.

<sup>236</sup> Patrick Hoge, *Independent contractor ruling on FedEx could affect “Sharing Economy”*, SAN FRAN. BUS. TIMES (Aug. 28, 2014),

employee determination will have to be made separately for each discrete 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 independent contractors.

Even if some sharing earners are subsequently adjudged to be employees, however, the initial embrace of independent contractor classification holds benefits for sharing businesses. First, it puts the burden of litigating the issue on the shoulders of workers who claim employee classification, and whose interests are dispersed. Second, even if sharing earners are eventually found to be employees, independent contractor classification lowers 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 due to their current economic arrangements with the sharing businesses, the sharing businesses may be able to restructure or tweak 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.<sup>237</sup> 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.<sup>238</sup>

The taking of 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:

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<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*, (Aug. 29, 2014), <http://www.smallschena.com/blog/2014/8/29/ninth-circuit-rules-fedex-misclassified-workers>.

<sup>237</sup> See *supra* Part II.C.2.

<sup>238</sup> See, e.g., San Francisco Business and Tax Regulations, Art. 7, 1.504-1.

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 who have to incur such costs (i.e., the hotel industry). 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 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, it has given Airbnb and its hosts and guests a material short-term advantage. 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.<sup>239</sup> However, such agreements have been piecemeal and Airbnb is still not collecting occupancy taxes in the majority of cities. Furthermore, this regulatory strategy has yielded the advantage that most localities have not been able to obtain payment of back taxes from Airbnb.<sup>240</sup>

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 captures the choices of Airbnb with

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<sup>239</sup> AIRBNB, <https://www.airbnb.com/help/article/653>; see also *supra* Part II.C.2 and sources cited *supra* note 160.

<sup>240</sup> Airbnb recently agreed to pay back taxes to San Francisco. See Joyce E. Cutler, *Airbnb Pays San Francisco Back Taxes While Opponents Plan Tighter Regulations* (BNA Snapshot, Feb. 20, 2015); Matier & Ross, *supra* note 160; Emily Badger, *Airbnb Is About To Start Collecting Hotel Taxes In More Major Cities, Including Washington*, WASH. POST (Jan. 21, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/29/airbnb-is-about-to-start-collecting-hotel-taxes-in-more-major-cities-including-washington/> (in negotiations with localities, Airbnb “has not put back taxes on the table anywhere”); Carolyn Said, *Airbnb to collect SF hotel tax*, SFGATE (Sept. 17, 2014 at 12:00pm), <http://blog.sfgate.com/techchron/2014/09/17/airbnb-to-collect-sf-hotel-tax-oct-1/>.

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.<sup>241</sup> While not a tax in the traditional 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. Thus, it is appropriate to include this discussion in our analysis of tax opportunism.<sup>242</sup>

The taxicab industry is highly regulated by local government agencies, in particular, state and local transportation authorities.<sup>243</sup> 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.<sup>244</sup> The industry may also be required to comply with certain

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<sup>241</sup> 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](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/>.

<sup>242</sup> The dynamic between ride sharing and taxis raises a wide range of other regulatory questions beyond the scope of this article. See generally Lisa Rayle, et al, *App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco*, University of California Transportation Center UCTC-FR-2014-08 (August 2014), <http://www.uctc.net/research/papers/UCTC-FR-2014-08.pdf>.

<sup>243</sup> See generally Bruce Schaller, *Entry Controls in Taxi Regulation: Implications of US and Canadian Experience for Taxi Regulation and Deregulation*, 14 TRANSPORT POL'Y 490-506 (2007).

<sup>244</sup> 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 243, at 3-5. In reality, of course, the actual regulatory architecture is

insurance and safety regulations, rate schedules, and paperwork requirements.<sup>245</sup>

The New York City taxicab medallion system is an example of a regulation system that generates revenue.<sup>246</sup> NYC taxicabs are regulated by the New York Taxi & Limousine Commission (TLC), a city agency.<sup>247</sup> TLC is responsible for fare and rate setting and for establishing vehicle safety and other rules that owners and drivers must follow.<sup>248</sup> New York City currently has both yellow (medallion) taxicabs and boro taxicabs.<sup>249</sup> This discussion focuses on regulation of the yellow taxicabs, which predominantly service Manhattan and NY airport pickups.<sup>250</sup> The yellow taxicabs are regulated under a medallion system, which dates back to 1937.<sup>251</sup> The medallion is essentially a license to operate the vehicle, and

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”).

<sup>245</sup> See generally *id.*; see also 2014 TAXICAB FACT BOOK, *supra* note 212.

<sup>246</sup> Cf. Schaller, *supra* note 243, at 6 (classifying the New York City taxicab industry as a limited-entry system that regulates on the individual level).

<sup>247</sup> See generally NYC TAX & LIMOUSINE COMMISSION, <http://www.nyc.gov/html/tlc/html/home/home.shtml>; 2014 TAXICAB FACT BOOK, *supra* note 212; see also TAXI 07: ROADS FORWARD, *supra* note 212 (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 NYC TAX & LIMOUSINE COMMISSION, <http://www.nyc.gov/html/tlc/html/industry/industry.shtml>.

<sup>248</sup> 2014 TAXICAB FACT BOOK, *supra* note 212, at 1; TAXI 07: ROADS FORWARD, *supra* note 212, 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. *Id.*; see also NYC TAX & LIMOUSINE COMMISSION, <http://www.nyc.gov/html/tlc/html/industry/industry.shtml>.

<sup>249</sup> 2014 TAXICAB FACT BOOK, *supra* note 212, at 1-2; see also NYC TAX & LIMOUSINE COMMISSION, [http://www.nyc.gov/html/tlc/html/passenger/shl\\_passenger.shtml](http://www.nyc.gov/html/tlc/html/passenger/shl_passenger.shtml) (describing boro taxis).

<sup>250</sup> 2014 TAXICAB FACT BOOK, *supra* note 212, 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).

<sup>251</sup> *Id.* at 12; see also Lawrence van Gelder, *Medallion System Stems 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. NYC TAX & LIMOUSINE COMMISSION, <http://www.nyc.gov/html/tlc/html/industry/shl.shtml>. 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 TLC Rules § 54-04; see also NY CITY CAB.COM, <http://nycitycab.com/HackLicense.aspx>. Taxicabs are also subject to numerous other TLC rules and regulations. See generally NYC TAX & LIMOUSINE COMMISSION, <http://www.nyc.gov/html/tlc/html/rules/rules.shtml> (TLC rules). For example, yellow cabs must undergo a “hack up” conversion (installation of roof light, meter, medallion, security

the medallion system was enacted to curb cab numbers and bolster driver incomes.<sup>252</sup> There are two types of medallions – corporate (or “mini-fleet”) medallions and individual medallions.<sup>253</sup> Individual medallion holders may not hold more than one medallion, and individual owners are subject to certain shift minimum and driving requirements.<sup>254</sup> Corporate medallions may be owned by non-driver (nonfleet) owners and fleet owners.<sup>255</sup> These tend to be consolidated in relatively few hands.<sup>256</sup> Taxi Licensing Commission rules mandate that corporate medallion vehicles must be operated for two shifts a day.<sup>257</sup>

Medallions are originally auctioned off by the city, and the city raises revenues from medallion sales.<sup>258</sup> Medallions can also be sold and transferred between private parties, and transfers are subject to a tax on 5% of the purchase price.<sup>259</sup> These revenues are paid into the city treasury and credited to the general fund.<sup>260</sup> New York City also imposes a 50-cent tax on taxicab rides starting in New York City and ending in the city or in

cameras, partitions, etc.) in order to be driven as a taxicab. *Medallion Licensing Information Guide*, NYC Taxi and Limousine Commission, [http://www.nyc.gov/html/tlc/downloads/pdf/medallion\\_licensing\\_guide.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/medallion_licensing_guide.pdf), at 8-9 (describing hack-up process); TAXI 07: ROADS FORWARD, *supra* note 212, at 22-27 (describing the hack-up process).

<sup>252</sup> 2014 TAXICAB FACT BOOK, *supra* note 212, at 12.

<sup>253</sup> *Id.*

<sup>254</sup> See TLC Rules § 58-20, available at [http://www.nyc.gov/html/tlc/downloads/pdf/rule\\_book\\_current\\_chapter\\_58.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/rule_book_current_chapter_58.pdf); see also TLC Notice of Rule promulgation, available at [http://www.nyc.gov/html/tlc/downloads/pdf/owner\\_must\\_drive\\_version\\_10.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/owner_must_drive_version_10.pdf); 2014 TAXICAB FACT BOOK, *supra* note 212, at 12; *Medallion Sales Information*, New York City Taxi & Limousine Commission, available at [http://www.nyc.gov/html/tlc/medallion/html/background/types\\_owner.shtml](http://www.nyc.gov/html/tlc/medallion/html/background/types_owner.shtml).

<sup>255</sup> 2014 TAXICAB FACT BOOK, *supra* note 212, at 12; see also *Medallion Sales Information*, *supra* note 254. Non-fleet corporate medallion owners lease out their corporate medallions through TLC-licensed agents. *Id.*

<sup>256</sup> 2014 TAXICAB FACT BOOK, *supra* note 212, at 12.

<sup>257</sup> TLC Rules § 58-20; 2014 TAXICAB FACT BOOK, *supra* note 212, at 8; *Medallion Sales Information*, *supra* note 254.

<sup>258</sup> See TLC Medallion Auction Homepage, [http://www.nyc.gov/html/tlc/html/industry/medallion\\_auction.shtml](http://www.nyc.gov/html/tlc/html/industry/medallion_auction.shtml); NYC Office of Management and Budget FY 2015-18 Fiscal Plan & Fiscal Plan Update, at [http://www.nyc.gov/html/omb/downloads/pdf/fp11\\_14.pdf](http://www.nyc.gov/html/omb/downloads/pdf/fp11_14.pdf); and [http://www.nyc.gov/html/omb/downloads/pdf/fpu11\\_14.pdf](http://www.nyc.gov/html/omb/downloads/pdf/fpu11_14.pdf) (forecasting revenues from medallion sales); see also Kristen Meriwether, *Hailing Higher Tax Revenue, City Lowers Expected Taxi Haul*, GOTHAM GAZETTE (Nov. 26, 2014), at <http://www.gothamgazette.com/index.php/government/5449-hailing-higher-tax-revenue-city-lowers-expected-taxi-haul>.

<sup>259</sup> NYC Administrative Code Tit. 11, ch. 14; §§ 11-1401–11-1417; see also NY Tax Law § 1201(j); TLC Rules § 58-43(b)(3).

<sup>260</sup> NYC Administrative Code Tit. 11, ch. 14; § 11-1417.

certain counties.<sup>261</sup> Uber cars do not charge this tax.<sup>262</sup> Like New York City, there are other local taxicab licensing systems that generate revenue through various fees and taxes.<sup>263</sup>

The failure of ridesharing services to embrace and operate under medallion licensing systems has been subject to much critique.<sup>264</sup> 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. 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.<sup>265</sup> Furthermore, tax avoidance does not appear to be the motivation behind the ridesharing industry 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.

Regardless of whether the position taken by ridesharing businesses with respect to medallions 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.

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<sup>261</sup> NY Tax Law §§ 1280-1290; see also <http://www.tax.ny.gov/bus/mctmt/taxi.htm>.

<sup>262</sup> See Editorial, *Tax Uber So Car Service Supports the MTA*, NY Daily News, at <http://www.nydailynews.com/opinion/editorial-tax-uber-article-1.2081971>; Editorial, *What Uber Owes Subways*, DAILY NEWS (FEB. 24, 2015), <http://www.nydailynews.com/opinion/editorial-uber-owes-subways-article-1.2126649>.

<sup>263</sup> See, e.g., Santa Monica Municipal Code, § 6.49.040(i) (imposing franchise and permitting fees on taxicabs); San Francisco Code § 1116 (imposing transfer fee); see generally CITY OF SAN DIEGO OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT, TAXICAB PERMITTING POLICY AND REVENUE GENERATION (Feb. 10, 2012) (discussing San Francisco, New York, and Chicago as examples of cities with revenue raising taxicab regulatory systems).

<sup>264</sup> See sources cited *supra* note 241; see also Gregory Wallace, *Uber CEO charged with operating illegal taxi service in South Korea*, CNN MONEY (Dec. 24, 2014 at 5:17pm), <http://money.cnn.com/2014/12/24/technology/uber-south-korea/>.

<sup>265</sup> In January 2015, Massachusetts enacted regulations governing businesses such as Lyft and Uber, designated a "Transportation Network Company" in the regulations. See 540 CMR 2.05; see also 1278 Mass. Regis. 101 (Jan. 16, 2015). In New Orleans, the City Council is considering a proposal to allow ridesharing app-based transportation using personal vehicles. See Robert McClendon, *Uber legalizations ordinances proposed by New Orleans City Council members*, TIMES-PICAYUNE (Jan. 23, 2015 at 7:22pm), [http://www.nola.com/politics/index.ssf/2015/01/uber-legalization\\_ordinance\\_pr.html](http://www.nola.com/politics/index.ssf/2015/01/uber-legalization_ordinance_pr.html).

#### 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. 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 (taking advantage of an existing gap in the law available due to inherent features of the new sharing model).<sup>266</sup> 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 TaskRabbit. 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 many businesses as an onerous imposition.<sup>267</sup> In the context of sharing businesses like Lyft and Sidecar, 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 personal capacity—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

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<sup>266</sup> See *supra* note 170 and accompanying text.

<sup>267</sup> See, e.g., Amy S. Elliott, *Credit Card Reporting Rules Could Burden Chain Firms*, 128 TAX NOTES 1028 (Sept. 6, 2010); Amy S. Elliott, *Final Credit Card Reporting Regs Disappoint Practitioners*, 28 TAX NOTES 820 (Aug. 23, 2010).

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 barrier to tax compliance in the sharing economy is the “microbusiness” nature of many sharing economy earners.<sup>268</sup> 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 less than 30 hours a 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.<sup>269</sup> Also of this 52%, 6 out of 10 started driving for Uber within the last three months.<sup>270</sup> There are reasons to believe that many, possibly even the majority, of drivers for other ridesharing services 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 reporting business income and expenses for the first time, 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

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<sup>268</sup> 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. GAO, *Tax Gap: Sources of Noncompliance and Strategies to Reduce It* (GAO-12-651T) at 4-5 (April, 2012). This 40% was due to the estimated underreporting of business income and corresponding self-employment tax by individuals. *Id.*

<sup>269</sup> See Uber Study, *supra* note 97.

<sup>270</sup> *Id.*

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 microbusinesses. 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 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 the ridesharing businesses mean that any driver earning amounts or driving trips short of the 200 trips/\$20,000 threshold will not be subject to reporting.<sup>271</sup> 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 IRS effort to audit 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 EITC compliance.<sup>272</sup> 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.<sup>273</sup> 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 to the extent the new modes of production and consumption erode the traditional tax base, both greater policy attention and new compliance solutions may be required.

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<sup>271</sup> See *infra* Part III.A.

<sup>272</sup> Anne L. Alstott, *The Earned Income a Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995); Leigh Osofsky, *Concentrated Enforcement*, 16 FLA. TAX REV. 325 (2014).

<sup>273</sup> IRS AUDIT GUIDE, *supra* note 213 (discussing taxicab industry audit issues).

### 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, skills, 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 likely to be substantially more very short term rental of real property that might be used for personal purposes the rest of the time.<sup>274</sup>

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.<sup>275</sup> 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 are playing in the industry.<sup>276</sup>

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<sup>274</sup> See Airbnb Study, *supra* note 119.

<sup>275</sup> See, e.g., James Alm & Jay A. Soled, *The Internal Revenue Code and Automobiles: A Study of Taxpayer Noncompliance*, 14 FL. TAX REV. 419 (2013).

<sup>276</sup> 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, Brian Erard & Jonathan Feinstein, *Tax Compliance*, 36 J. OF ECON. LIT. 818, 846-47 (1998)

This is a question that needs to be investigated – for many sharing earners this 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 apply to paid preparers as well.

In addition to traditional paid preparers, other sources of advice for sharing earners include websites such as 1099.is and zen99.com, as well as various forums and discussion threads that touch on how to comply with the tax laws. More investigation is needed to determine the accuracy of these sources of advice and their impacts on taxpayer reporting accuracy.<sup>277</sup>

#### 5. Attitudes towards tax compliance

A final tax compliance issue that ought to be considered is the effects 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.<sup>278</sup> 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 effectiveness, taxpayer education and miseducation, and unfamiliarity with independent contractor tax filing. The confluence of these two features means that sharing is likely to present unique and potentially serious tax

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(reviewing studies of the influence of tax practitioners on compliance); Morse, *supra* note 17 at 42-43.

<sup>277</sup> See Oei and Ring, *Advising the Sharing Economy* (file on copy with authors).

<sup>278</sup> See e.g., Dean Baker, *Don't buy the 'sharing economy' hype: Airbnb and Uber are facilitating rip-offs*, GUARDIAN (May 27, 2014), <http://www.theguardian.com/commentisfree/2014/may/27/airbnb-uber-taxes-regulation>; Pender, *supra* note 6.

compliance and enforcement complications.

What measures might a tax authority take in proactively handle these challenges? In this Part, we explore strategies that a taxing authority might use to manage the unique issues raised by sharing. We divide these strategies into three broad groups: In Part IV.A, we consider concrete strategies that might be effective in responding to the problems raised by sharing in federal income and employment tax compliance. In Part IV.B, we discuss longer-term strategies and approaches that might be employed by federal, state, and local taxing authorities in confronting sharing's challenges. In Part IV.C we discuss the broader takeaways that can be gleaned from the rise of sharing that might be applicable to contexts beyond sharing.

It should be noted that we do not address the broader theoretical question of whether taxes should be enforced. Some might argue that taxing authorities should deliberately underenforce the tax obligations of sharing economy earners, in order to facilitate the development of a new industry.<sup>279</sup> 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.<sup>280</sup> We do not take a position on those questions. Rather, we simply address the threshold issue of whether sharing is likely to raise unique tax compliance issues and, if so, what can be done in response. We also do not address the question of the optimal level of tax enforcement, and what mix of policy choices might lead to optimal enforcement.<sup>281</sup> Again, our narrower aim is simply to set forth the types of solutions and approaches that are likely to be effective in increasing compliance.

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<sup>279</sup> See, e.g., Leigh Osofsky, *The Case for Categorical Nonenforcement* (forthcoming, TAX L. REV. 2015), available at <http://ssrn.com/abstract=2513349>.

<sup>280</sup> See, e.g., Shu-Yi Oei, *Who Wins When Uncle Sam Loses? Social Insurance and the Forgiveness of Tax Debts*, 46 U.C. DAVIS L. REV. 421 (2012).

<sup>281</sup> See, e.g., 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. OF 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”); James Alm, *What is an “Optimal” Tax System?*, 49 NAT'L TAX J. 117, 124 (1996) (“[O]ptimal enforcement should not eliminate all tax evasion ...”); Frank Cowell, *The Economic Analysis of Tax Evasion*, 37 BULL. OF ECON. RES. 163, 183 (1985) (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”); 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).

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

As this Article has argued, sharing is likely to raise tax compliance and enforcement challenges, particularly with respect to federal income and employment tax reporting. There are some obvious strategies that may be pursued in strengthening tax compliance.

#### 1. Clarify Worker Classification

Probably the most obvious step that ought to be undertaken at the outset is to clarify whether sharing workers should be classified as independent contractors or employees. As discussed in Part II.C.1 and III.B.1, the sharing businesses have embraced independent contractor classification, but the issue is still before the courts. The question of classification needs to be decided as a threshold 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.<sup>282</sup>

#### 2. Lowering Information Reporting Thresholds

Assuming that the independent contractor classification of sharing earners is accurate, then other measures can be taken. Most importantly, to the extent that the information reporting positions taken by some sharing businesses are leading to non-reporting of sums below the threshold earned in the sharing economy, 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.<sup>283</sup> 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 impacts of more complete Form 1099-K reporting is somewhat open to question,

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<sup>282</sup> See *supra* Part III.B.1.

<sup>283</sup> See, e.g., Jeffrey Kahn and 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 “the 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”; 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.”).

given the newness of both the Form 1099-K and of the sharing economy.<sup>284</sup> However, there is reason to think that clarifying that sharing businesses are not “third party settlement organizations” 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 lowered information reporting thresholds may help with information corroboration, this only provides information about 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 is reason to think that excessive expense taking might detract from tax collection in this sector.<sup>285</sup> In order to ensure accuracy of expense taking, other measures might need to be adopted.

One group of such measures that might prove effective is the enactment of safe harbors or advance rulings regarding what magnitude of expense taking is reasonable. We already see this type of approach, for example, in the use of the standard mileage method for vehicles.<sup>286</sup> While standard mileage still requires computation of miles driven, the relatively convenient cents-per-miles 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. Rev. Proc. 2013-13 offers a similar simplified method for calculating the home office deduction.<sup>287</sup>

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 over a less favorable one in situations where there is arguably a case to be made that either regime might apply. They do not involve deliberate structuring of the transactions and 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 economic substance, step transaction, substance over

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<sup>284</sup> See *supra* Part III.A.2.d.

<sup>285</sup> See, e.g., Slemrod et al., *supra* note 17, at note 2.

<sup>286</sup> See *supra* Part I.A.2 (describing standard mileage method).

<sup>287</sup> Rev. Proc. 2013-13, 2013-1 C.B. 478.

form, and sham transaction doctrines – are unlikely to prove effective in addressing the challenges raised by sharing.

#### 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.<sup>288</sup> 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.<sup>289</sup> 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 criminal convictions and civil injunctions in the weeks preceding the April income tax filing deadline.<sup>290</sup>

#### 5. Taxpayer Education

Finally, another strategy to enhance compliance is taxpayer education, particular 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 (which has been raised for populations such as low-

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<sup>288</sup> Leigh Osofsky, *Concentrated Enforcement*, 16 FLA. TAX REV. 325 (2014); Leigh Osofsky, *Concentrated Enforcement in a Best-Case Tax Enforcement Regime*, 2014 IRS RESEARCH BULLETIN, available at <http://ssrn.com/abstract=2462147>.

<sup>289</sup> *Id.*

<sup>290</sup> Joshua D. Blank & Daniel Z. Levin, *When is Tax Enforcement Publicized*, 30 VA. TAX REV. 1 (2010) (studying IRS publicity releases and concluding that the disproportionately large number of releases in the weeks preceding April 15 is statistically significant).

income taxpayers)<sup>291</sup> 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.

### *B. Medium- to Long-term Approaches*

Part A discussed some relatively obvious strategies that might be employed to facilitate compliance in the sharing sector. These are strategies that are attainable and are compatible with the structures of tax law and procedure as it currently exists. In addition to those relatively easy strategies and fixes, we suggest that 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 mile driven on each trip. This tracking of mileage may be used by the IRS in ensuring compliance and enforcement.<sup>292</sup>

The idea that technology may be better harnessed for the interests of 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 in general.<sup>293</sup> 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.<sup>294</sup> In

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<sup>291</sup> See Taxpayer Advocate Service, *Low Income Taxpayer Clinics Program Report* (December 2014), available at <http://www.irs.gov/pub/irs-pdf/p5066.pdf> (citing U.S. Census, Population Characteristics, Computer and Internet Use in the United States, 5 (May 2013)).

<sup>292</sup> 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.

<sup>293</sup> Alm & Jay A., Soled, *supra* note 275, at 456-457.

<sup>294</sup> Michael Hatfield, *Taxation and Surveillance: An Agenda* (Jan. 13, 2015), available

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 of technological capabilities must almost by definition mean 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 (in ridesharing), number of days a property is rented, 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.

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.<sup>295</sup> Such arrangements effectively capitalize on the centralized nature of the 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, Lyft, and Sidecar all operate on essentially the same model using similar technologies, and there are only a few major ridesharing companies.<sup>296</sup> The same is true for the home sharing sector and

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at <http://ssrn.com/abstract=2539835>.

<sup>295</sup> AIRBNB, <https://www.airbnb.com/help/article/653>.

<sup>296</sup> See *supra* Part I.A.

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, all Uber drivers are classified the same way by Uber.<sup>297</sup> Many own their own cars. Many home sharers own their homes and rent them on an excess capacity business. Thus, there is less heterogeneity of economic arrangements for a taxing authority to accommodate, as compared perhaps with traditional sectors, such as the taxicab industry.

In sum, the relative uniformity of economic relationships in the sharing sector may make it easier for taxing 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 tryzen99.com are now playing an important role in advising sharing earners on how to report income and expenses.<sup>298</sup> Uber, for example, has recently 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.<sup>299</sup> Furthermore, many sharing earners are technologically savvy enough to go online to discuss tax issues with peers and tax advising professionals on various discussion threads on websites such as intuit.com, reddit.com, and uberpeople.net.<sup>300</sup> Such online forums may generate

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<sup>297</sup> Whether the classification is correct is a different question. *See supra* Part III.B.1.

<sup>298</sup> 1099.IS, <http://1099.is> (describing itself as “a crowd-sourced repository of tax and accounting information for self-employed workers and folks getting side income”); ZEN99, <https://www.tryzen99.com> (“Zen99 provides the support services that contractors need in the growing 1099 economy”).

<sup>299</sup> INTUIT, <http://www.intuit.com/company/press-room/press-releases/2015/Intuit-Uber-partner-QBO-Self-Employed/>. In January 2015, H&R Block, a nationwide tax preparation service, announced it was offering tax preparation discounts for Uber drivers. H&R BLOCK, <http://newsroom.hrblock.com/hr-block-offers-tax-preparation-discount-drivers-partner-uber/>.

<sup>300</sup> *See, e.g.*, INTUIT ANSWERXCHANGE, <https://tlic.intuit.com/questions/2640671-today-i-rec-d-a-1099-k-from-uber-they-reported-to-the-irs-that-i-earned-approx-8k-more->

communities of compliance or non-compliance, depending on the prevailing norms in such forums.

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.

### C. Beyond Sharing

Aside from specific prescriptions and recommendations, the sharing economy raises a number of broader questions that ought to be flagged.

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

First, commentators have pointed out that sharing reflects a broad change in the ways in which labor markets are structured and operate.<sup>301</sup> 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.<sup>302</sup> These changes have been driven, in part, by the changing role of 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 obviate the need for traditional employment arrangements.

If sharing reflects a broader shift in market and industry structures and labor arrangements, we must question our ability to tax these new market

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[than-i-actually-rec-d-in-my-direct-deposit-should-i-contact-the-irs.](#)

<sup>301</sup> See, e.g., Weber, *supra* note 139; Weber, *supra* note 152; Anne-Marie Slaughter, *How the Future of Work May Make Many of Us Happier*, WORLD POST (Jan. 21, 2015, at 9:52am), [http://www.huffingtonpost.com/annemarie-slaughter/future-of-work-happier\\_b\\_6453594.html](http://www.huffingtonpost.com/annemarie-slaughter/future-of-work-happier_b_6453594.html).

<sup>302</sup> See, e.g., Weber, *supra* note 139; see also Lily Kahng & Mary Louise Fellows, *Costly Mistakes: Undertaxed Business Owners and Overtaxed Workers*, 81 GEO. WASH. L. REV. 329 (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 increasingly use independent contractors and temporary workers and business investment in workers is declining.)

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? 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 that might be brought to bear in taxing these new economic arrangements? These developments also 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?<sup>303</sup>

In these senses, 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 the sharing example is the potential for tax rules adopted to facilitate tax administration and enforcement to be subsequently used in unexpected ways. As discussed, one of the biggest challenges to the effective taxation of sharing has been the information reporting positions taken by sharing businesses that have adopted the high reporting thresholds. These thresholds, enacted with intermediaries like Amazon and PayPal in mind, have now been embraced by the new sharing businesses as applicable to themselves. Relatedly, the rule providing that amounts subject to Form 1099-K reporting (irrespective of meeting the threshold) 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 perils of evolving and shifting business models, changes in technology, and the strategic use of favorable legislation not necessarily intended to apply to new economic arrangements. 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.

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<sup>303</sup> See, e.g., Zervas et al, *supra* note 5.

## 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, 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 be taken. 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 likely 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 incremental changes such as lowering and clarifying information reporting thresholds and adoption of easy-to-apply safe harbors may go a long way toward

managing this new wave of economic relationships.