DAVID Y. IGE
GOVERNOR

JOSH GREEN M.D.
LIEUTENANT GOVERNOR

LINDA CHU TAKAYAMA
DIRECTOR

DAMIEN A. ELEFANTE
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF TAXATION
830 PUNCHBOWL STREET, ROOM 221
HONOLULU, HAWAII 96813
http://tax.hawaii.gov/
Phone: (808) 587-1540 / Fax: (808) 587-1560
Email: Tax.Directors.Office@hawaii.gov

To: The Honorable Roy M. Takumi, Chair
and Members of the House Committee on Consumer Protection & Commerce

The Honorable Chris Lee, Chair
and Members of the House Committee on Judiciary

Date: Wednesday, March 20, 2019
Time: 2:00 P.M.
Place: Conference Room 329, State Capitol

From: Linda Chu Takayama, Director
Department of Taxation

Re: S.B. 1292, S.D. 2, H.D. 1, Relating to Transient Accommodations

The Department of Taxation (Department) supports S.B. 1292, S.D. 2, H.D. 1, and offers the following comments regarding the tax provisions for the Committee's consideration.

The Department supports H.D. 1 because it believes the bill will enhance TAT and GET enforcement by requiring these taxes to be paid by one entity rather than individually by each operator and plan manager. The Department also believes that the proposed civil fines for engaging in business without registering for a transient accommodations tax (TAT) license will support the Department's enforcement efforts.

The following is a summary of key tax provisions of S.B. 1292, S.D. 2, H.D. 1, which are each effective upon approval:

Definitions and Fines

- Defines "booking service" and "hosting platform";
- Repeals the misdemeanor for operating a transient accommodation without a TAT license;
- Imposes civil fines for operating a transient accommodation without a TAT license; and
- Clarifies that posting an advertisement for the furnishing of a transient accommodation is engaging in business; and
- Adds a new subsection to section 237D-4.5, Hawaii Revised Statutes (HRS), which imposes a civil penalty for entering into an agreement to furnish transient accommodations at noncommissioned negotiated contract rates prior to registering for a TAT license.

Mandatory Duties as Tax Collection Agent

- A hosting platform that collects fees for booking services must register as a tax collection agent on behalf of its operators and plan managers;
- Each tax collection agent will be required to report, collect, and pay general excise tax (GET) and TAT on behalf of its operators and plan managers for transient accommodations booked directly through the tax collection agent;
- Tax collection agents shall be personally liable for the taxes imposed by chapters 237 and 237D, HRS;
- The tax collection agent's operators and plan managers will be deemed to be licensed under chapters 237 and 237D, HRS;
- The tax collection agent must provide the following information for each operator and plan manager in a cover sheet with each annual return filed with the Department: name, address, social security or federal employer identification number; and income apportioned by county; and
- The tax collection agent must notify its operators and plan managers that the reporting and remittance of Hawaii income tax is the responsibility of each operator and plan manager.

Finally, the Department requests that if this bill is moved forward, it be amended so that all parts apply no sooner than January 1, 2020. This will allow the Department sufficient time to make the necessary form and computer system changes.

Thank you for the opportunity to provide comments.

MICHAEL P. VICTORINO
MAYOR

MICHELE CHOUTEAU MCLEAN, AICP
DIRECTOR

JORDAN E. HART
DEPUTY DIRECTOR

DEPARTMENT OF PLANNING
COUNTY OF MAUI
ONE MAIN PLAZA, 2200 MAIN STREET, SUITE 315
WAILUKU, MAUI, HAWAII 96793

March 18, 2019

TESTIMONY OF MICHELE CHOUTEAU MCLEAN, AICP
PLANNING DIRECTOR
COUNTY OF MAUI

BEFORE THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
AND
THE HOUSE COMMITTEE ON JUDICIARY

Wednesday, March 20, 2:00 P.M.
Conference Room 329

SB 1292, SD2, HD1 RELATING TO TRANSIENT ACCOMMODATIONS.

Rep. Roy M. Takumi, Chair
Rep. Linda Ichiyama, Vice Chair
Honorable Members of the House Committee on Consumer Protection & Commerce

Rep. Chris Lee, Chair
Rep. Joy A. San Buenaventura, Vice Chair
Honorable Members of the House Committee on Judiciary

Thank you for this opportunity to testify with **comments** on SB1292, SD2, HD1.

This measure amends the definition of "transient accommodations" to include additional forms of transient accommodations; makes any person who fails to register with DOTAX subject to a citation process and monetary fines; and requires hosting platforms that collect fees for booking services to register as collection agents on behalf of its operators and plan managers for GET and TAT.

The Maui County Planning Department supports the intention of this measure. We would request that the committee restore the language in SB1292 SD2 which assists the counties in TVR enforcement. Specifically, please restore, in the appropriate section, the following language from Section 5 in the SD 2 version:

> (g) A registered tax collection agent shall file periodic returns in accordance with section 237-30 and annual returns in accordance with section 237-33. Each periodic return required under section

237-30 shall be accompanied by an electronic cover sheet, in a form prescribed by the department that includes the following information:

(2) For each transient accommodation rented through the registered tax collection agent or the website or hosting platform designated in the certificate of registration issued pursuant to chapter 237D, for which taxes are being remitted pursuant to this chapter:

(A) The address of the transient accommodation;

(i) When conducting business with an operator or plan manager with respect to a property for lease or rent, transient accommodations brokers, platform hosts, and booking services shall:

(3) Require the operator or plan manager to provide the transient accommodation broker, platform host, and booking service with the county non-conforming use registration number, or other unit-specific transient accommodation registration number as issued by the appropriate county agency, and verification of compliance with state and county land use laws in the form of a written certification, verification, or permit, as applicable, issued by the appropriate county agency; and

(4) Require the operator or plan manager to provide any other information as may be required by rulemaking.

An operator or plan manager shall remove any advertisement published through the transient accommodations broker, including an online advertisement, for a transient accommodation located in the State for which the operator or plan manager fails to comply with paragraph (3), or (4) or for which the operator or plan manager has received written notice from a state or county governmental authority that the property is not in compliance with state law or county ordinance, as applicable. The state or county governmental authority shall provide a copy of the written notice to the transient accommodations broker.

Alternatively, the measure could simply give the counties authority to regulate hosting platforms as a business practice as per the language in HB400 starting on page 20 line 11 through page 21 line 10.

Thank you for this opportunity to offer my comments on SB1292, SD2, HD1.

Sincerely,

Michele Chouteau McLean, AICP
Department of Planning
County of Maui

HAWAI'I TOURISM AUTHORITY

Hawai'i Convention Center
1801 Kalākaua Avenue, Honolulu, Hawai'i 96815
kelepona tel 808 973 2255
kelepa'i fax 808 973 2253
kahua pa'a web hawaiitourismauthority.org

David Y. Ige
Governor

Chris Tatum
President and Chief Executive Officer

Statement of
CHRIS TATUM

Hawai'i Tourism Authority
before the
HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
AND
HOUSE COMMITTEE ON JUDICIARY

Wednesday, March 20, 2019
2:00 PM
State Capitol, Conference Room #329

In consideration of
SENATE BILL NO 1292 SD2 HD1
RELATING TO TRANSIENT ACCOMMODATIONS.

Chair Takumi, Chair Lee, Vice Chair Ichiyama, Vice Chair San Buenaventura and members of the Committee on Consumer Protection & Commerce and members of the Committee on Judiciary, the Hawai'i Tourism Authority (HTA) **supports SB 1292 SD2 HD1**, which will assist in the collection or Transient Accommodations Tax (TAT) and will provide a mechanism to address non-compliant transient accommodations throughout the state.

The Hawai'i Tourism Authority supports efforts at both the state and county level to address the proliferation of illegal, non-compliant, and potentially unsafe transient vacation rentals throughout our community. At its most recent board meeting, the HTA reaffirmed its position towards illegal vacation rentals. The HTA supports the elimination of illegal vacation rentals in order to ensure that Hawai'i remains a highly desirable place for residents by developing and enforcing laws related to illegal vacation rentals in an effort to improve the quality of life for our residents.

Thank you for the opportunity to offer testimony in **support** of this measure.

SB-1292-HD-1
Submitted on: 3/16/2019 2:15:33 PM
Testimony for CPC on 3/20/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Stephanie Donoho	Kohala Coast Resort Association	Support	No

Comments:

Tuesday March 19th, 2019

House Committee on Consumer Protection and Commerce
Rep. Roy M. Takumi, Chair; Rep. Linda Ichiyama, Vice Chair

House Committee on Judiciary
Rep. Chris Lee, Chair, Rep. Joy A. San Buenaventura, Vice Chair

Wednesday March 20th, 2019, 2:00 P.M.
Conference Room 329

TESTIMONY IN OPPOSITION TO SB 1292, SD2, HD1

Dear Chairs, Vice-Chairs, and Members of the Joint Committee:

On behalf of Airbnb, I want to take the opportunity to share our concerns regarding SB1292, SD2, HD1. Airbnb is committed to helping the state solve the long-standing problem of efficiently and accurately collecting taxes from the short-term rental industry in Hawaii. Airbnb collects and remits taxes on behalf of hosts in more than 400 jurisdictions globally, generating more than $1 billion in hotel and tourist taxes to date, helping cities, states, and our host community around the globe. Our experience in tax collection and remittance can greatly benefit Hawaii by streamlining compliance for the state and removing burdens from hard-working Hawaii residents who share their homes. We are committed to being a good partner to the state and support the legislature's effort to allow short-term rental platforms to collect and remit taxes on behalf of their users.

Airbnb's Objections To SB1292, SD2, HD1:

Violation of Federal Laws- The bill requires platforms, as a condition of collecting and remitting taxes, to turn over personally identifiable information for people using the platform. This is deeply problematic for a number of reasons. This disclosure may conflict with two federal laws - the Communications Decency Act (CDA) and the Stored Communications Act (SCA) in a number of ways. The SCA governs "access to stored

communications and records."[1] In order to comply with the SCA, entities like Airbnb that provide users the ability to "send or receive wire or electronic communications" and that store such communications cannot disclose user data without the appropriate process.[2] The SCA requires that governmental entities use an administrative subpoena to obtain basic user information (such as name, address, telephone number, and so forth), and get a court order to obtain any information more detailed than that (such as detailed rental activity).[3] Testimony from Airbnb's legal counsel, David Louie, provides a detailed analysis of the bill's legal flaws.

Data Privacy- Even if this provision did not conflict with federal law, it is wholly unnecessary to ensure accurate tax collection. Indeed, in the dozens of states where Airbnb collects transient occupancy taxes pursuant to voluntary collection agreements (VCAs), Airbnb provides, upon audit, anonymized, transaction-level detail for each booking made through the platform. SB1292, SD2, HD1 requires platforms like Airbnb to turn over personally identifiable information such as a host's name, email, address, social security and federal employer identification number. This is unnecessary and undermines the privacy of hundreds of Hawaii residents. Anonymized data is sufficient for both reporting and audit purposes because occupancy taxes are transaction taxes -- i.e., user personally identifiable information neither triggers tax nor is it necessary in order to collect the tax.

Tax Collection Agent Liability- RE: "A tax collection agent shall be personally liable for the taxes imposed by this chapter that are due and collected on behalf of operators and plan managers, if taxes are collected, but not reported or paid, together with penalties and interest as provided by law. If the tax collection agent is an entity, the personal liability under this subsection shall apply to any officer, member, manager, or other person who has control or supervision over amounts collected to pay the taxes or who is charged with the responsibility for the filing of returns or the payment of taxes." We urge the joint committee to revise this provision. To hold an individual officer, manager, or supervisor of a tax collection entity personally liable for the taxes imposed by this chapter goes too far.

Registration- The process by which SB1292, SD2, HD1 requires hosting platforms to comply with a registration mechanism is unclear as currently drafted. For example, under "hosting platforms" SB1292, SD2, HD1 states, "A tax collection agent shall be issued a separate certificate of registration under this chapter with respect to taxes due

---

[1] *United States v. Steiger*, 318 F.3d 1039, 1047 (11th Cir. 2003).
[2] 18 U.S.C. §§ 2510(15), 2711(1)–(2).
[3] See *id.* §§ 2702(a)(3), 2703(c); *United States v. Davis*, 785 F.3d 498, 505–06 (11th Cir. 2015) (en banc).

on behalf of its operators and plan managers in its capacity as a tax collection agent and, if applicable, with respect to any taxes payable under this chapter for its own business activities." In addition to hosting platforms, under "237D-4.5 Certificate of registration for transient accommodations broker, travel agency, and tour packager" there remains an additional requirement for "transient accommodations brokers" to obtain a certificate of registration. We urge the joint committee to clarify the proposed registration process, including the rationale for various and potentially duplicative registration requirements in SB1292, SD2, HD1. As it currently stands, the registration requirements are confusing and it is unclear who would need to comply and at which junctures.

In conclusion, due to the potential conflict with federal laws, the requirement to turn over personally identifiable information of our host community, and a confusing registration process, we cannot support this bill as drafted. We remain willing to work with the state to develop a path to allow us to collect and remit taxes on behalf our hosts. Mahalo and we hope the joint committee will take our feedback into consideration.

Regards,

Matt Middlebrook
Head of Public Policy, Hawaii

KOBAYASHI SUGITA & GODA, LLP
Attorneys at Law

Bert T. Kobayashi, Jr.*
Alan M. Goda*

John R. Aube*
Charles W. Gall*
Neal T. Gota
Clifford K. Higa*
Robert K. Ichikawa*
Christopher T. Kobayashi*
Jan M. L. Y. Kutsunai*
David M. Louie*
Nicholas R. Monlux
Jonathan S. Moore
Bruce A. Nakamura*
Kenneth M. Nakasone*
Gregory M. Sato*
Jesse W. Schiel*
Craig K. Shikuma*
Lex R. Smith*
Joseph A. Stewart*
Anthony F. Suetsugu
David B. Tongg*
Maria Y. Wang

*A Law Corporation

Of Counsel
Kenneth Y. Sugita*
Wendell H. Fuji*
Jonathan A. Kobayashi
Burt T. Lau*
John F. Lezak*
Larry L. Myers*

Jesse D. Franklin-Murdock
Charles D. Hunter
Chelsea C. Maja
Aaron R. Mun
Gabriele V. Provenza
Nicholas P. Smith
Brian D. Tongg
Caycie K. G. Wong

March 19, 2019

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Rep. Roy M. Takumi, Chair, Rep. Linda Ichiyama, Vice Chair

HOUSE COMMITTEE ON JUDICIARY
Rep. Chris Lee, Chair, Repo. Joy A. San Buenaventura, Vice Chair

HEARING DATE: Wednesday, March 20, 2019
TIME: 2:00 p.m.
PLACE: Conference Room 329

Re: LETTER ON BEHALF OF AIRBNB OPPOSING SENATE BILL NO. 1292 SD2 HD1.

Dear Representatives:

We write on behalf of our client, Airbnb, in opposition to Senate Bill No. 1292 SD2 HD1 ("*SB1292 SD2 HD1*"). Although we support SB1292 SD2 HD1's improvements over prior versions of this bill, and its intent to permit hosting platforms to act as tax collection agents, which would further tax collection purposes, these purposes cannot overcome the fact that SB1292 SD2 HD1 still impermissibly violates federal law and runs afoul of other constitutional protections.

SB1292 SD2 HD1 contains problematic language that would render it invalid, unworkable, and unenforceable. The current language of SB1292 SD2 HD1 violates two federal laws: (1) the federal Communications Decency Act, 47 U.S.C. § 230 ("*Section 230*") and (2) the Stored Communications Act, 18 U.S.C. Chapter 121 §§ 2701-2712 (the "*SCA*"). Section 230 and the SCA are two laws which provide vital protections that ensure a free and open internet. SB1292 SD2 HD1 is therefore preempted by these federal laws and would thus be unenforceable if passed.

Section 230 of the Communications Decency Act

Although a state may regulate in various areas, it must do so in a manner that does not conflict with federal law. Section 230 is considered the cornerstone of the legal framework that

has allowed the internet to thrive, and it "protects websites from liability for material posted on the website by someone else." *Doe v. Internet Brands, Inc.*, No 12-56638, 2016 WL 3067995, at *3 (9th Cir. May 31, 2016). It does so through two key provisions. First, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Second, "[n]o liability may be imposed under any State or local law that is inconsistent with this section." *Id.* at § 230(e)(3). As the United States District Court for the District of Hawaii observed, "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." *Sulla v. Horowitz*, No. CIV. 12-00449 SOM, 2012 WL 4758163, at *2 (D. Haw. Oct. 4, 2012) (quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003)).

Accordingly, courts across the country have regularly found that Section 230 preempts state laws that attempt to hold websites liable for third-party content. *See e.g., Backpage.com, LLC v. McKenna*, 881 F.Supp.2d 1262, 1273 (W.D. Wash. 2012). Section 230 also protects websites from being forced to screen or otherwise verify third-party content. *See, e.g., Doe v. Friendfinder Network, Inc.*, 540 F.Supp.2d 288, 295 (D.N.H. 2008) (Section 230 "bars the plaintiff's claims that the defendants acted wrongfully by ... failing to verify that the profile corresponded to the submitter's true identity."); *Doe v. MySpace, Inc.*, 474 F.Supp.2d 843, 850 (W.D. Tex. 2007) (finding that Section 230 barred claims that MySpace was liable for policies relating to age verification); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1180 (9th Cir. 2008)("webhosts are immune from liability for ... efforts to verify the truth of" third-party statements posted on the website); *Prickett v. InfoUSA, Inc.*, 561 F.Supp.2d 646, 651 (E.D. Tex. 2006) ("The Plaintiffs are presumably alleging that ... the Defendant is liable for failing to verify the accuracy of the content. Any such claim by the Plaintiffs necessarily treats the Defendant as 'publisher' of the content and is therefore barred by § 230."); *Mazur v. eBay Inc.*, No. CIV 07-3967 MHP, 2008 WL 618998, at *9 (N.D. Cal. Mar. 4, 2008).

The Stored Communications Act

In 1986, Congress enacted the SCA, 18 U.S.C. Chapter 121 §§ 2701-2712, to give persons using internet platforms statutory protection, similar to the Fourth Amendment of the U.S. Constitution, against access by the government to stored electronic private information held by those internet platforms without due process such as a search warrant. Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1209-13 (2004). The SCA limits the government's ability to compel internet platforms to disclose information in their possession about their users and limits the internet platform's ability to voluntarily disclose information about their users to the government, absent a subpoena, warrant, or court order. The SCA contains both criminal and civil penalties for violations. Numerous courts have held that the SCA applies to internet platforms and websites. *See e.g., Brown Jordan Int'l Inc. v. Carmicle*, 846 F.3d 1167 (11th Cir. 2017); *Crispin v. Christian Audiger, Inc.*, 717 F.Supp.2d (C.D. Cal. 2010); *Campbell v. Facebook, Inc.*, 315 F.R.D. 250 (N.D. Cal. 2016).

In a recent example, a federal judge restricted the city of Portland from enforcing some of its lodgings tax regulations against HomeAway, a vacation rental website. *Homeaway.com, Inc. v. City of Portland*, Civ. No. 3:17-cv-00091-PK, (D. OR. Mar. 27, 2011). That case involved regulations by the city of Portland which required HomeAway to provide information to the city – including customer names, listings, and rental addresses, and potentially lengths and prices of stays arranged through its website – without a subpoena or other legal process. U.S. District Judge Michael W. Mosman ruled that significant portions of the regulations would violate the SCA. *See* http://www.oregonlive.com/portland/index.ssf/2017/03/post_588.html.

SB1292 SD2 HD1 impermissibly violates Section 230

SB1292 SD2 HD1 violates Section 230 because it seeks to make hosting platforms responsible for the content and veracity of information provided by its users in advertisements. At the core of Section 230's protections is the idea that hosting platforms cannot be held responsible for the content users provide and cannot be required to verify such information. SB1292 SD2 HD1 violates these federal protections by seeking to penalize hosting platforms for the content users provide and for not verifying the accuracy of that content. First, SB1292 SD2 HD1 makes hosting platforms responsible for the content included in advertisements prepared by users. Proposed §§ 237D-4(c) and (d) of Part III state:

> (c) Any advertisement, including an online advertisement, for any transient accommodation or resort time share vacation interest, plan, or unit shall conspicuously provide:
>
> (1) The registration identification number or an electronic link to the registration identification number of the operator or plan manager issued pursuant to this section; and
>
> (2) The local contact's name, phone number, and electronic mail address, provided that this paragraph shall be considered satisfied if this information is provided to the transient or occupant prior to the furnishing of the transient accommodation or resort time share vacation unit.
>
> (d) Failure to meet the requirements of subsection (c) shall be unlawful. *The department may issue citations to any person, including* operator, plan managers, and *transient accommodations brokers, who violates subsection (c)* [and the citation also includes] a monetary fine… (Emphasis added.)

Sections 237D-4(c) and (d) make hosting platforms, serving as transient accommodations brokers, require users to include certain content in every advertisement or otherwise face a financial penalty. *See Internet Brands, Inc.*, No 12-56638, 2016 WL 3067995, at *3 (noting that Section 230 "protects websites from liability for material posted on the website by someone else"). In addition to making hosting platforms responsible for the content of the required information in

advertisements, these sections further require hosting platforms to ensure that the information provided by their users is *correct*. *See Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1180 ("webhosts are immune from liability for ... efforts to verify the truth of" third-party statements posted on the website); *Prickett*, 561 F.Supp.2d at 651 (noting that claims treating hosting platforms "as 'publisher' of the content" is barred by § 230."); *Horowitz*, No. CIV. 12-00449 SOM, 2012 WL 4758163, at *2 ("so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity").

Hosting platforms do not lose Section 230's protections just because they serve as transient accommodations brokers. Courts have noted that state and local legislatures – whose laws are equally subject to Section 230 preemption – may not "creative[ly]" draft ordinances to "work around" Section 230 and accomplish prohibited ends in a law that would preempted if enacted directly. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (noting that "[p]ermitting the evasion of Section 230 would undermine the "congressional recognition that the Internet ... 'ha[s] flourished ... with a minimum of government regulation.'" (quoting 47 U.S.C. § 230(a)(4))). Further, two recent Supreme Court decisions have held that states may not "evade pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 636 (2013); *see National Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012). In short, because §§ 237D-4(c) and (d) hold hosting platforms, serving as transient accommodations brokers, accountable for the content and veracity of information provided by their users, these provisions clearly violate Section 230.

SB1292 SD2 HD1 creates problems under the SCA

SB1292 SD2 HD1 could violate the SCA by requiring that hosting platforms make a number of disclosures of private information to the state without a subpoena or other legal process. Sections §§ 237-__(f) and 237D-__(f) of Sections 5 and 6 of Part IV provide that:

> (f) A tax collection agent shall file periodic returns in accordance with section 237-30 [237D-6] and annual returns in accordance with section 237-33 [237D-8.6]. Each annual return required under section 237-33 [237D-8.6] shall be accompanied by a cover sheet, in a form prescribed by the department, that includes the following information for each operator and plan manager on whose behalf the tax collection agent is required to report, collect, and pay over taxes due under this chapter:
>
> (1) Name;
>
> (2) Address;

(3) Social security or federal employer identification number; and

(4) Income apportioned by county.

These provisions may violate the SCA. Without a subpoena or other form of due process, SB1292 SD2 HD1 requires hosting platforms to disclose their users' private tax information. The SCA prohibits hosting platforms from disclosing some of the information required under SB1292 SD2 HD1 without due process, such as a subpoena. Such a requirement creates concerns under the SCA.

On top of the potential SCA violations, these provisions may also violate the protections to privacy afforded by the Fourth Amendment of the U.S. Constitution and Article I, Section 7 of the Hawaii Constitution by requiring hosting platforms to turn over personal information of their users to the government without due process. Article I, section 7 of the Hawaii Constitution "expressly guarantees the right to privacy [and] protects people from unreasonable government intrusions into their legitimate expectations of privacy." *State v. Navas*, 81 Haw. 113, 122, 913 P.2d 39, 48 (1996) (noting that Article I, section 7 of the Hawaii Constitution "provides Hawaii's citizens greater protection against unreasonable searches and seizure that the United States Constitution"). Further, the Fourth Amendment[1] of the U.S. Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]"

The right to privacy in both state and federal law protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" The U.S. Supreme Court has held that "searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge are *per se* unreasonable ... subject only to a few specifically established and well-delineated exceptions." *City of Los Angeles, Calif. v. Patel*, 135 S.Ct. 2443, 2452 (2015). Here, §§ 237-__(f) and 237D-__(f) of Sections 5 and 6 of Part IV require hosting platforms such as Airbnb to provide private information of their users to the state without due process. Thus, these provisions of SB1292 SD2 HD1 may violate the constitutional right to privacy and would thus be unenforceable.

[1] Because Article I, Section 7 of the Hawaii State Constitution largely tracks the language of the Fourth Amendment, and because Article I, Section 7 affords even greater protections than the Fourth Amendment, discussions of the Fourth Amendment is also applicable to Article I, Section 7 of the Hawaii State Constitution. *See State v. Curtis*, 139 Hawaii 486, 497, 394 P.3d 716, 727 (2017) ("We have often recognized broader protections '[i]n the area of searches and seizures under article I, section 7' than our federal counterparts".).

Conclusion

For the foregoing reasons, the problematic language of SB1292 SD2 HD1 renders it invalid. We therefore urge that SB1292 SD2 HD1 be held. Thank you for your consideration.

Very truly yours,

DAVID M. LOUIE
for
KOBAYASHI, SUGITA & GODA, LLP

LEGISLATIVE TAX BILL SERVICE

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304 Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: GENERAL EXCISE, TRANSIENT ACCOMMODATIONS, Transient Accommodations Brokers as Tax Collection Agents

BILL NUMBER: SB 1292, HD-1

INTRODUCED BY: House Committee on Tourism & International Affairs

EXECUTIVE SUMMARY: Adds definitions to the TAT law. Amends the definition of "transient accommodations" to include additional forms of transient accommodations. Makes any person who fails to register with DOTAX subject to a citation process and monetary fines. Requires hosting platforms that collect fees for booking services to register as collection agents on behalf of its operators and plan manager for GET and TAT.

SYNOPSIS:

Part I is the preamble.

Part II: Definitions

Adds the following definitions to section 237D-1, HRS:

"Booking service" means any advertising, reservation, or payment service provided by a person or entity that facilitates a transient accommodation transaction between an operator and a prospective transient or occupant, and for which the person or entity collects or receives, directly or indirectly, through an agent or intermediary, a fee in connection with the advertising, reservation, or payment services provided for the transient accommodation transaction.

"Hosting platform" means a person or entity that participates in the transient accommodations business by providing, and collecting or receiving a fee for, booking services through which an operator may offer a transient accommodation. Hosting platforms usually, though not necessarily, provide booking services through an online platform that allows an operator to advertise the transient accommodations through a website provided by the hosting platform and the hosting platform conducts a transaction by which potential renters arrange, use, pay, whether the renter pays rent directly to the operator or to the hosting platform."

Adds to the definition of "transient accommodations" that the term includes "transient accommodations units", "transient vacation rentals", "transient vacation units", transient vacation use", or any similar term that may be defined by county ordinance to mean a room, apartment, house, condominium, beach house, hotel room, suite, or similar living accommodation rented to a transient person for less than one hundred eighty consecutive days in exchange for payment in cash, goods, or services.

Part III: Citation Process and Monetary Fines

Amends HRS section 237D-4 and 237D-4.5 to make a person who fails to register prior to engaging or continuing in the business of furnishing transient accommodations, which includes posting any advertisement for the furnishing of a transient accommodation, subject to a citation process and monetary fines; and to make any person who enters into an agreement to furnish transient accommodations without registering with DOTAX subject to a citation and monetary fines.

Repeals existing HRS section 237-4(g) which now provides for criminal penalties against noncompliant taxpayers or officers of noncompliant entities.

Part IV: Hosting Platform Transparency and Data Sharing

Adds new sections to chapters 237 and 237D, HRS, providing that a hosting platform that collects fees for booking services shall register as a tax collection agent on behalf of all of its operators and plan managers.

Provides that a tax collection agent shall be issued a separate license under this chapter with respect to taxes due under this chapter on behalf of its operators and plan managers in its capacity as a tax collection agent.

Provides that in addition to its own responsibilities under the GET and TAT laws, a tax collection agent shall report, collect, and pay over the taxes due under this chapter on behalf of all of its operators and plan managers to or for whom booking services are provided; provided that the tax collection agent's obligation to report, collect, and pay taxes on behalf of all of its operators and plan managers shall apply solely to transient accommodations in the State for which booking services were provided by the tax collection agent.

Provides that a tax collection agent shall be personally liable for the taxes imposed by this chapter that are due and collected on behalf of operators and plan managers, if taxes are collected, but not reported or paid, together with penalties and interest as provided by law. If the tax collection agent is an entity, the personal liability applies to any officer, member, manager, or other person who has control or supervision over amounts collected to pay the taxes or who is charged with the responsibility for the filing of returns or the payment of taxes.

Provides that a tax collection agent's operators and plan managers shall be deemed licensed as to the business activity conducted directly through the tax collection agent from the date of registration. Licensure and payment requirements apply directly to the operators and plan managers for any other business activity.

Provides that a tax collection agent's annual returns shall include a cover sheet reporting the following information for each operator and plan manager on whose behalf the tax collection agent is required to report, collect, and pay over taxes due under this chapter:

(1) Name;

(2) Address;

(3) Social security or federal employer identification number; and

(4) Income apportioned by county.

Provides that before collecting any fee for booking services, a tax collection agent shall notify each of its operators or plan managers that the reporting and remittance of Hawaii income tax is the responsibility of each operator and plan manager.

Provides that nothing in this section shall be construed to preempt or prohibit the authority of any county or political subdivision of the State, to adopt, monitor, and enforce local land use ordinances, rules, or regulations, nor to transfer the authority to monitor and enforce these ordinances, rules, or regulations away from the counties.

EFFECTIVE DATE: Upon approval.

STAFF COMMENTS: These comments are principally addressed to Part IV.

Act 143, SLH 1998, amended HRS section 237-9 to allow multi-level marketing companies to act as agents to collect and pay over GET on behalf of their independent entrepreneurs. At the time, it was considered beneficial for the marketing companies to collect and pay over tax as opposed to having the Department of Taxation chase down a myriad of independent owners with varying degrees of tax compliance among them.

This bill presents an opportunity for the same logic and policy considerations to apply to transient vacation rental (TVR) activity operating through transient accommodation brokers such as AirBnB, Flipkey, Homeaway, and VRBO, except that the stakes may be a little higher because TAT as well as GET is being collected. This bill would appear to be necessary or desirable to enhance the Department's collection ability given the limited resources available for all of state government including the Department.

TVR activity is a business and the dollars earned in that business are subject to Hawaii state taxes. Specifically, General Excise Tax (GET) and Transient Accommodations Tax (TAT) both apply, so those hosts that are in this business need to register appropriately and pay these taxes. But alas, not everyone does. So, the bill proposes to require the broker to register with the Department of Taxation and to remit the GET and TAT to the State on behalf of the hosts. Once registered, any time a host earns money on the broker's platform, the broker will pay the taxes and will pay over the balance to the host. The concept is like withholding, with which those of us who receive a paycheck are quite familiar: we work for an employer, the employer pays us our wages, but the employer deducts some taxes and pays them to the Department of Taxation and IRS.

A similar measure, HB 1850 (2016), passed three years ago but was vetoed by Governor Ige. The principal objection concerns county-level restrictions on property use. Some TVR activity violates county zoning laws. Some counties, as well as neighboring residents, see withholding as described in this bill as enabling hosts to hide illegal activities from county law enforcement. Some people have gone further. They blame TVR hosts for wrecking the sanctity of neighbor-hoods with an unending stream of tourists or for yanking housing units off the market in the

name of greed, resulting in stratospheric housing prices that are yet another crippling blow to hardworking families struggling to make ends meet. Then, they turn to the brokers and demand that the brokers stop encouraging and facilitating such illegal, anti-societal, and morally depraved activity.

Ultimate responsibility as to both State tax and county zoning laws rests with the owners of the accommodations, not the broker. Owners may be in varying degrees of compliance with the zoning laws just as they are in varying degrees of compliance with the tax laws. The broker is not in an efficient position to police the former, but effectively can do something about the latter because money from the transient guests flows through the broker's system.

One of the key provisions for which technical change is necessary is the personal liability provision, subsection (c) of the new sections. We recommend that personal liability not be established except for a **willful** failure to pay over the amount collected, as in section 237-41.5, HRS. This can be accomplished by replacing the last sentence of subsection (c) with: "If the tax collection agent is an entity, the personal liability under this subsection shall apply to any officer, member, manager, or other person who wilfully fails to pay or to cause to be paid any taxes due from the taxpayer pursuant to this chapter."

Digested 3/19/2019

Maui Hotel & Lodging
ASSOCIATION

Testimony of
Lisa H. Paulson
Executive Director
Maui Hotel & Lodging Association
on
SB 1292 SD 2 HD 1
Relating To Transient Accommodations

COMMITTEE ON CONSUMER PROTECTION AND COMMERCE
COMMITTEE ON JUDICIARY
Wednesday, March 20, 2019, 2:00 pm
Conference Room 329

Dear Chairs Takumi and Lee; Vice Chairs Ichiyama and San Buenaventura;and Members of the Committee,

The Maui Hotel & Lodging Association (MHLA) is the legislative arm of the visitor industry. Our membership includes 195 property and allied business members in Maui County – all of whom have an interest in the visitor industry. Collectively, MHLA's membership employs over 25,000 residents and represents over 19,000 rooms. The visitor industry is the economic driver for Maui County. We are the largest employer of residents on the Island - directly employing approximately 40% of all residents (indirectly, the percentage increases to 75%).

MHLA **strongly supports SB 1292 SD2 HD1**, which adds definitions to the TAT law. Amends the definition of "transient accommodations" to include additional forms of transient accommodations. Makes any person who fails to register with DOTAX subject to a citation process and monetary fines. Requires hosting platforms that collect fees for booking services to register as collection agents on behalf of its operators and plan manager for GET and TAT. (SB1292 HD1)

MHLA is in strong support of this measure and any sound legislation that seeks to establish a fair, level playing field to ensure transparency, enforcement, and accountability among the online transient vacation rentals (TVRs) and traditional bricks-and-mortar lodgings. There are more than 23,000 alternative accommodations in the Hawaiian Islands competing with hotels, resorts, timeshares, and bed-and-breakfasts, with many them likely avoiding the 10.25 percent transient accommodations and general excise taxes.

As the Legislature and administration approve funding to expand our inventory of affordable housing, we as a community have been unable to successfully address the impact of proliferating TVRs on the availability of rental property. By removing housing from the rental market, TVRs are only compounding such problems as a shortage of affordable housing, high real estate prices, purchases of housing units by non-residents, and already-high rents.

This issue is not about the hospitality industry versus the TVRs. Rather, this is a community issue in which illegal rentals in neighborhoods across the state are adversely affecting the quality of life for residents.

Thank you for the opportunity to testify.

SB-1292-HD-1
Submitted on: 3/17/2019 5:42:25 PM
Testimony for CPC on 3/20/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lisa Marten	Individual	Oppose	No

Comments:

Aloha Chairs Lee and Takumi and Esteemed Committee Members.

Please oppose SB1292 in its current form.

The bill had some enforcement and platform accountability provisions, but they have been removed. Now there is no platform accountability for illegal listings. This just provides a way for illegal units to hide from law enforcement by simply providing brokers and hosting platforms with tax collection authority.

Unless there is accountability to uphold the law, this bill is just a trick of the vacation rental industry to ignore our State and County laws. You would be helping them.

Mahalo, Lisa Marten

March 20, 2019

House of Representatives Committee on Consumer Protection & Commerce
The Honorable Roy M. Takumi, Chair
The Honorable Linda Ichiyama, Vice Chair

House of Representatives Committee on Judiciary
The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventure, Vice Chair

RE: SB 1292, SD 2, HD 1, Relating to Transient Accommodations

Dear Chairman Takumi, Chairman Lee and distinguished members of the House of Representatives Committees on Consumer Protection and Commerce, and Judiciary:

On behalf of Expedia Group – the globe leading travel technology platform[1] – I'd like to thank you for the opportunity to comment on SB 1292, SD 2, HD 1. Consistent with our commitment to collaborate with the State of Hawai`i to create reasonable regulations for its important vacation rental ecosystem, we'd like to share insight into the current proposal before the legislature and the broader need for comprehensive policies governing the state's long-standing vacation rental industry.

I. SB 1292, SD2, HD1 is Flawed

Expedia Group welcomes the opportunity to engage with the state on ways to encourage and enhance tax compliance. Therefore, we generally support the tax collection and remittance provisions in SB 1292, SD 2, HD1. However, we cannot support the bill in its current form. The bill includes provisions that violate law and that will not withstand judicial scrutiny. It also includes provisions that are simply bad policy that will harm the state's economy and drive some vacation rental property owners "underground" to avoid onerous regulation.

A. Forced Disclosure of Confidential Information Violates the Stored Communications Act

The provisions of the bill requiring hosting platforms to disclose confidential information in "annual returns" are improper. *See* bill at Part IV, Sections 5 and 6. Federal law requires Expedia Group and its affiliates to keep confidential all the personal information of homeowners and travelers who use their websites. Specifically, the Stored Communications Act ("SCA") prescribes the rules that must be followed before a company can disclose information to a governmental entity.[2] To protect the privacy of

[1] The Expedia Group portfolio serves both leisure and business travelers to Hawai`i with disparate needs and budgets, and includes trusted brands like Orbitz, Expedia, Travelocity, Egencia, Trivago, HomeAway, VRBO, and others. Our vacation rental brands include HomeAway and VRBO.

[2] The SCA restricts government entities' ability to compel disclosure of the contents of users' communications and information from an electronic communications service ("ECS") or a remote computing service ("RCS"). *See, e.g.*, 18 U.S.C. § 2703(a)-(c); *see also id.* § 2702(a). In simple terms, an ECS is any service that allows users to communicate electronically with one another, while a RCS is any

online communications, Congress passed the SCA, which "creates a set of Fourth Amendment-like privacy protections by statute, regulating the relationship between government investigators and service providers in possession of users' private information." Orin S. Kerr, A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It, 72 Geo. Wash. L. Rev. 1208, 1212 (2004). "The Act reflects Congress's judgment that users have a legitimate interest in the confidentiality of communications in electronic storage at a communications facility." *Theofel v. Farey-Jones*, 359 F.3d 1066, 1072–73 (9th Cir. 2004). Our concerns are not merely theoretical: the SCA allows individuals whose information is provided to a governmental entity in violation of the statute's requirements to sue for damages. 18 U.S.C. § 2707. Intentional violations can be punished by both statutory and punitive damages and attorneys' fee awards.

The SCA limits the forms of process a government entity may use to obtain information from HomeAway or VRBO, as an ECS and RCS, depending on the type of information sought. It divides electronic information into two distinct categories: (1) the contents of users' communications, and (2) non-content customer records. 18 U.S.C. § 2703(a)-(c). When a government entity seeks the contents of communications, the protections of the SCA are strongest. *See* 18 U.S.C. § 2703(a)–(b). A warrant based upon probable cause is required for communications that have been in the electronic storage of an ECS for 180 days or less. *Id.* § 2703(a), (b)(1)(A), (c)(1)(A). If the government seeks non-content customer "records," the government generally must either obtain a court order authorizing disclosure or demonstrate that the customer consented to disclosure. *Id.* § 2703(c)(1)(B)–(C). Section 2703 permits the disclosure of basic information—which, as explained above, is limited to a customer's name and address, and other discrete categories—only if the government employs an administrative, grand jury, or trial subpoena. *Id.* § 2703(c)(2).[3] Thus, in *HomeAway.com, Inc. v. City of Portland*, the court held that the SCA barred the City's attempt to obtain user information from HomeAway without obtaining an appropriate subpoena or court order. Here, the bill similarly seeks user information without such due process.

B. Forced Disclosure of Confidential Information Violates the U.S. and Hawai`i Constitutions

In addition to the SCA violations, the provisions of the bill noted above also violate the U.S. and Hawai`i Constitutions. It is well-established that constitutional privacy protections extend to electronic communications and protect against government searches. The U.S. Supreme Court has warned against allowing technological advances to "erode the privacy guaranteed by the Fourth Amendment." *Kyllo v.*

---

service that stores or processes information submitted by users. *See* 18 U.S.C. §§ 2510(15), 2711(2). A single service may satisfy both definitions.

Expedia and its affiliates, including HomeAway, are both ECSs and RCSs. They are communication platforms that enable communications between listing owners and travelers through the secured communication feature it provides on its websites. They store and process information provided by users, including communications, pictures of properties, and listing information provided by owners.

A federal court in Portland held that HomeAway was an ECS and RCS. *HomeAway.com, Inc. v. City of Portland*, No. 3:17-CV-91 (D. Or. Mar. 20, 2017). And a federal court in Washington, D.C., recently held that Airbnb, which provides a similar secured communications service, is an ECS. *In re United States for an Order Pursuant to 18 U.S.C. § 2705(b)*, 2018 WL 692923 (D.D.C. Jan. 30, 2018, No. MC-17-2490-BAH).

[3] A federal appellate court has stated that it is "abundantly clear" that the SCA applies to "even a list of customers." *Telecomms. Regulatory Bd. Of P.R. v. VTIA-The Wireless Ass'n*, 752 F.3d 60, 67 (1st Cir. 2014).

United States, 533 U.S. 27, 34 (2001); *see also Marshall v. Barlow's Inc*., 436 U.S. 307, 311 (1978) (Fourth Amendment protects business property no less than residential property).

The court has held that "searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2452 (2015) (municipal code provision requiring hotel operators to provide guests' information to police is facially unconstitutional). Here, the bill requires forced disclosure of confidential information without any due process and therefore violates the U.S. and Hawai`i Constitutions.[4]

C. There Is No Basis to Impose Personal Liability

Expedia Group strongly objects to the provisions of the bill imposing personal liability on any officer, member, manager, or other persons responsible for the filing of returns or the payment of taxes. *See* bill at Part IV, Sections 5 and 6. The issue of a third party's personal liability in connection with tax liability has already been addressed by the Legislature. *See* Hawai`i Revised Statutes ("HRS") § 237-41.5. Specifically, the Legislature refused to establish personal liability on such third parties unless they committed a willful act (defined as a voluntary, intentional violation of a known legal duty). *Id.* There is no reason to create a different rule here. As such, any imposition of personal liability should be similarly dependent upon a willful act.

D. The Bill Invites the Counties to Enact Potentially Inconsistent Rules

The bill encourages the various counties to adopt additional and possibly inconsistent ordinances and rules governing vacation rentals. *See* bill at Part IV, Sections 5 and 6. As we have witnessed, such allowance leads to misguided regulations, including the new Maui Charter amendment that imposes ruinous daily fines of $20,000 and that violates the constitutional prohibition against excessive fines. Here, the Legislature is uniquely positioned to prevent such misguided regulations and to enact and enforce a comprehensive regulatory scheme at the state level.

II. Expedia Group's Proposal

As an alternative to SB 1292, SD 2, HD 1, and to demonstrate our commitment to the State of Hawai`i, we provide below adapted best practices from across the country that would create a regulatory scheme that both regulates the industry in reasonable ways and assures full compliance with tax laws.

We believe that these best practices will assist in maintaining a healthy vacation rental industry and Hawai`i's tourism-driven economy.

The key features are as follows:

1. Address the flaws in pending legislation relating to vacation rentals.

2. Provide industry-wide regulation of all hosting platforms at the state level.

[4] Indeed, HomeAway and Airbnb recently successfully enjoined a New York City ordinance that would require them to turn over voluminous data regarding customers who use their websites to advertise vacation rentals. *Airbnb, Inc. v. City of New York*, 18 Civ. 7712 (PAE) and 18 Civ. 7742 (PAE), (S.D. N.Y. Jan. 3, 2019). The court had "little difficulty" holding that the ordinance "is a search or seizure within the Fourth Amendment." In so holding, the court discussed an expansive line of authority that "ma[de] clear that the compelled production from home-sharing platforms of user records is an event that implicates the Fourth Amendment."

3. Provide comprehensive tools to assist in compliance and enforcement with tax laws.

    a. Platforms will create a mandatory field for owners to enter their transient accommodations tax ("TAT") number, in the same format as issued by the State of Hawai`i;

    b. Platforms will display the TAT numbers on all new and existing property listings;

    c. Platforms will remove any existing listing that does not display a TAT number, and will prohibit any new listings that do not display a TAT number;

    d. If the State determines that any TAT numbers are invalid, either because the number is incorrect or has expired, it can notify the platform, and the platform will remove the listing from its platforms within 10 business days of receiving notice from the State;

    e. To allow the State to determine the validity of the TAT numbers supplied by the owners, and to ascertain the owner or host of each property, platforms will send to the State, on a quarterly basis, a list that matches URLs of every vacation rental listing on its site together with the TAT number for that listing; and

    f. To provide the State with visibility into the amount of vacation rental activity occurring within its borders, platforms will send to the State, on a quarterly basis, aggregated data of (1) the total number of vacation rental listings on their sites during the previous quarter, and (2) the total number of nights booked in vacation rentals through their sites during the previous quarter.

The vacation rental industry plays a vital role in Hawaii's broader tourism-driven economy. We recognize and support the State's efforts to collect all taxes owed and would like to work with the state and local governments to modernize the regulations of this important economic sector.

Thank you for the opportunity to provide comments on SB 1292, SD 2, HD1 and please reach out with any additional questions.

Mahalo,

Amanda Pedigo
Vice President, Government and Corporate Affairs
Expedia Group
APedigo@ExpediaGroup.com

DEPARTMENT OF PLANNING
THE COUNTY OF KAUA'I
DEREK S. K. KAWAKAMI, MAYOR
MICHAEL A. DAHILIG, MANAGING DIRECTOR

KA'ĀINA S. HULL
DIRECTOR

JODI A. HIGUCHI SAYEGUSA
DEPUTY DIRECTOR

Testimony of Ka'āina Hull
Planning Director, County of Kaua'i

Before the
House Committee on Consumer Protection & Commerce and the
House Committee on Judiciary

March 20, 2019; 2:00 pm
Conference Room 329

In consideration of
Senate Bill 1292 SD2 HD1
Relating to Transient Accommodations

Honorable Chairs Roy M. Takumi and Chris Lee, and Members of the Committees:

The County of Kaua'i, Department of Planning submits its **comments in opposition** to SB1292 SD2 HD1. Previous iterations of SB 1292 sought to implement the following important purposes: (1) required records "be made available upon lawful request to enforcement authorities, for greater transparency and data sharing purposes;" (2) create a law that made it "unlawful for a hosting platform to provide, and collect a fee for, booking services regarding transient accommodations that are not lawfully . . . permitted under applicable county ordinance;" and (3) required "a transient accommodations broker, platform host, and booking service to remove a transient accommodation advertisement upon notice that the property is not in compliance with state law or county ordinance." These necessary tools were stripped from SB 1292 SD2 HD1.

Currently, Kaua'i has approximately 4,500 unique listings for vacation rentals advertised across numerous third party hosting sites. Although a large number of these listings are located within Kaua'i's Visitor Destination Areas where transient accommodations are outright permitted, we anticipate approximately 800 to 1,200 of these units to be located outside of our Visitor Destination Areas where those uses are prohibited. Reasons for prohibiting transient accommodations outside of the Visitor Destination Areas are two-fold:

1. To address the proliferation of resort uses within our residential neighborhoods; and

2. To address Kaua'i's housing inventory crisis. Although a recent study demonstrated that approximately 1 in every 20 homes in

the State is a vacation rental, 1 in every 7 homes is a vacation rental on the island of Kaua'i.

To this end, our Zoning Enforcement Division has primarily focused its resources on monitoring and shutting down illegal vacation rental operators. While our enforcement team has been successful in shutting down several hundred vacation rentals over the past few years, our efforts have been stymied by the overwhelming wave of illegal vacation rentals that advertise and book business through third party hosting platforms.

The County of Kaua'i is aware of the 9th Circuit Court of Appeals decision in HomeAway.com, Inc. v. City of Santa Monica that was filed on March 13, 2019, which upheld several obligations of hosting platforms, including: (1) "disclosing certain listings and booking information regularly;" (2) "refraining from completing any booking transaction for properties not licensed and listed on the registry;" and (3) "refraining from collecting or receiving a fee for facilitating or providing services ancillary to a vacation rental or unregistered home-share." These obligations are similar to those initially imposed in previous iterations of SB 1292 and are necessary to further the Department of Planning's enforcement priorities. As such, the Department respectfully requests that Part III of SB 1292 SD2 be restored with an additional requirement to disclose listing information on a regular basis as follows:

HOSTING PLATFORM AND TRANSIENT ACCOMMODATIONS BROKER LIABILITY

SECTION 3. Chapter 237D, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"**§237D- Booking services.** (a) It shall be unlawful for a hosting platform to provide booking services and collect a fee for such booking services provided in connection with transient accommodations located in the State if the operator of the transient accommodation is not registered with the department as required under section 237D-4. This section shall not apply to booking services provided in connection with a transient accommodation that is a hotel.

(b) A hosting platform or transient accommodation broker that violates this section shall be subject to a penalty of $1,000 per booking service transaction from which fees were collected in violation of subsection (a). The following transactions shall be deemed to be separate booking services transactions:

(1) Each reservation for the letting of a transient accommodation;

(2) Each pay-per-listing agreement between a hosting platform and an operator;

(3) A single calendar month of a subscription-based listing agreement between a hosting platform and an operator;

(4) Each instance of an operator registering with a hosting platform; and

(5) Other transactions set forth by administrative rule.

(c) As used in this section:

"Booking service" shall have the same meaning as in section 237D-1.

"Hotel" means an establishment consisting of any building, structure, or portion thereof containing more than nine rooming units that, as part of its routine operations, furnishes transient accommodations and provides one or more additional customary lodging services other than the living accommodations and the use of furniture, fixtures, and appliances, such as room attendant, room service, bell service laundering service, concierge service or daily housekeeping services.

"Hosting platform" shall have the same meaning as in 237D-1.

"Service business" shall have the same meaning as in section 237-7.

(d) Subject to applicable laws, hosting platforms shall disclose to the department on a regular basis each transient accommodation, home-sharing, and vacation rental listing located in the state, the names and registration identification numbers for all operators for whom the hosting platform provided booking services, the address of each such listing, the length of stay for each such listing, and the price paid for each stay.

The department shall not impose penalties under this section if the hosting platform obtains the registration identification number issued under section 237D-4 of the operators described in this subsection, in the format in which such numbers are issued by the department.

Upon request by the planning director or mayor of the applicable county, the department shall disclose any of the information required by this subsection to the planning director or any county official designated by the mayor to receive the information. Notwithstanding any law to the contrary, including section 237-34, the planning director and county official designated to receive the information pursuant to this subsection may examine information required by this subsection to ensure compliance with this section, state tax laws and county tax ordinances, and any applicable land use laws and ordinances.

(e) Any monetary penalty assessed under this section shall be due and payable thirty days after the hosting platform is notified of the imposition of the penalty. Penalties assessed under this section may be appealed to the director of taxation or the director's designee."

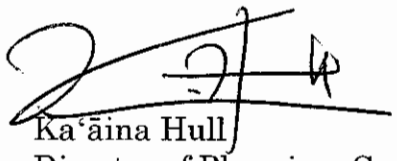
In addition, in accordance with regular disclosure listings and booking information instead of prohibiting disclosure altogether, we respectfully request that page 14, lines 4 through 10 within Part IV be deleted.

Alternatively, SB 1292 SD2 HD1 could explicitly provide the counties with the authority under HRS Chapter 237D or HRS §46-1.5(7) to create ordinances to require hosting platforms to disclose certain listings and booking information regularly; refrain from completing any booking transaction for properties not compliant with county land use laws; and refraining from collecting or receiving a fee for facilitating or providing services ancillary to a vacation rental or unregistered home-share. Possible enabling language could read as follows:

> The counties shall have the power to regulate the business activity or booking transactions of hosting platforms not in conformance with county laws.

As the 9th Circuit stated in HomeAway.com, Inc. v. City of Santa Monica, "[l]ike their brick-and-mortar counterparts, internet companies must also comply with any number of local regulations concerning, for example, employment, tax, or zoning." Thus, these important obligations are required to prevent "a lawless no-man's-land on the Internet" at the expense of preserving our housing stock and quality and character of our residential neighborhoods for future generations to come.

Respectfully submitted,



Ka'āina Hull
Director of Planning, County of Kaua'i

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8000 • FAX: (808) 768-6041
DEPT. WEB SITE: www.honoluludpp.org • CITY WEB SITE: www.honolulu.gov

KIRK CALDWELL
MAYOR

KATHY K. SOKUGAWA
ACTING DIRECTOR

TIMOTHY F. T. HIU
DEPUTY DIRECTOR

EUGENE H. TAKAHASHI
DEPUTY DIRECTOR

March 20, 2019

The Honorable Roy M. Takumi, Chair
and Members of the Committee on Consumer
Protection and Commerce
The Honorable Chris Lee, Chair
and Members of the Committee on Judiciary
Hawaii House of Representatives
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chairs Takumi and Lee, and Committee Members:

Subject: Senate Bill No. 1292, HD 1
Relating to Transient Accommodations

The Department of Planning and Permitting (DPP) **offers comments** on Senate Bill No. 1292, HD 1, which amends the definition of transient accommodations and requires hosting platforms that collect fees for booking services to register as tax collection agents.

The department understands the desire to collect transient accommodations tax and general excise tax on those short-term operations, many of which have skirted this obligation. As such, we do not object to requiring hosting platforms to become tax collection agents.

We do **support** the following provisions of the Bill:

1. Assigns the State Department of Taxation new responsibilities in administering tax obligations of transient accommodation operators and managers. We welcome this additional regulatory oversight, including the imposition of progressive fines for violations.

2. Makes it clear that the counties can adopt and enforce their own regulations related to short-term rentals.

3. Adopts regulations for the advertising of transient accommodations.

However, the Bill should allow sharing of data from the Department of Taxation. Also, county clearance should be a prerequisite to obtaining a certificate from the Department of Taxation. This could be as simple as furnishing the county registration number, and will greatly aid in our enforcement program.

As you may know, the Honolulu City Council is actively reviewing an updated regulatory framework for short-term rentals. We drafted our proposal to balance the needs of our residential neighborhoods to keep them residential in character, and at the same time, recognize the need to diversify our visitor accommodation industry. Our bill offers the public more transparency, and requires more accountability from the operators of short-term rentals. We also seek to create new property tax classifications, so not only can the City realize more revenue from these higher valued properties, but doing so will not allow them to elevate the property values of their neighboring properties that are in long-term use. We are hopeful that an ordinance will be adopted very soon.

Thank you for the opportunity to testify.

Very truly yours,

Kathy Sokugawa
Acting Director