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To: The Honorable Richard H.K. Onishi, Chair
and Members of the House Committee on Tourism & International Affairs

Date: Tuesday, March 12, 2019
Time: 9:00 A.M.
Place: Conference Room 312, State Capitol

From: Linda Chu Takayama, Director
Department of Taxation

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

The Department of Taxation (Department) supports the intent of Parts II, III, IV, and V of S.B. 1292, S.D. 2, and offers the following comments regarding the tax provisions for the Committee's consideration.

The following is a summary of key tax provisions of Parts II and III of S.B. 1292, S.D. 2, which are effective March 15, 2094:

Hosting Platform-Booking Services Liability

- Defines "booking service" and "hosting platform."
- Hosting platforms are liable for civil fines for collecting fees for booking services, including advertising, for transient accommodations that are not registered under Chapter 237D, Hawaii Revised Statutes (HRS).
- Imposes fines of $1,000 per booking service transaction for which fees were collected for any transient accommodation that was not registered under Chapter 237D, HRS.
- Excludes booking services related to hotels.
- Provides a safe harbor if the hosting platform obtains the transient accommodations tax (TAT) number in the format issued by the Department.
- Authorizes the Department to require hosting platforms to provide the names and TAT numbers of operators.

The Department notes that the provision authorizing the Department to require hosting platforms to provide the names and TAT numbers may raise concerns with the Stored Communications Act, 18 U.S.C. Chapter 121 2701-2712 (SCA). In regard to these concerns, the Department suggests amending subsection (d) to provide that the Department may require information from hosting platforms *by subpoena*. To do this, the Department suggests the first paragraph of subsection (d) be amended to read as follows:

> (d) The department may require, by subpoena, a hosting platform to provide the names and registration identification numbers for all operators for whom the hosting platform provided booking services and for all operators whose property or transient accommodations the hosting platform provided booking services for.

The Department supports Parts II and III of the bill. Part II of the bill provides definitions. Part III of the bill will aid the Department in enforcement of the TAT by penalizing hosting platforms that provide booking services to unregistered operators.

The following is a summary of key tax provisions of Part IV of S.B. 1292, S.D. 2, which is effective March 15, 2094:

Advertising and Reporting Requirements

- Advertisements for all transient accommodations and time share vacation interests, plans, or units must provide the operator or plan manager's TAT number. The use of an electronic link to the TAT number is disallowed.
- Advertisements for all transient accommodations and time share vacation interests, plans, or units must provide the county-level TAT number as provided by the county.
- Operators and plan managers must remove advertisements upon notice that the advertised property is not in compliance with state law or county ordinance. Failure to remove advertisements results in civil fines.
- Transient accommodations brokers, platform hosts, and booking services must provide monthly, anonymized reports of their listings in Hawaii, aggregated by zip code. The reports must be provided to the Department of Business, Economic Development, and Tourism (DBEDT). The reports must include the number of units and available rooms, the total of both available and occupied room nights, the average daily rate, and total revenue. Failure to provide the reports results in civil fines.
- Repeals the fine for operators and plan managers that fail to provide a TAT number in an advertisement. Imposes the fine instead on platform hosts and booking services.
- Repeals the misdemeanor for operating a transient accommodation without a TAT license.

First, the Department notes that S.B. 1292, S.D. 2, seems to delete the fine on an operator or plan manager for failing to provide a TAT number in an advertisement contained in section 237D-4(d), HRS. The Department notes that it is able to enforce the fine for failure to provide the TAT number in an advertisement against the operator or plan manager, but is not able to enforce this fine against the transient accommodations broker, platform host, or booking service. The Department strongly suggests that the fines against operators and plan managers be reinstated.

In previous testimony, the Department noted that the requirement that either the operator's or plan manager's TAT number, or the transient accommodations broker's TAT number, be displayed in any advertisement was not enforceable due to federal preemption under the Communications Decency Act, 47 U.S.C. §230. The Department wishes to clarify that this meant that the provision was not enforceable against the transient accommodations broker,

platform host, or booking service. The provision is enforceable against an operator or plan manager.

Second, the Department notes that proposed section 237D-4(h), HRS, is unclear and should be clarified. This subsection imposes reporting requirements on transient accommodations brokers, platform hosts, and booking services. However, the penalty for noncompliance with this reporting is imposed on operators or plan managers. Similarly, the subsection requires the reports be provided to DBEDT, while the penalty is imposed for failure to report to the Department of Taxation. The Department recommends the reporting provision be clarified to clearly identify to whom the reporting must be made and upon whom the penalty is imposed.

Third, the Department notes that the proposed repeal of section 237D-4(g), HRS, which makes operating a transient accommodation without a license a misdemeanor, would leave no penalty for operating without a license. To provide a consequence for operating without a license, the Department strongly suggests adding the following as a new subsection to section 237D-4, HRS:

> (i) Any person who is required by this section to register as a condition precedent to engaging or continuing in the business of furnishing transient accommodations or as a plan manager subject to taxation under this chapter, who engages or continues in the business without registering in conformity with this section, shall be subject to the citation process and monetary fines under subsection (d).

Furthermore, to clarify the meaning of "engaging or continuing in the business of furnishing transient accommodations" for purposes of the penalty, the Department recommends adding the following additional new subsection to section 237D-4, HRS:

> (j) For purposes of this section, "engaging or continuing in the business of furnishing transient accommodations" includes posting any advertisement for the furnishing a transient accommodation.

This proposed subsection clarifies that operators or plan managers are required to be licensed under section 237D-4, HRS, even if they are merely posting advertisements for their transient accommodations and have not yet entered into a transaction for the rental of their transient accommodation.

Fourth, the Department notes that Act 211, Session Laws of Hawaii 2018, imposed TAT on transient accommodations brokers, travel agencies, and tour packagers who furnish transient accommodations at noncommissioned negotiated contract rates and requires these parties to register with the Department. This requirement is codified in section 237D-4.5, HRS. Section 237D-4.5, HRS, contains no penalty for nonregistration. Currently, the misdemeanor imposed by section 237D-4(g) for operating without a registration applies to these taxpayers. However, S.B. 1292, S.D. 2, proposes to repeal that misdemeanor, leaving no penalty for nonregistration.

The Department recommends the following language be added to section 237D-4.5, HRS:

> Any person who enters into an arrangement to furnish transient accommodations without registering in conformity with this section shall be subject to citation process and monetary fines under section 237D-4(d).

Fifth, the Department supports the intent of the remaining provisions in Part IV of the bill. The requirements will bolster enforcement of the TAT, especially enforcement against a transient accommodations broker tax collection agent.

The following is a summary of key tax provisions of Part V of S.B. 1292, S.D. 2, which is effective March 15, 2094:

Duties as Tax Collection Agent

- A transient accommodations broker who voluntarily registers as a tax collection agent will be required to report, collect, and pay general excise tax (GET) and transient accommodations tax (TAT) on behalf of all of its operators and plan managers for transient accommodations booked directly through the registered agent.
- The registered agent's operators and plan managers will be required to be licensed under chapters 237 and 237D, HRS.

Reporting Requirements

- The registered agent must provide the following information in a cover sheet with every tax return filed with the Department: the name, address, and license identification number of each operator; the address of each transient accommodation; the number of nights that each transient accommodation was rented; the amount of tax being remitted for each transient accommodation; and the amount of income reportable on federal form 1099 for each transient accommodation.
- The registered agent must disclose the information in the cover sheet to the planning director or any county official.

Compliance with Land Use Laws

- When conducting business with an operator or plan manager, the registered agent shall: (1) notify the operator that the property is required to be in compliance with applicable land use laws; (2) require the operator to provide the transient accommodations number and local contact and include said information in the advertisement; (3) require the operator to provide verification of compliance with state and county land use laws; and (4) require the operator to provide any other information required by rulemaking.

The Department supports the intent of Part V of S.B. 1292, S.D. 2.

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.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019

ON THE FOLLOWING MEASURE:
S.B. NO. 1292, S.D. 2, RELATING TO TRANSIENT ACCOMMODATIONS.

BEFORE THE:
HOUSE COMMITTEE ON TOURISM AND INTERNATIONAL AFFAIRS

DATE: Tuesday, March 12, 2019 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 312

TESTIFIER(S): Clare E. Connors, Attorney General, or
Mary Bahng Yokota, Deputy Attorney General

Chair Onishi and Members of the Committee:

The Department of the Attorney General provides the following comments.

This bill appears to:

(1) Amend the definition of "transient accommodations" to include similar terms used by the counties;

(2) Make it unlawful for a hosting platform to provide, and collect a fee for, booking services regarding transient accommodations that are not registered with the Department of Taxation;

(3) Require monthly reports relating to transient accommodations listings;

(4) Permit a transient accommodations broker to register as a tax collection agent for its operators and plan managers for general excise tax and transient accommodations tax purposes; and

(5) Require an operator or plan manager to remove an advertisement for transient accommodations upon notice that the property is not in compliance with state law or county ordinance.

I. Federal Communications Decency Act

Under the federal Communications Decency Act (CDA), "[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" and "[n]o cause of action

may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(c)(1) and (e)(3). The term "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C.A. § 230(f)(2). The functions of publishers include reviewing, editing, and deciding whether to publish or *withdraw* from publication third-party content. Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1102 (9th Cir. 2009).

1. The fifth stated purpose of the bill is to "[r]equire 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" (emphasis added). Page 3, lines 7-11. This stated purpose may be subject to challenge under the CDA. Transient accommodations brokers, platform hosts, or booking services may argue that they are interactive computer service providers who post on their websites advertisements provided by operators or plan managers and the intent of the bill is to treat them as the publisher of such advertisements by requiring them to remove certain advertisements in violation of the CDA. Significantly, the statutory amendments in the bill require the *operator or plan manager* – not the transient accommodations broker, platform host, and booking service – to remove the advertisement. Page 12, lines 1-3; page 24, lines 13-20; page 35, lines 3-12. Thus, we recommend that the fifth stated purpose of the bill on page 3, lines 7-11 be amended to read as follows:

> (5) Require [~~a transient accommodations broker, platform host, and booking service~~] operators and plan managers to remove a transient accommodation advertisement upon notice that the property is not in compliance with state law or county ordinance.

2. It appears that one of the intents of this bill is to create a statute modeled after a San Francisco ordinance, which hosting platforms challenged under the CDA but were unsuccessful in Airbnb v. San Francisco, 217 F. Supp. 3d 1066 (N.D. Cal. 2016).

The San Francisco ordinance made it a misdemeanor to collect a fee for providing booking services to rent an unregistered unit and defined "booking service" as follows:

> A Booking Service is any reservation and/or payment service provided by a person or entity that facilitate a short-term rental transaction between an Owner or Business Entity and a prospective tourist or transient user, and for which the person or entity collects or receives, directly or indirectly through an agent or intermediary, a fee in connection with the reservation and/or payment services provided for the short-term rental transaction.

This draft of the bill similarly makes it unlawful for a hosting platform to collect a fee for booking services if the operator is not registered with the Department of Taxation under section 237D-4, Hawaii Revised Statutes (HRS), but adds the function of "advertising" within the definition of "booking service." Page 4, lines 3 and 8. As set forth above, "advertising" was not within the definition of "booking services" in the San Francisco ordinance. In San Francisco v. Airbnb, the ordinance was found to hold the hosting platforms "liable only for their own conduct, namely for providing, and collecting a fee for, Booking Services, in connection with an unregistered unit." Id. at 1073. And, the court specifically noted that, under the San Francisco ordinance, the hosting platforms were "free to charge a fee for posting a listing (even a listing for an unregistered unit) on their websites." Id. at 1075. Thus, we anticipate that the hosting platforms may argue that this bill as amended is distinguishable from, and is not supported by, Airbnb v. San Francisco. In accord with the intent of the bill to track the San Francisco ordinance, we recommend that the term "advertising" be deleted from the definition of "booking service" on page 4, lines 3-10, as follows:

> "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.

We also recommend that related provisions on page 6, line 15, through page 7, line 6, be amended as follows:

> [~~The following transactions~~] Each reservation or payment service for the letting of a transient accommodation shall be [~~deemed to be~~] a 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 transaction set forth by administrative rule.~~] transaction.

Although Airbnb v. San Francisco may not be binding in Hawaii, the courts in Hawaii may nonetheless find it persuasive.

3. In section 237D-4, HRS, subsection (c) currently provides that any advertisement for transient accommodation or resort time share vacation interest, plan, or unit shall conspicuously provide certain information while subsection (d) provides that the Department of Taxation may issue citations to any person, including operators, plan managers, and transient accommodations brokers, who violates subsection (c). This bill amends subsection (d) by deleting references to "operators" and "plan managers" and adding "platform hosts" and "booking services" to the list of those who may be included as "any person . . . who violates subsection (c)." Page 12, lines 4-8.

a. Platform hosts and booking services may challenge the statute as amended by this bill under the CDA. The likelihood of such a challenge may be reduced if subsection (d) of section 237D-4, HRS, on page 12, lines 4-12, was amended to limit the imposition of liability to the operators and plan managers, who appear to be the providers of the information in question, as follows:

> (d) Failure to meet the requirements of subsection (c) shall be unlawful. The department may issue citations to [~~any person, including~~] operators[~~,~~] and plan managers[~~, and transient accommodations brokers,~~] who [~~violates~~] violate subsection (c). A citation issued pursuant to this subsection for each transient accommodation or resort time share vacation interest, plan, or unit in violation of subsection (c) shall include a monetary fine of not less than:

b. The terms "operators" and "plan managers" may have been deleted on page 12, lines 4-8, but "operators" and "plan managers" may still constitute "any

person . . . who violates subsection (c)." Page 12, lines 4-8. It is not clear whether the intent of the bill is to exclude "operators" and "plan managers" from liability or to still hold them liable as "any person . . . who violates subsection (c)." If the former, it may be appropriate to delete "any person, including" on page 12, lines 5-6. If the latter, it does not appear necessary to delete "operators" and "plan managers" on page 12, line 6. We recommend clarification.

II. Federal Stored Communications Act

The federal Stored Communications Act (SCA), 18 U.S.C. § 2701, et seq. addresses the disclosure of communications and records of subscribers and customers of an electronic communication service (ECS) or a remote computing service (RCS) held by the ECS or RCS provider. An ECS is "any service which provides to users thereof the ability to send or receive wire or electronic communications" 18 U.S.C. § 2510(15). An RCS is "the provision to the public of computer storage or processing services by means of an electronic communications system." 18 U.S.C. § 2711(2).

The bill provides that the Department of Taxation "may require a hosting platform to provide the names and registration identification numbers for all operators for whom the hosting platform provided booking services and for all operators whose property or transient accommodations the hosting platform provided by booking services for." Page 8, lines 1-6. Based on prior testimonies on this bill and similar bills, the hosting platforms may argue that they provide ECS and/or RCS, operators are the subscribers or customer of such service, and, consequently, they are prohibited from disclosing the required information as set forth in this bill under the SCA.

The Department of the Attorney General has taken the position in litigation that the SCA only applies to an ECS or RCS function as a messaging service provider and not to their function as a booking or reservation service provider. Nevertheless, to reduce the chance of a challenge under the SCA, we recommend that page 8, lines 1-6, be amended to read as follows:

> (d) The department may<u>, by subpoena,</u> require a hosting platform to provide the names and registration identification numbers for all operators for whom the hosting platform provided booking services and for all operators whose property or transient accommodations the hosting platform provided booking services for.

Even if the hosting platforms can show that they are ECS or RCS providers and meet all the other requirements for the SCA to apply, the SCA provides that the name and "subscriber number or identity" of a subscriber to or customer of the ECS or RCS shall be disclosed when a governmental unit uses an administrative subpoena. 18 U.S.C. § 2703(c)(2).

III. Other Comments

1. This draft of the bill adds a new subsection (h) to section 237D-4, HRS, which provides that "[e]ach *transient accommodations broker, platform host, and booking service* shall provide a monthly report of listings in Hawaii" and that the "[l]isting data shall be submitted through an online process with a reporting template and appropriate calculation guideline developed by, and made publically available on the website of, the *department of business, economic development, and tourism*" (emphases added). Page 14, lines 13-20. The reported data shall be "anonymized and aggregated by zip code" and shall include the total number of available units and rooms, total available room nights, total occupied room nights, average daily rate, and total revenue. Page 14, line 20, through page 15, line 6. The bill also provides that "[a]ny *operator or plan manager* who fails to provide a monthly report to the *department of taxation* shall be subject to the citation process and penalties of $100 per day for noncompliance" (emphases added). The bill also states that the legislature finds that "transient accommodations brokers, platform hosts, and booking services" should provide monthly report "to the department of taxation." Page 2, lines 3-9.

a. It is unclear (1) who is to provide the report: the operator/plan manager or the transient accommodations broker/platform host/booking service; (2) to whom the report is to be submitted: Department of Business, Economic Development, and Tourism (DBEDT), the Department of Taxation, or both; (3) who is to "anonymize" and "aggregate" the reported data: the transient accommodations broker/platform host/booking service, DBEDT, or the Department of Taxation; and (4) whether it is the "listing data" that is submitted or the "template and appropriate calculation guidelines" that is made publicly available on DBEDT's website. The purpose of the requirement

and whether the report is reasonably relevant to that purpose are also unclear. We recommend clarification.

b. In addition to the comment above, the first full paragraph on page 2, lines 3-9, also appears to include a typographical error (repeat of "transient accommodations") and refers to a part of the bill that was deleted in Senate Draft 1 of the bill. Those parts on page 2, lines 3-9, are stricken below:

> The legislature additionally finds that [~~transient accommodations~~] transient accommodations brokers, platform hosts, and booking services should provide a monthly report of transient accommodations listings in Hawaii by zip code to the department of taxation[~~, and maintain records that should be made available upon lawful request to enforcement authorities,~~] for greater transparency and data sharing purposes.

2. The bill provides that the "legislature also finds that hosting platforms, such as Airbnb, should be subject to fines if the hosting platform collects a booking service fee for posting online a transient accommodations unit rental *that is not registered with its respective county in Hawaii*" (emphasis added). Page 1, line 15, through page 2, line 2. The bill also similarly states that one of the purposes of this Act is to "[m]ake it unlawful for a hosting platform to provide, and collect a fee for, booking services regarding transient accommodations *that are not lawfully certified, registered, or permitted under applicable county ordinance*" (emphasis added). Page 2, lines 10 and 14-18. These provisions appear to be inconsistent with the statutory amendments in this draft of the bill, which makes it unlawful for hosting platforms to collect a fee for booking services in connection with transient accommodations *not registered with the Department of Taxation*. Page 6, lines 4-9. For consistency, we recommend that page 1, line 15, through page 2, line 2, be amended as follows:

> The legislature also finds that hosting platforms, such as Airbnb, should be subject to fines if the hosting platform collects a booking service fee for [~~posting online a~~] transient accommodations [~~unit rental that is not registered with its respective county in Hawaii~~] <u>located in the State if the operator or plan manager of the transient accommodation is not registered with the department of taxation under section 237D-4, Hawaii Revised Statutes.</u>

Similarly, we also recommend that page 2, lines 10 and 14-18, be amended as follows:

> The purpose of this Act is to: . . .
>
> (2) Make it unlawful for, a hosting platform to provide, and collect a fee for, booking services [~~regarding~~] in connection with transient accommodations [~~that are not lawfully certified, registered, or permitted under applicable county ordinance~~] located in the State if the operator or plan manager of the transient accommodation is not registered with the department of taxation as required under section 237D-4, Hawaii Revised Statutes; . . .

3. "Operator" means any person operating a transient accommodation, whether as owner or proprietor or as lessee, sublessee, mortgagee in possession, licensee, or otherwise, or engaging or continuing in any service business which involves the actual furnishing of transient accommodation. HRS § 237D-1. A "plan manager" means a person who undertakes the duties, responsibilities, and obligations of managing a resort time share vacation plan or is required to act for a resort time share vacation plan under chapter 237D, HRS. Id. Both are required to register with the Director of Taxation as a condition precedent to engaging or continuing in the business of furnishing transient accommodations or in a business as a resort time share vacation plan. HRS § 237D-4. It appears that this draft of the bill sometimes refers to "operators" and sometimes "operators" and/or "plan managers." If this is not intentional, we recommend that references to "operator" and "plan manager" be used consistently.

4. We recommend that page 6, lines 12-17, be amended as follows:

> (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 referenced subsection (a) makes it unlawful for a "hosting platform" – not a "transient accommodation broker" -- to provide booking services and collect a fee for such bookings services.

5. The term "platform host" (or "platform hosts") is used on the following pages of the bill:

Page 2, lines 4 and 20;
Page 3, lines 7-8;
Page 12, line 7;
Page 23, line 6; and
Page 24, line 2.

If the term "platform host" is referring to the term "hosting platform" defined on page 4, lines 11-21, we recommend that the term "hosting platform" be used consistently. If the terms have different meanings, we recommend that "platform host" be defined.

6. This draft of the bill provides that a registered tax collection agent shall be issued separate "certificates of registration" under chapter 237 with respect to taxes payable on behalf of its operators and plan managers in its capacity as a registered tax collection agent and, if applicable, with respect to any taxes payable under chapter 237 for its own business activities. Page 18, line 20, through page 19, line 4. With respect to any taxes payable for the registered tax collection agent's own business activities, it would be issued a "license" and not a "certificate of registration." HRS § 237-9. We recommend that page 18, line 20, through page 19, line 4, be amended as follows:

> A registered tax collection agent shall be issued a [~~separate~~]certificate[~~s~~] of registration under this chapter with respect to taxes payable on behalf of its operators and plan managers in its capacity as a registered tax collection agent and, if applicable, a separate license with respect to any taxes payable under this chapter for its own business activities.

7. We recommend that subsection (f) in the new section in chapter 237D, HRS, on page 30, lines 14-19, be amended as follows:

> (f) Except as otherwise provided in this subsection and subsection (g), all returns and other information provided by a registered tax collection agent, including the application for registration as a tax collection agent or any tax collection agreement, shall be confidential, and disclosure thereof shall be prohibited as provided in section [~~237-34~~] 237D-13. . . .

The new statute relates to chapter 237D, HRS, relating to transient accommodations tax. The nondisclosure statute under chapter 237D, HRS, is section 237D-13, HRS – not section 237-34, HRS, which is the nondisclosure statute for general excise tax purposes.

8. It appears that section 5 of the bill adds a new section in chapter 237, HRS, relating to general excise tax and section 6 of the bill adds a parallel section in chapter 237D, HRS, relating to transient accommodations tax. We bring to your attention that subsection (i) of the new section in chapter 237, HRS, relating to general excise tax (pages 23 through 24), is no longer the same as the corresponding

subsection (i) of the new section in chapter 237D, HRS, relating to transient accommodations tax (pages 33 through 35) as a result of changes made in Senate Draft 1 of the bill.

We respectfully ask that the Committees amend the bill as recommended.

HAWAI'I TOURISM AUTHORITY

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David Y. Ige
Governor

Chris Tatum
President and Chief Executive Officer

Statement of
CHRIS TATUM

Hawai'i Tourism Authority
before the
HOUSE COMMITTEE ON TOURISM & INTERNATIONAL AFFAIRS

Tuesday, March 12, 2019
9:00 AM
State Capitol, Conference Room #312

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

Chair Onishi, Vice Chair Holt and members of the Committee on Tourism & International Affairs, the Hawai'i Tourism Authority (HTA) **supports SB 1292 SD2**, 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.

COUNTY COUNCIL
Arryl Kaneshiro, Chair
Ross Kagawa, Vice Chair
Arthur Brun
Mason K. Chock
Felicia Cowden
Luke A. Evslin
KipuKai Kualiʻi

OFFICE OF THE COUNTY CLERK

Jade K. Fountain-Tanigawa, County Clerk
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Council Services Division
4396 Rice Street, Suite 209
Līhuʻe, Kauaʻi, Hawaiʻi 96766

March 11, 2019

TESTIMONY OF KIPUKAI KUALIʻI
COUNCILMEMBER, KAUAʻI COUNTY COUNCIL
ON
SB 1292, SD2, RELATING TO TRANSIENT ACCOMMODATIONS
House Committee on Tourism & International Affairs
Tuesday, March 12, 2019
9:00 a.m.
Conference Room 312

Dear Chair Onishi and Members of the Committee:

Thank you for this opportunity to provide testimony in support of SB 1292, SD2, Relating to Transient Accommodations. My testimony is submitted in my individual capacity as a Member of the Kauaʻi County Council.

I wholeheartedly support the intent of this measure to address the proliferation of illegal transient vacation accommodations in our communities by providing the counties with much needed support in identifying properties operating illegally and strengthening the counties' ability to enforce its land use policies. Transient vacation accommodations operating illegally negatively affects the quality of life of our island residents. SB 1292, SD2, will begin to provide disincentives for illegal operations to continue to ignore Hawaiʻi's zoning and land use laws.

Thank you again for this opportunity to provide testimony in support of SB 1292, SD2. Should you have any questions, please feel free to contact me or Council Services Staff at (808) 241-4188.

Sincerely,

KIPUKAI KUALIʻI
Councilmember, Kauaʻi County Council

AMK:aa

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 Tourism & International Affairs

March 12, 2019; 9:00 am
Conference Room 312

In consideration of
Senate Bill 1292 SD2
Relating to Transient Accommodations

Honorable Chair Richard H.K. Onishi and Members of the Committee:

The County of Kaua'i, Department of Planning **supports the intent but has comments** on SB1292 SD2, which, in part: (1) makes 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;" (2) requires "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;" and (3) requires records "be made available upon lawful request to enforcement authorities, for greater transparency and data sharing purposes."

SD 1292 SD2's intent to subject hosting platforms to fines "if the hosting platform collects a booking service fee for posting online a transient accommodations unit rental that is not registered with its respective county in Hawai'i," however, requires clarification to effectuate this intent. For example, Part IV's amendments to Hawai'i Revised Statutes (HRS) §237D-4(c) requires "an **operator or plan manager** [to] remove the transient accommodations unit advertisement" "[u]pon notice that the property is not in compliance with state law or county ordinance." HRS §237D-4(d), however, subjects "transient accommodations brokers, platform hosts, and booking services, who violates subsection (c)" to monetary fines established in that subsection. Part IV's amendments to HRS §237D-4(c) should require **transient accommodations brokers, platform hosts, and booking services** to remove advertisements instead of "an operator or plan manager" since the amendments to HRS §237D-4(d) subjects "transient accommodations brokers, platform hosts, and booking services" to civil fines.

In addition to the tax compliance mechanisms established in SB 1292 SD2, the Department of Planning seeks further authority to get a grip on the massive and ever-changing undertaking to control transient accommodations that are not located within legally permitted zones through additional amendments to HRS. 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 on third party hosting platforms.

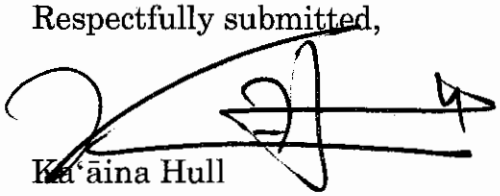
As such, the Department respectfully requests that SD1292 SD2 be amended to allow the counties to enact and enforce ordinances to regulate booking services, transient accommodation brokers, and hosting platforms. Specifically, we request additional language in SD 1292 SD2 that amends HRS §46-1.5 as follows:

(28) Any law to the contrary notwithstanding, each county shall have the power to enact and enforce ordinances regulating the operation of hosting platforms providing booking services for transient accommodation operators located within the county.

For purposes of this section:
(A) "Booking service" means any reservation or payment service provided by a person or entity who facilitates a transient accommodations transaction between a prospective transient user and a host.
(B) "Hosting platform" means a person or entity who participates in the transient accommodations business by collecting or receiving a fee, directly or indirectly through an agent or intermediary, for

conducting a booking transaction using any medium of facilitation."

Respectfully submitted,



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

OFFICE OF THE MAYOR
THE COUNTY OF KAUA'I

DEREK S. K. KAWAKAMI, MAYOR
MICHAEL A. DAHILIG, MANAGING DIRECTOR

Testimony of Michael Dahilig
Managing Director, County of Kaua'i

Before the
House Committee on Tourism & International Affairs

March 12, 2019; 9:00 am
Conference Room 312

In consideration of
Senate Bill 1292 SD2 Relating to Transient Accommodations

Honorable Chair Onishi, Vice Chair Holt, and Members of the Committee:

The County of Kaua'i **supports the intent but has comments** on SB1292 SD2 which adds definitions to the TAT law and amends the definition of transient accommodations; makes it unlawful for a hosting platform to provide, and collect a fee for, booking services regarding transient accommodations if the operator is not registered with the Department of Taxation; establishes additional options for counties to obtain relief for violations of county ordinances or rules; specifies that where a county seeks injunctive relief for violations related to single-family transient vacation rental units, the county need not show irreparable injury; amends requirements relating to transient accommodations tax certificates of registration to ensure greater transparency; and allows a transient accommodations broker to register as a GET and TAT tax collection agent for its operators and plan managers.

We do suggest language in Part IV amendments to Hawai'i Revised Statutes (HRS) §237D-4(c) should require **transient accommodations brokers, platform hosts, and booking services** to remove advertisements instead of "an operator or plan manager" since the amendments to HRS §237D-4(d) subjects "transient accommodations brokers, platform hosts, and booking services" to civil fines. This would align the language to effectuate the intent.

In addition to the tax compliance mechanisms established in SB1292 SD2 that reinforce compliance with state and county land use laws, the County of Kauai asks for additional support to regulate transient accommodations not located within legally permitted zones, Visitor Destination Areas (VDA), through additional amendments to HRS. For example, 18 to 27 percent of our 4500 listings for vacation rentals advertised across third party hosting sites are located outside our VDAs. 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.

Although the County of Kaua‘i’s Department Zoning Enforcement Division has focused and been successful in shutting down several hundred vacation rentals, the illegal vacation rentals that advertise on third party hosting platforms has proliferated. As such, the County of Kaua‘i supports the Planning Department’s request that SD1292 SD2 contain language to allow the counties to enact and enforce ordinances to regulate booking services, transient accommodation brokers, and hosting platforms. Specifically, requesting additional language in SD 1292 SD2 to amend HRS §46-1.5 as follows:

(28) Any law to the contrary notwithstanding, each county shall have the power to enact and enforce ordinances regulating the operation of hosting platforms providing booking services for transient accommodation operators located within the county.

For purposes of this section:

(A) “Booking service” means any reservation or payment service provided by a person or entity who facilitates a transient accommodations transaction between a prospective transient user and a host.

(B) “Hosting platform” means a person or entity who participates in the transient accommodations business by collecting or receiving a fee, directly or indirectly through an agent or intermediary, for conducting a booking transaction using any medium of facilitation.

Thank you for the opportunity to comment on this subject.

Michael A. Dahilig
Managing Director, County of Kaua‘i

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
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KIRK CALDWELL
MAYOR

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ACTING DIRECTOR

TIMOTHY F. T. HIU
DEPUTY DIRECTOR

EUGENE H. TAKAHASHI
DEPUTY DIRECTOR

March 12, 2019

The Honorable Richard H. K. Onishi, Chair
and Members of the Committee on Tourism
and International Affairs
Hawaii House of Representatives
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Onishi and Committee Members:

Subject: Senate Bill No. 1292, SD 2
Relating to Transient Accommodations

The Department of Planning and Permitting (DPP) is pleased to **support, with a recommended amendment,** Senate Bill No. 1292, SD 2, to the extent that it reflects a concerted State and county approach to taxing and regulating transient accommodations. It introduces significant new tools to help the counties better administer and enforce appropriate regulations on short-term vacation rentals, particularly in our residential neighborhoods.

The department takes no position on the establishment of hosting platforms as tax collection agents. However, we do support:

- The requirement that registered tax collection agents must share information with the county planning directors and mayors, including the location of the vacation rental property, the name of the operator, and the number of nights the property was rented
- The requirements that operators provide evidence that each property complies with applicable State and county land use laws, as confirmed by the appropriate agency
- The requirement that any advertisement must be removed if it does not adhere to the requirements of this Bill, which include a county registration number
- Clear provisions that allow the Department of Taxation and counties to impose penalties for lack of compliance with Bill provisions

We do humbly offer one amendment regarding booking information. Various sections of the Bill reference the number of nights rented. For county enforcement, it is important to note how many nights were rented per booking. It is possible that for a total of 120 booked nights that there was just one booking, or many. Under City regulations, a booking of more than 30 nights is not a violation. Thus, while aggregated booking information by zip code will be good information for statistical purposes, it does not help for county enforcement.

We support the removal of the requirement that hotels obtain a registration number and comply with the proposed provisions, as hotels already must file TAT returns, and, by definition, offer short-term overnight accommodations.

In short, we respectfully ask that this Bill move forward with the requested amendment.

Thank you for the opportunity to testify.

Very truly yours,

Kathy Sokugawa
Acting Director

OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

SB1292 SD2
RELATING TO TRANSIENT ACCOMMODATIONS
House Committee on Tourism & International Affairs

March 12, 2019 9:00 a.m. Room 312

The Office of Hawaiian Affairs (OHA) **SUPPORTS** SB1292 SD2, which seeks to improve enforcement of land use regulations relating to transient vacation rentals, while facilitating the collection of tax revenue from transient vacation rentals that comply with the law. Given the impact of unlawful transient vacation rentals on housing opportunities for Native Hawaiians and other Hawai'i residents, OHA appreciates and supports the strong and much-needed enforcement mechanisms that would be provided by this measure.

As home prices, rental prices, and homelessness continue to increase, and as O'ahu anticipates additional population growth and an associated demand for more housing over the next decade,[1] land-use planning that ensures housing affordability and availability is more critical now than ever before. As the legislature recognizes, Hawai'i is in the midst of an affordable housing crisis: recent research indicates a need for 65,000 more housing units by 2025, with half of this demand for units at or below 60% of the Area Median Income (AMI);[2] only 11 percent of State's housing demand is for housing units at or above 140% AMI, or for units that do not meet the State's current definition of "affordable housing."[3] **With 48% of households in the State already unable to afford basic necessities including housing, food, transportation, health care, and child care,[4] the lack of affordable housing and rising housing costs require bold and aggressive policies and land use enforcement that meaningfully prioritize the housing needs of local residents.**

Native Hawaiians are particularly disadvantaged by land uses that contribute to our local residential housing challenges, including increased rental housing costs and rental housing shortages in particular. Notably, Native Hawaiians are less likely to own a home and, therefore, disproportionately rely on the rental housing market.[5] Native Hawaiian households are also much more likely to be "doubled up," with multi-generational or unrelated individuals living together in single households,[6] and Native Hawaiian households are more than three times more likely have a 'hidden homeless' family member than all state households.[7]

Unfortunately, the unaddressed proliferation of illegal vacation rentals may exacerbate the rise in rental housing costs beyond what Honolulu residents and Native Hawaiians are able to afford, and has directly removed much-needed housing units from

the residential rental market. The 2016 Hawai‘i Housing Planning Study estimates that there are 28,397 non-commercial vacation rentals, located in nearly all communities in Hawai‘i.[8] Not surprisingly, the proliferation of such units, which generate nearly 3.5 times more income than the average long term residential rental,[9] has correlated with substantially increased housing costs throughout the islands; Honolulu in particular had the highest rates of increase in average monthly rent and average daily rent over the past several years.[10] In addition to raising the costs of available long term rental units, the proliferation of illegal vacation rentals also represents a direct loss of housing units from the long term rental market.[11]

Clearly, allowing the continued illegal use of housing units for vacation rentals will only exacerbate our housing crisis. Without more meaningful regulatory and enforcement mechanisms, there is nothing to stop the negative impacts of illegal vacation rentals on housing opportunities for Native Hawaiians and other local residents. In contrast, each and every illegal vacation rental unit that is returned to long-term residential use is one more unit that can help meet our existing housing demand.[12] **Accordingly, OHA has advocated for regulatory and enforcement approaches that may systemically curb and reverse the impact that illegal vacation rentals continue to have on residential housing opportunities in Hawai‘i.**

Accordingly, OHA appreciates and strongly supports the robust enforcement framework provided for under this measure. This includes the per-booking fine for hosting platforms and transient accommodations brokers who profit from illegal vacation rental operations; the requirement that vacation rental listings include state- and county-level registration numbers; mandatory compliance monitoring and reporting action required of transient vacation rental brokers who wish to act as tax collection agents on behalf of rental operators; the requirement that advertisements for illegal vacation rentals be removed; and clear penalties for noncompliance on both brokers and operators that will deter further unlawful land uses. **Such provisions will appropriately hold those most responsible for our transient vacation rental problem directly accountable for their actions, and subject them to penalties that reflect the magnitude of our growing housing crisis.**

As a final note, research shows that vacation rental activity in the State generally is not likely to provide meaningful and long-term economic benefits to Hawai‘i or its residents, including Native Hawaiians. Data has shown that **70% of properties listed as vacation rentals in Hawai‘i are owned by out-of-state property owners** who do **not** reside in the islands.[13] Native Hawaiians in particular are less likely to benefit directly from a transient vacation rental operation; with Native Hawaiian homeownership rates lower than the state average, they are less likely to own second or additional homes that could be rented as vacation units.[14] As previously mentioned, Native Hawaiians also often live in overcrowded households, without the extra rooms needed to operate an owner-occupied vacation rental. As such, while some Hawai‘i residents may be able to earn extra income from the use of a property as a vacation rental, vacation rental

operations primarily benefit nonresident property owners and real estate speculators – who may also seek to buy out any vacation rentals that owned by local residents now and in the future.

In addition, other jurisdictions have found that any economic benefits gained from permitted short-term vacation rental operations are far outweighed by the larger social and economic costs of removing long term rentals from the housing market. For example, an economic analysis by the City of San Francisco found a negative economic impact of $300,000 for each housing unit used as a vacation rental, exceeding any economic benefits from visitor spending, hotel tax, and associated revenues.[15] Most recently, the Economic Policy Institute has found that, for "internet based service firms" offering transient vacation rental hosting services, **"[t]he economic costs [to renters and local jurisdictions] likely outweigh the benefits," "the potential benefit of increased tourism supporting city economies is much smaller than commonly advertised," "[p]roperty owner . . . beneficiaries [from hosting services] are disproportionately white and high-wealth households," and "[c]ity residents likely suffers when [hosting platforms] circumvent[] zoning laws that ban lodging businesses from residential neighborhoods."[16]**

Again, the short-term benefits of vacation rental units to some property owners, including non-resident property owners and corporate vacation rental operators, are likely to be substantially outweighed by the fiscal impacts on Hawai'i and its residents from increased housing costs, increased real estate speculation, and the need for more social services and housing subsidies. **Accordingly, OHA strongly believes that regulatory and enforcement mechanisms that decrease the number of illegal vacation rental units operating in Hawai'i will best benefit Native Hawaiians and all Hawai'i residents.**

Therefore, OHA urges the Committee to **PASS** SB1292 SD2. Mahalo nui for the opportunity to testify on this measure.

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[1] *See* SMS, HAWAI'I HOUSING PLANNING STUDY, at 34 (2016), *available at* https://dbedt.hawaii.gov/hhfdc/files/2017/03/State_HHPS2016_Report_031317_final.pdf.
[2] *See id.*
[3] *See id.* at 34.
[4] ALOHA UNITED WAY, ALICE: A STUDY OF FINANCIAL HARDSHIP IN HAWAI'I (2017)
[5] *See* OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN HOMEOWNERSHIP HO 'OKAHUA WAIWAI FACT SHEET VOL.2016, NO. 1, page 3, *available at* https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/NH-Homeownership-Fact-Sheet-2016.pdfSheet-2016.pdf. This figure includes 8,329 DHHL residential lease "owner-occupied" property units. DHHL ANNUAL REPORT 2014, at 47, *available at* http://dhhl.hawaii.gov/wpcontent/uploads/2011/11/DHHL-Annual-Report-2014-Web.pdf. For non-DHHL properties, the NativeHawaiian homeownership rate is therefore 41.2%, 15.5 percentage points below the statewide rate.
[6] 24.8% of Native Hawaiian households, compared to 9.6% of state households include more than two generations or unrelated individuals. SMS, *supra* note 1, at 70.
[7] 14.1% of Native Hawaiian households, compared to 4.2% of state households have a hidden homeless family member. *Id.*

[8] There are an estimated 45,075 total vacation rental units measured by the study. The study estimates that at least 37% of these rentals are 'commercial' rentals, or resort condominium and condominium hotel properties which are legally permitted commercial operations. As such, the study estimates that 28,397 units are non -commercial, i.e. unlawful, transient vacation rentals. SMS, *supra* note 1, at 58.
[9] SMS, *supra* note 1, at 55.
[10] Honolulu's average monthly rent growth rate was 26.1%, and the six-year growth rate of average daily rental rate was 47%. SMS, THE IMPACT OF VACATION RENTAL UNITS IN HAWAI'I, 2016, at 8, *available at* http://www.hawaiitourismauthority.org/default/assets/File/Housing%20and%20Tourism%20113016.pdf
[11] The Hawai'i Tourism Authority's 2016 study found that vacation rentals increased by 34% per year between 2005 and 2015. Further investigation found that between 2011 and 2014, units held for seasonal use and not available for long term rent increased by 12%. *See id.* at 3.
[12] *See generally* SMS, *supra* note 1.
[13] Notably, the Hawai'i Tourism Authority report found that 45,075 total properties are available for short term vacation rentals, with between 21,295 and 23,002 as non-commercial vacation rental units advertised in 2016. 70% of these properties are offered by out-of-state property owners. SMS, *supra* note 10, at 5-6.
[14] For non-DHHL properties, the Native Hawaiian homeownership rate is 41.2%, 15.5 percentage points below the statewide rate. See *supra* note 5.
[15] *See* CITY OF SAN FRANCISCO, OFFICE OF THE CONTROLLER, AMENDING THE REGULATION OF SHORT-TERM RESIDENTIAL RENTALS: ECONOMIC IMPACT REPORT, May 2015, available at http://sfcontroller.org/sites/default/files/FileCenter/Documents/6458150295_economic_impact_final.pdf?documentid=6457.
[16] JOSH BIVENS, THE ECONOMIC COSTS AND BENEFITS OF AIRBNB: NO REASON FOR LOCAL POLICYMAKERS TO LET AIRBNB BYPASS TAX OR REGULATORY OBLIGATIONS (2019), available at https://www.epi.org/files/pdf/157766.pdf.

Testimony of Kelvin Bloom
Aqua-Aston Hospitality, LLC

Before the House Committee on Tourism & International Affairs

Tuesday, March 12, 2019, 9:00 a.m.
State Capital, Conference Room 312

In Consideration of
Senate Bill 1292, SD1
Relating to Transient Accommodations

Dear Chair Onishi, Vice Chair Holt and Committee Members:

I am Kelvin Bloom, Manager of Aqua-Aston Hospitality, LLC, which manages many hotels and resorts in the State of Hawaii. Aqua-Aston **is in support** of Senate Bill 1292, SD1 **but only with the following modification:**

As originally drafted, SB1291 modified HRS §237D-4, paragraph (c), to provide that "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 either: (A) The operator or plan manager issued pursuant to this section; or (B) The transient accommodations broker tax collection agent registered under section 237D- , if applicable.

Now, SB1292, SD1 modifies the proposed bill by deleting the option of conspicuously providing an electronic link to the registration identification number in any advertisement, including an online advertisement. In 2015, the option to use an electronic link was specifically inserted into HRS §237D-4 in order to ensure that management companies like Aqua-Aston Hospitality, Castle Hotels & Resorts and Outrigger Enterprises would not have to include hundreds of registration identification numbers in a single advertisement.

The properties managed by Aqua-Aston Hospitality include a few units to hundreds of units. Aqua-Aston Hospitality does not advertise specific units. Aqua-Aston Hospitality advertises properties as whole and transient guests are assigned to a specific unit only upon check-in. Oftentimes, Aqua-Aston Hospitality advertises more than one managed property within a single advertisement. Without the option to use an electronic link, Aqua-Aston Hospitality would be required to list hundreds of registration identification numbers within a single advertisement. Currently, Aqua-Aston Hospitality (as well as Castle Hotels & Resorts and Outrigger Enterprises) utilize an electronic link to the registration identification numbers to satisfy the requirements of the law and still be able to advertise in a clear yet efficient manner.

You are strongly encouraged to re-insert the option to provide an electronic link to the registration identification numbers.

Thank you for the opportunity to testify.

Kohala Coast
RESORT ASSOCIATION

March 10, 2019

Representative Richard Onishi, Chair
House Committee on Tourism and International Affairs
Hawaii State Legislature

Testimony in Support of Bill 1292 related to Transient Accommodations

Dear Chair Onishi and Members of the House Committee on Tourism and International Affairs,

The Kohala Coast Resort Association strongly supports 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 lodgings.

According to the Hawaii Tourism Authority's most recent Visitor Plant Inventory, there are an estimated 13,396 rooms rented as TVR units on Hawaii Island, compared to 6,110 hotel rooms. All of our members have been required to pay the hotel/resort property tax rate ($11.55 per $1000 valuation) to the County of Hawaii, as well 10.25% in TAT and 4.25% in GET to the State of Hawaii. Unfortunately, those property taxes, TAT and GET collections have not been fairly and equitably enforced with the owners of TVRs.

The Hawaii Attorney General revealed in a court filing on February 4, 2019, that a single online TVR service, Airbnb, admitted that its hosts have not all paid taxes. Airbnb also testified before lawmakers that it would have generated more than $41 million in new revenue for the state in two years had it been allowed to collect and remit taxes from about 16,000 operators, who represent just a fraction of the total TVR units in the islands according to HTA's study.

Hawaii County recently enacted Bill 108, which will regulate some aspects of TVRs on our island. We look forward to seeing that bill implemented later this year. We encourage you to also provide for the enforcement, transparency and equitability in the accommodations sector, by supporting SB1292.

KCRA is a collection of master-planned resorts and hotels situated north of the airport which represents more than 3,500 hotel and timeshare accommodations and an equal number of resort residential units. This is approximately 35 percent of the accommodations available on the Island of Hawai`i. KCRA member properties annually pay more than $20 million in TAT and $20 million in GET.

Sincerely,

Stephanie P. Donoho

Stephanie Donoho
Administrative Director

PO Box 6991, Kamuela, HI 96743 * (808) 747-5762 * kohalacoastresortassn@gmail.com * www.kohalacoastresorts.com

Maui Hotel & Lodging
ASSOCIATION

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

COMMITTEE ON TOURISM AND INTERNATIONAL AFFAIRS
Tuesday, March 12, 2019, 9:00 am
Conference Room 312

Dear Chair Onishi, Vice Chair Holt 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**, which Part I: Describes the purpose of this Act. Part II: Adds definitions to the TAT law. Amends the definition of "transient accommodations" to include additional forms of transient accommodations. Part III: Makes it unlawful for a hosting platform to provide, and collect a fee for, booking services regarding transient accommodations if the operator is not registered with the Department of Taxation. Part IV: Amends requirements relating to transient accommodations tax certificates of registration to ensure greater transparency. Part V: Allows a transient accommodations broker to register as a GET and TAT tax collection agent for its operators and plan managers. Effective 3/15/2094. (SD2)

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.

HAWAI'I LODGING & TOURISM ASSOCIATION

Testimony of

Mufi Hannemann
President & CEO
Hawaii Lodging & Tourism Association

House Committee on Tourism and International Affairs

Senate Bill 1292 SD2: Relating to Transient Accommodations

Chair Onishi, and members of the Committee:

Mahalo for the opportunity to offer this testimony on behalf of the Hawai'i Lodging & Tourism Association, the largest private sector visitor industry organization in the state with 700 members, 170 of which are hotels managing 51,000 rooms and nearly 40,000 employees.

The HLTA supports 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 an estimated 23,000 alternative accommodations in the Hawaiian Islands competing with hotels, resorts, timeshares, and bed-and-breakfasts, except that the majority of them are most likely avoiding proper tax registrations and county zoning laws, and are skirting our 10.25 percent Transient Accommodations Tax and the 4.0-4.5 percent General Excise Tax.

The Hawaii Attorney General revealed in a court filing on February 4, 2019, that a single online TVR service, Airbnb, admitted that its hosts have not all paid taxes. Airbnb also testified before lawmakers that it would have generated more than $41 million in new revenue for the state in two years had it been allowed to collect and remit taxes from about 16,000 operators, who represent a fraction of the total in the islands. An HTA report from December 2016 stated that vacation rentals, if regulated, would have brought in an estimated $135.7 million in transient accommodations taxes for the year 2018. The report further stated that TAT revenues from TVRs would grow to $172.4 million by 2022.

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. According to the Hawai'i Appleseed Center for Law and Economic Justice's TVR study, nine out of ten units are being rented as entire homes, as opposed to single rooms. Additionally, the report suggests roughly half the hosts are non-residents. 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.

The counties of Kaua‘i, Maui, and Hawai‘i have all enacted ordinances regulating some aspect of TVRs, leaving only the City and County of Honolulu without any comprehensive regulations or enforcement. Any action by the Legislature should prompt the City Council to act on pending legislation now before that body.

This bill will help us achieve a level playing field in regard to collecting taxes owed, provide for greater transparency and accountability for hosting platforms and their operators, and will strengthen the relationship between the State and Counties to better safeguard against the proliferation of illegal rentals in our communities.

Thank you.

March 12, 2019

House Committee on Tourism & International Affairs
The Honorable Richard H.K. Onishi, Chair
The Honorable Daniel Holt, Vice Chair

RE: SB 1292, SD 2, Relating to Transient Accommodations.

Dear Chairman Onishi and distinguished members of the House Committees on Tourism & International Affairs:

Dear Chairman Rhoads, Chairman Dela Cruz and distinguished members of the Senate Committees on Judiciary, and Ways and Means:

On behalf of Expedia Group – the globe leading travel technology platform that empowers travel and tourism throughout Hawai'i – I'd like to thank you for the opportunity to share our story and provide insight into how policies like SB 1292, SD2 could impact the state's robust travel and tourism ecosystem.

Background on Expedia Group

Collectively, Expedia Group brands cover virtually every aspect of researching, planning, and booking travel, from choosing the best airplane seat, to reading personal travel reviews of hotels, to planning what to do in a destination once you arrive. The Expedia Group portfolio serves both leisure and business travelers with disparate needs and budgets—and includes trusted brands like Orbitz, Expedia, Travelocity, Egencia, Trivago, HomeAway, VRBO, and others.[1]

Our vacation rental brands HomeAway and VRBO take immense pride in our long-standing commitment to local vacation rental homeowners, the small business communities they serve, and the millions of families that have used our vacation rental sites to experience Hawai'i in a unique and special way. We believe travelers, communities, and governments benefit from a fair mix of all type of accommodations choices—from boutique hotels and vacation rentals to B&Bs and brand hotels.

Vacation Rentals and Hawai`i's Economy

While we appreciate the Legislature's efforts to adopt reasonable regulation of transient accommodations brokers and hosting platforms, we have significant concerns regarding SB 1292, SD2. We explain those concerns in more detail below, but first it is important to recognize the benefits that Hawai`i's vacation rental industry provides.

[1] Please see submitted *Expedia Group Overview* for additional corporate information.

- According to the HTA, in 2016 vacation rental visitors spent nearly $1.2 billion on lodging. In addition, it is estimated that they spent over $1.9 billion on food, entertainment, and souvenirs. And, HTA estimated that in 2019 visitors would spend about $1.6 billion on lodging and nearly $2.6 billion on other local goods and services. Taking over $4 billion out of Hawai`i's economy would be devastating.

- The growth of vacation rentals in the hospitality ecosystem reflects two important realities: First, travelers are increasingly looking for family and group experiences in whole-home rentals. Second, the availability of those accommodations has become and important criterion for these vacationers. In other words, in some cases travelers rank the type of accommodations they can use ahead of the place they visit.

- Reports have shown that many families today prefer to stay in vacation rentals and would choose to stay in a different destination if no vacation rentals were available. They want to rent a home that has multiple bedrooms, a kitchen, a swimming pool, and a yard for their kids. For that growing segment of the tourist population, a hotel is not a suitable substitute for a vacation rental.

- This would mean over $430 million not spent in Hawai`i on lodging and other local goods and services, causing a loss of over $37 million in TAT and GET. It would also result in lost jobs and potential loss of airlift into Hawai`i.

- Even if vacation rental visitors were to switch to traditional resort lodging, there would not be enough hotel rooms to accommodate them. Traditional hotels have been operating at an annual capacity of 85% for the past six years, and it does not appear that this will slow down. This is widely considered to be maximum capacity for a hotel. As the HTA has confirmed, vacation rentals are "growing the pie," not taking market share from hotels.

Expedia Group's Proposal

Expedia Group is committed to working with the State of Hawai'i to maintain a healthy vacation rental industry while not creating an overly-burdensome regulatory environment for the broader tourism-driven economy. As it has done in other jurisdictions, Expedia Group welcomes the opportunity to collaborate with taxing authorities in Hawai`i to help ensure that they are receiving all taxes due. That collaboration must be part of a comprehensive regulatory scheme that both regulates the industry in reasonable ways and assures full compliance with tax laws.

We believe that such a regulatory framework should be implemented on a statewide basis. Just as the Legislature adopted provisions of Hawai`i Revised Statutes Chapter 201H to promote development of affordable housing statewide (overriding local rules and ordinances), it should address issues relating to the existence of vacation rentals statewide, instead of leaving the issues to local measures. In this way, the Legislature is positioned to prevent a patchwork of misguided regulatory efforts, such as the new Maui ordinance that imposes ruinous daily fines of $25,000, which violate the constitutional prohibition against excessive fines.

To demonstrate its commitment to a fair and effective path forward, Expedia Group has adapted the best practices from across the country into a proposed statute that would create a coherent regulatory scheme and a robust method for reporting and collecting taxes[2]. If adopted, it will enable Hawai`i to collect all the taxes owed and permit vacation rentals to operate in places and ways that are compatible with the reasonable needs of communities on every island.

The key features of this proposed legislation are:

1. Platforms to help promote a balance between healthy communities and a robust tourism economy by assisting with the enforcement of responsible limits on vacation rentals, such as:
    a. limits on the number of properties an owner can offer in non-resort areas;
    b. limits on the total number of vacation rentals in non-resort areas.

2. Platforms to offer tools to assist in compliance and enforcement with tax laws, such as:
    a. mandatory display of registration number;
    b. take down within 10 business days upon notice that a registration number is invalid;
    c. quarterly reports of listing URLs and registration numbers;
    d. quarterly reports of aggregated listing and night data;
    e. educate operators by providing a link to applicable laws;
    f. collection and remittance of taxes.

3. Statewide legislation with the above-referenced requirements would create consistency as it pertains to local regulation of short-term rentals.

Fundamental Flaws in SB 1291, SD2

To be clear, Expedia Group does not encourage or support avoidance of tax laws. Therefore, it generally supports the sections of SB 1292, SD2 that permit transient accommodations brokers to act as tax collection agents on behalf of all of its operators and plan managers. While the bill has a well-intended goal, it is flawed in key aspects. Those areas include:

1. The bill would impose monetary penalties on transient accommodations brokers (and their agents) if they engage in business with owners of transient accommodations ("operators") who are not in compliance with state and county ordinances. This shifts the government's obligation to enforce its laws to the brokers, requiring them to continually monitor operators' compliance with extensive land use, tax, and licensing laws. See bill at 1:15-2:2, 2:14-18, 6:4-7:9, 8:12-16, 12:6-7.

[2] Please see submitted *Whole-Home, Whole Community* outline for additional corporate information.

2. The bill does not provide a process by which a broker may appeal the tax director's denial of an application for registration as a tax collection agent. The bill also grants the director unreviewable discretion to unilaterally cancel a tax collection agent's registration for any reason. See bill 22:18-23:3, 33:9-15.

3. The bill would require a registered tax collection agent to disclose private information of operators to government, which violates the intent and purpose of the taxpayer confidentiality provisions in the Hawai`i tax code and would negate protections currently granted to Hawai`i taxpayers. Absent a valid subpoena or court order, these requirements also violate, and are preempted by, the Fourth Amendment and the federal Stored Communications Act. As such, we cannot support the disclosure of returns, nor furnishing of information to the counties without proper legal process. See bill at 2:3-9, 8:1-6, 8:12-16, 14:13-15:6, 16:3-7, 20:20-22:9, 26:12-16, 31:5-32:20.

4. The bill would impose personal liability on any officer, member, manager, or other persons responsible for the filing of returns or the payment of taxes. See bill at 19:15-20:3, 30:4-13.
   The bill encourages the various counties to adopt additional and possibly inconsistent ordinances and rules governing vacation rentals. See bill at 25:3-9, 35:14-20.

Expedia Group would welcome the opportunity to share our proposal as SB 1292, SD2, and other related bills, proceed through the legislative process.

Thank you for the opportunity to provide comments on SB1292, SD2 and please reach out with any additional questions.

Mahalo,

Amanda Pedigo
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Expedia Group
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Monday March 11th, 2019

House Committee on Tourism and International Affairs
Rep. Richard H.K. Onishi, Chair; Rep. Daniel Holt, Vice Chair

Tuesday March 12th, 2019, 9:00 A.M.
Conference Room 312

TESTIMONY IN OPPOSITION TO SB 1292, SD2

Dear Chair, Vice-Chair, and Members of the Committee:

On behalf of Airbnb, I wanted to take the opportunity to share our concerns regarding S.B. 1292, SD2. 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.

Unfortunately, while S.B. 1292, SD2 allows platforms to collect and remit taxes on behalf of hosts, the measure only allows them to do so under onerous and unacceptable conditions and may conflict with federal law. Because of this, Airbnb can not agree to voluntarily collect and remit taxes under this bill as currently drafted, and we oppose this bill. We have summarized our concerns below:

- To begin, let me address comments that S.B. 1292, SD2 is akin to the ordinance in place in San Francisco. That is not accurate. S.B. 1292, SD2 has some provisions that may appear to mirror parts of the San Francisco law, but these are just provisions lifted out of a comprehensive law which addresses the balance of allowable use and enforcement. Renting out all or a portion of your residence in San Francisco is a fully legal activity in every corner of the city. All of our discussions with San Francisco and how it enforces its ordinance have been

grounded in the fact that sharing your home is legal everywhere. This bill would in fact do just the opposite and add even more onerous fines to those sharing their own homes. Again, to equate the San Francisco law and the measure before you is not an accurate comparison.

- Additionally, 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:
    - First, 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.
    - Second, 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. 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.
    - Third, it is unlikely that a platform would agree to collect and remit taxes under these conditions. Hosts would likely migrate to another rental platform that did not disclose their personal information. As a result, the very intent of the bill -- to collect taxes from the STR community -- would be undermined.
- This proposal would use state-level tax collection to enforce outdated local land use laws while counties are engaged in the development of comprehensive short-term rental policies. When applied on Oahu, the bill would apply

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[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).

extraordinarily onerous enforcement provisions to the existing law regulating TVUs. This law was adopted in 1989 and does not take into account any of the current market realities, the changing nature of the global tourism market, the creation and establishment of the internet, and the growth of the alternative accommodations market since the regulations and permitting for short-term rentals were last updated nearly 30 years ago. In Honolulu, Airbnb and short-term rental operators have engaged in meaningful and rigorous discussion with City and County officials including the Mayor, City Council, and the Department of Permitting and Planning in order to seek a balanced short-term rental policy on Oahu. A number of bills have already progressed through the first reading at City Council and are before the Committee on Planning. This bill will only lead to further confusion in an already complicated marketplace and instead creates an additional layer of unnecessary regulation.

- Further, the purpose of any tax bill is to help ensure the assessment, collection and payment of taxes, not to facilitate the Department of Taxation's enforcement of county land use laws. S.B. 1292, SD2 includes problematic language such as "the planning director and county official designated to receive the information pursuant to this subsection may examine and copy the returns and cover sheets to ensure compliance with this section, state tax laws and county tax ordinances, and any applicable land use laws and ordinances." Tax payment does not impact a user's county land use liability. Taxpayer information is confidential under state law for important policy and privacy reasons, and should not be used to enforce county land use laws.
- This bill does not contemplate a fair process for regulating the industry but simply seeks to impose harsh fines for engaging in business, on an operator or plan manager who is "not in compliance with all state laws and county ordinances." Thus, an internet hosting platform may be punished with civil penalties if a person or entity with whom it does business is not in compliance with each and every applicable state tax law, traffic law, zoning ordinance, or land use law. Even if this is limited only to land use laws, S.B. 1292, SD2 thereby seeks to make an internet hosting platform financially responsible for the content (or lack of content) of any online advertisement, and seeks to financially penalize and for the actions or inactions of other people and entities using the internet platform, not for anything that the internet platform has done. These proposed civil penalties against internet platforms are unfair and unwarranted, and may implicate federal laws such as CDA Section 230. The bill requires operators and/or property owners to provide the Transient Accommodations Broker, including platforms, "with verification of compliance with state land use laws or county land use ordinances" when no such verification process exists at the state

or local level. It asks the operators to generate evidence for which there is no uniform way to demonstrate compliance, and it asks the platforms to be responsible for verifying documents that do not currently exist and do not have a uniform standard.

- While there has been much discussion among legislators about allowing local residents to share their home legally, this bill does nothing to protect those activities while at the same time imposing hefty civil penalties.
- There has been no discussion of the devastating impact this bill will have on the Hawaii economy, which will be significant, hurting local residents, small businesses, and the entire Hawaii tourism industry. Hundreds of millions, if not billions, of dollars in tourist revenue could be at risk if this bill were adopted as currently proposed.
    - Alternative accommodations support the state's biggest industry and generate millions in annual tax revenue.
        - A recent study conducted by the local economic consultants Kloninger & Sims found that just on Oahu, alternative accommodations support more than $2B in economic impact and 12,000 jobs.

In conclusion, because the conditions for voluntarily collecting are so onerous and violate federal law, no platforms will be able to participate and thus this bill will generate zero new revenue for the state while severely negatively impacting the local economy, hurting local residents and businesses. We will continue to work with local leaders to develop common sense regulations on short-term rentals, and remain willing to work with the state to develop a path to allow us to collect and remit taxes on behalf our hosts.

Regards,

Matt Middlebrook
Head of Public Policy, Hawaii

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March 11, 2019

HOUSE COMMITTEE ON TOURISM & INTERNATIONAL AFFAIRS
Rep. Richard H.K. Onishi, Chair, Rep. Daniel Holt, Vice Chair

HEARING DATE: Tuesday, March 12, 2019
TIME: 9:00 a.m.
PLACE: Conference Room 312

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

Dear Representatives:

We write on behalf of our client, Airbnb, in opposition to Senate Bill No. 1292 SD2 ("*SB1292 SD2*"). Although we support SB1292 SD2's 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 impermissibly violates federal law and runs afoul of other constitutional protections.

SB1292 SD2 contains problematic language that would render it invalid, unworkable, and unenforceable. The current language of SB1292 SD2 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 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 procession." *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., Blackpage.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) ("§ 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 impermissibly violates Section 230

SB1292 SD2 violates Section 230 in several ways. It seeks to make hosting platforms responsible for the content and veracity of information provided by its users. It also improperly seeks to make hosting platforms liable for collecting a fee for "booking services" where the users do not comply with local land use laws, again penalizing hosting platforms for the content of listings provided by users. Finally, it requires that the hosting platforms agree in writing to not collect any fee if it receives a written notice from a state or county governmental authority that the subject property is not in compliance with local land use laws, regardless of whether a judicial determination of noncompliance has been made.

A. Numerous Provisions in SB1292 SD2 Improperly Make Hosting Platforms Responsible for Content and the Veracity of Information Provided by Users.

At the core of Section 230's protections is the idea that hosting platforms cannot be held responsible for the content provided by their users and cannot be required to verify such information. SB1292 SD2 has numerous provisions that violate these federal protections by seeking to penalize hosting platforms for the content provided by users and for not verifying the accuracy of that content. First, SB1292 SD2 makes hosting platforms responsible for the content included in advertisements prepared by users. Proposed §§ 237D-4(c) and (d) of Part IV 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 operator or plan manager's transient accommodations tax registration identification number;
>
> (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; and

> (3) The county-level transient accommodations tax registration identification number of each advertised unit as provided by the county having jurisdiction.
> Upon notice that the property is not in compliance with state law or county ordinance, an operator or plan manager shall remove the transient accommodations unit advertisement.
>
> (d) Failure to meet the requirements of subsection (c) shall be unlawful. *The department may issue citations to any person, including transient accommodations brokers, platform hosts, and booking services, who violates subsection (c)* [and the citation also includes] a monetary fine… (Emphasis added.)

§§ 237D-4(c) and (d) makes hosting platforms 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"). In short, because §§ 237D-4(c) and (d) hold hosting platforms accountable for the content and veracity of information provided by their users, these provisions clearly violate Section 230.

Second, §§ 237 __(i) and 237D__(i)[1] of Parts V and VI attempt to hold hosting platforms liable for content provided by its users, as each provision states that:

> When conducting business with an operator or plan manager with respect to a property for lease or rent, *a transient accommodations broker, platform hosts, and booking services shall*:
> …
> (2) R*equire the operator or plan manager to provide* the transient accommodations broker, platform host, or booking service with the operator's or plan manager's *transient accommodations registration identification tax identification number* and local contract information *and shall notify* the operator or plan manager *that this information is required in advertisements* for transient

[1] § 237D-_(i) only identifies "transient accommodations broker" rather than "transient accommodations broker, platform hosts, and booking services" used in § 237-_(i).

> accommodations or resort time share vacation interests, plans, or units under section 237D-4;
>
> (3) R*equire the operator or plan manager to provide the transient accommodations broker, platform host, and booking service with the county agency, and verification, or permit, as applicable, issued by the appropriate county agency;*
>
> (4) *Require*[2] *the operator or plan manager to provide any other information as may be required by rulemaking.* (Emphasis added.)

The intent of these provisions is clear. The State wants to create a system whereby the hosting platforms are required to ensure that their users are complying with state laws and county ordinances. However, because Section 230 prohibits internet platforms from being liable for requiring specific content or verification of the information voluntarily provided by their users, these provisions are preempted and invalid. § 237-_(i) and § 237D-_(i) create liability for hosting platforms in the event that: (1) the hosting platform did not satisfy the requirements under this section by verifying certain user-provided information, or (2) the user provided wrong, or faulty, or incorrect information to the hosting platform. Under either set of circumstances, Section 230 clearly prohibits the state government from seeking to hold hosting platforms liable due to the acts and/or statements of its users. Furthermore, the requirements in these provisions seek to put the hosting platforms into the role of being police, judge, and jury for compliance with local land use law. That is not the proper role of hosting platforms, and Section 230 prohibits the State from imposing that role upon them.

B. SB1292 SD2 Impermissibly Penalizes Hosting Platforms for User Violations by Prohibiting Hosting Platforms From Collecting Fees for "Booking Services".

Preventing hosting platforms from collecting fees based on violations by users is prohibited by Section 230. Part II, entitled "Definitions" of SB1292 SD2 defines "booking services" as:

> ***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. (Emphasis added).

[2] This provision is subsection (5) in § 237D-_(i).

Later Part III, § 237D_-3 provides:

> "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 collation of subsection (a).

First, SB1292 SD2 seeks to avoid the application of Section 230 by regulating "booking services" as an action that is somehow different from advertisements. This is a distinction without a difference. Moreover, SB 1292 SD2 now explicitly includes "advertising" in the definition of "booking services". *See* SB 1992 SD2, Part II. Courts have noted that state and local legislatures – which 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). Advertisements and "booking services" are inextricably linked and cannot be separated in an attempt to avoid the application of Section 230. As such, SB 1292 seeks to punish internet platforms in violation of Section 230. *See Goddard v. Google, Inc.*, 2008 WL 5245490, at *4 (N.D. Cal. Dec. 17, 2008) ("[C]ourts repeatedly have rejected attempts to recharacterize claims ... to avoid § 230's prohibition on treat[ing] [the defendant] as a 'publisher' of information."). The United States Supreme Court precedent cited above makes it clear that this impermissible objective cannot be saved through creative drafting.

Even assuming that "advertisements" and "booking services" are separate concepts (which they are not), these provisions improperly make hosting platforms responsible for the obligations, and the violation of any obligations, of the people and entities using the hosting platforms. In other words, SB1292 SD2 penalizes hosting platforms for the status of their users' homes or units and requires internet platforms to determine such status before collecting any fees for services provided

to such users. *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); *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"). SB1292 SD2 thus penalizes hosting platforms for the actions of their users and requires them to verify that the information provided by its users is accurate. This conflicts with and violates Section 230.

C. SB1292 SD2's Requirement that Transient Accommodation Brokers Agree in Writing to Refuse Collection of Fees Based on User Violations Runs Afoul of Section 230.

SB1292 SD2 permits hosting platforms to operate as "a tax collection agent" provided the platforms "agree[] in writing" to a number of requirements. In Parts V and VI, §§ 237-__(a) and 237D-__(a) provide:

> "(a) The director may permit a transient accommodations broker to register as a tax collection agent ... provided that the transient accommodations broker *agrees in writing*:
> ...
> (3) *That continuing to collect fees for booking services in connection with a transient accommodation, seven days after receiving written notice from a state or county governmental authority that the subject property is not in compliance with state law or county ordinance, is a violation of the tax collection agreement.*" (Emphasis added.)

Accordingly, this provision penalizes hosting platforms for the violations of its users by banning their ability to collect a fee for services provided *purely because of the status of the user.* Such a provision punishes hosting platforms for the alleged violations, acts and/or omissions of its users. As such, SB1292 SD2 requires that hosting platforms "agree in writing" to break federal law if they want to become a tax collection agent. Hawaii law has long held that such contracts are void. *See Goo Yee v. Rosenberg*, 21 Haw. 513, 517 (1913) (stating "that contracts ... which contemplate the performance of that which is either *malum in se*, or prohibited by some positive statute, are void").

Under Section 230, an internet platform cannot be held liable as a publisher or speaker of particular content submitted by its users and is not responsible or liable for such content. Further, websites are protected from being forced to verify third-party content placed on their platforms. As SB1292 SD2 seeks to make hosting platforms responsible for the information of its users and punishes platforms for the users' violates, SB1292 SD2 violates Section 230.

SB1292 SD2 impermissibly violates the SCA.

SB1292 SD2 violates the SCA by requiring that hosting platforms make a number of disclosures to the state and/or counties. Sections §§ 237-__(g) and 237D-__(g) of Parts V and VI provide that:

> (g) A registered tax collection agent shall file periodic returns in accordance with section 237D-6 and annual returns in accordance with section 237D-7. Each periodic return required under section 237D-6 shall be accompanied by an electronic cover sheet, in a form prescribed by the department that includes the following information:
>
> (1) 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, the operator's or plan manager's name, address, and transient accommodations registration identification number; and
>
> (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 subsection (a), for which taxes are being remitted pursuant to this chapter:
>
> (A) The address of the transient accommodation;
>
> (B) The number of nights that each transient accommodation was rented and the rate or price at which each transient accommodation was rented; and
>
> (C) The amount of tax being remitted pursuant to this chapter and the amount of any federal form 1099 income that was derived from each transient accommodation.
>
> **Upon request by the planning director or mayor of the applicable county, a registered tax collection agent shall disclose any of the information contained in the returns or cover sheets 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 237D-13, the planning director and county official designated to receive the information pursuant to this subsection may examine and copy the returns and cover sheets to ensure compliance with this section, state and county tax laws and ordinances, and any applicable land use laws and ordinances. (Emphasis added.)

These provisions clearly violate the SCA. Without a subpoena or other form of due process, SB1292 SD2 requires hosting platforms to disclose their users' private tax information to county officials for non-tax purposes (address, number of rental nights, rates, etc.). The SCA prohibits hosting platforms from disclosing some of the information required under SB1292 SD2 without due process. Accordingly, these provisions require hosting platforms, without any form of due process, to provide the counties with information about its users. *See Goo Yee*, 21 Haw. at 517 (stating "that contracts ... which contemplate the performance of that which is either *malum in se*, or prohibited by some positive statute, are void"). In other words, these provisions require hosting platforms to turn over private information of its users in violation of the SCA.

On top of the SCA violations, these provisions 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[3] 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[.]"

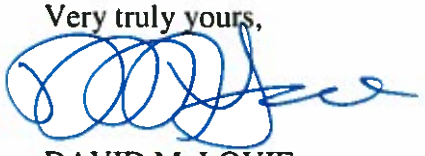
The right to privacy in both state and federal law protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" The U.S. Supreme Court has held that "searches conducted outside the judicial process, without prior approval 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-__(g) and 237D-__(g) of Parts V and VI require hosting platforms such as Airbnb to provide private information of their users to the state and/or counties of Hawaii without due process. Thus, these provisions of SB1292 SD2 violate the constitutional right to privacy and are unenforceable.

[3] 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 renders it invalid, or at the least, completely unworkable for hosting platforms. We therefore urge that SB1292 SD2 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

LATE

BILL NUMBER: SB 1292, SD-2

INTRODUCED BY: Senate Committees on Judiciary, and Ways & Means

EXECUTIVE SUMMARY: Allows a transient accommodations broker to serve as a collection agent for general excise and transient accommodations taxes. This type of arrangement would probably enhance collection of taxes because of the difficulty of policing individual owners. However, the number of caveats, conditions, and restrictions that are placed on the broker signing up for this program is so large that it is unlikely that any broker in its right mind would sign up. If no broker is motivated to sign up, this legislation will accomplish nothing.

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: Hosting Platform Liability

Adds a new section to HRS chapter 237D making it unlawful for a hosting platform to provide booking services for compensation in connection with transient accommodations in Hawaii if the operator of the transient accommodation is not registered with the Department of Taxation. Violation is subject to a penalty of $1,000 per transaction, which may be appealed to the director or designee. Provides that the penalty shall not be imposed if the hosting platform obtains the registration numbers of the operators involved. No penalty is imposed if the transient accommodation involved is a hotel.

Part IV: Hosting Platform Transparency and Data Sharing

Amends section 237D-4(c), HRS, so that any advertisement for a transient accommodation shall include the operator's or plan manager's TAT registration number; the local contact's name, phone number, and email address; and the county-level registration number of the advertised unit. Provides that the operator or plan manager shall remove the advertisement upon notice that the property is not in compliance with state law or county ordinance.

Also requires each operator and plan manager to provide an anonymous monthly report of listings in Hawaii, aggregated by zip code, to the department of taxation by the fifth day of each month with the previous month's data. Provides recordkeeping requirements, and penalties for noncompliance like those that now are in section 237D-4(d).

Part V: Transient Accommodations Brokers as Tax Collection Agents

Adds a new section each to HRS chapter 237 and chapter 237D allowing the director of taxation to permit a transient accommodations broker to register as a tax collection agent on behalf of all of its operators and plan managers. To register, the broker must secure the consent of its operators and plan managers to the disclosure of its returns or return information, agree to furnish information to the counties, and agree that continuing to collect fees for booking services in connection with a transient accommodation, seven days after receiving written notice from a state or county governmental authority that the subject property is not in compliance with state law or county ordinance, is a violation of the tax collection agreement. The tax collection agreement shall be subject to any requirements under state or county law, and does not permit the broker, operator, or plan manager to opt out of any requirements or obligations under state or county law. Defines "operator," "plan manager," and "transient accommodations broker" the same as in the TAT law.

The department is required to accept or deny an application for registration within thirty days. Upon acceptance as a tax collection agent, the broker shall report, and collect, and pay over the tax due on behalf of all its operators and plan managers as it relates to activity booked through the broker. Registration does not relieve the broker from any of its own tax obligations, and the operators and plan managers are not protected as to any business activity other than that booked through the broker. Furthermore, owners and plan managers are subject to all requirements of state and law (including county zoning law) as if the agreement did not exist.

A registered broker shall be issued separate licenses with respect to taxes payable on behalf of its operators and plan managers in its capacity as a registered transient accommodations broker tax

collection agent and, if applicable, with respect to any taxes payable under this chapter for its own business activities. The broker is to file periodic returns reporting income and exemptions as collection agent separately from its own business activity. With respect to taxes collected, the broker is jointly and severally liable with the operator or plan manager for the taxes. If the broker is an entity, responsible officials of the entity are made personally liable for the tax collected but unpaid, together with applicable penalties and interest.

A broker may cancel its registration by delivering a written cancellation notice to the department and its customers; the cancellation will be effective no earlier than 90 days after delivery of the notice. The department may also cancel a registration for any cause, including violations of the tax laws or a breach of the registration agreement.

Requires a broker, before conducting business with an operator or plan manager with respect to a property for lease or rent, to: (1) notify the operator or plan manager that the subject property is required to be in compliance with applicable state and county land use laws and ordinances prior to retaining the services of the transient accommodations broker; (2) require the operator or plan manager to provide the transient accommodations broker, platform host, or booking service with the operator's or plan manager's transient accommodations tax identification number and local contact information and shall notify the operator or plan manager that this information is required in advertisements for transient accommodations or resort time share vacation interests, plans, or units under section 237D-4; (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.

When the broker files periodic or annual GET or TAT returns, the broker shall also file an electronic cover sheet that includes the following information: (1) for each operator and plan manager on whose behalf the tax collection agent is required to report, collect, and pay over taxes, the operator's or plan manager's name, address, and general excise tax license number; and (2) for each transient accommodation rented through the registered tax collection agent or the website or hosting platform designated in the certificate of registration, for which taxes are being remitted: (A) the address of the transient accommodation; (B) the number of nights that each transient accommodation was rented and the rate or price at which each transient accommodation was rented; and (C) the amount of tax being remitted and the amount of any federal form 1099 income that was derived from each transient accommodation. Provides that cover sheet information or other information contained in the returns filed on behalf of an operator may be disclosed upon request of an appropriate county official to ensure compliance with local land use and zoning laws.

EFFECTIVE DATE: March 15, 2094.

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

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 allow 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 neighborhoods 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.

But do we really want a withholding agent to be our brother's keeper? Is it right to ask our employers to call up our banks and credit card companies to see if we are current on our mortgage and paying our bills on time? If we aren't timely or break the law, should we blame our employers for facilitating illegal or immoral activity by paying us our wages (after the tax authorities have, of course, gotten their share) instead of first making sure that those monies are applied to payment of our debts?

At some point, we need to recognize that TVR hosts, like most employees, are adults. They have chosen to go into business, and they are responsible for running their business and all that it

entails. They, as the property owners, are answerable to the counties for the use or misuse of those properties. Certainly, the brokers need to be aware of and compliant with laws that pertain to their business if they are going to be doing business here. But it seems a bit much to ask the brokers to be policemen for the counties when the counties, for whatever reason, can't or won't enforce their own zoning laws.

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.

It needs to be kept in mind that the bill is attempting to set up a system for collection of tax that is **voluntary**. Brokers will need to **want** to sign up for it for the system to have any effect whatsoever. With the multifarious caveats and conditions and requirements and personal liability, who would want to sign up? This is not God laying down the Ten Commandments at Mt. Sinai. We need to make a deal for something like this to work.

One of the key provisions for which technical change is necessary is the personal liability provision, at pages 19:15-20:3 and 30:4-13. 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 adding to the end of subsection (e) the language: "The person shall be personally liable for any unpaid taxes and interest and penalties on those taxes, if such officer or other person wilfully fails to pay or to cause to be paid any taxes due from the taxpayer pursuant to this chapter."

Digested 3/8/2019

State House of Representatives Hearing on
S.B. 1292 S.D. 2
March 12, 2019

Introduction
My name is Martine Aceves-Foster. I am a fulltime lecturer at Leeward Community College. I have been divorced for the last 11 years, live in Kailua, and own my home. Since I will be teaching at the time of this hearing, I appreciate you taking the time to read my testimony.

As an Airbnb Host
I have been hosting for the last 3 years; I rent the extra bedroom in my house to guests from all parts of the world. The reason I host is because my pay is not enough to meet all my monthly expenses, especially during the summer when I receive no salary. Furthermore, when I retire, it will certainly be necessary for me to continue as a host to supplement my modest pension.

Many people in Hawaii have a second job simply because the cost of living in relation to salaries is high. Hosting is my choice for a second job, and I enjoy the interaction with guests. It's a pleasure to greet guests, orient them, check in with them to make sure all is going well, and to simply chat with them. I gain a sense of fulfillment from making connections and ensuring my guests have a good experience while here in Hawaii, whether they are tourists or once-upon-a-time Hawaii residents returning to visit family, friends and old haunts.

Yes, the cleaning and administration are extra work, but the peace of mind I gain from making ends meet certainly makes hosting worthwhile for me. I am grateful for the home I live in, and I do not wish to lose my home. Hosting is my choice for filling in the income gap that I and many in Hawaii strive to bridge in order to keep a roof over our heads.

At the same time, I am fully compliant at the state and federal levels. I am up to date on Excise, Transient Accommodations as well as state and federal income taxes. I sincerely and honestly uphold my end as a citizen and business owner-operator. The only reason I do not hold a non-conforming use registration number is because the means to obtain one do not exist.

My views on S.B. No. 1292 S.D. 2
I agree with **Part 1**, in which transient accommodations brokers and platform hosts can act as tax collecting agents to collect Excise and Transient Accommodations taxes for the State of Hawaii.

I also agree that if such an agreement is made between transient accommodations brokers and platform hosts and the State of Hawaii, it should be unlawful for transient accommodations brokers and platform hosts to advertise properties and units that are not "lawfully certified, registered, or permitted under applicable county ordinance".

According to page 14, line 13 to page 15, line 6, information about hosts will be made publicly available via database, but the data will not present specific names or addresses; all information will be "anonymized and aggregated."

I believe the $1,000 fine for hosting platforms and transient accommodations brokers seems fair to me too and, certainly, a fee of $5 is not too onerous for me to register as an owner-operator who rents one bedroom in my house.

On the other hand, $500-$5,000 in fees because a host forgot to list his or her contact information and registration and tax ID information does seem excessive. It's not that these are difficult requirements to meet; it's just a lot of money to charge for such small offenses.

Remaining Questions

1. With respect to periodic returns filed by registered tax agents see pg. 20, line 14 to pg. 21, line 18), I am concerned that the data of specific owner-operators could become available to the public, either accidentally or purposefully, and this could lead to serious problems. Transient accommodations are an emotionally charged issue, and I have already been approached at my home by an individual citizen who was checking on my hosting business. I do not wish to routinely or even sporadically become a target due to the State of Hawaii either presenting or accidentally leaking information about me as a host to the general public. <u>Will only the Department of Taxation have this information? What safeguards will be taken to protect the data, and how safe will the data be? What other purposes might the data be used for?</u>

2. How long will the grace period for hosts to properly register be?

3. What happens if a county does not yet have an agreement for registering hosts? How will that affect registration of hosts at the state level?

The Issue of Homelessness

Transient accommodations have been demonized as causing high home prices and, by extension, homelessness. However, many hosts of small operations (including me) are simply trying to keep their homes and make ends meet.

It is also important to keep in mind other factors that may have a more significant impact on the cost of housing and homelessness. According to Hawaii's State Department of Business, Economic Development and Tourism, 45% of homes on Maui were purchased by non-residents in 2016; on Kauai and the Big Island that figure was 37%, and on Oahu 23%. Taking homes out of the hands of residents, a decades old problem, may, in fact, have a stronger effect on homelessness, especially when homes are purchased as investments. Let's be fair when assigning blame.

Conclusion

Passing a bill that allows online platforms to collect excise and transient accommodations taxes for the State of Hawaii is a long time coming. The State and its residents will surely benefit when an agreement is finally reached. If for some reason this bill does not pass, my recommendation, which I make most humbly, is to address one aspect of this complex bill at a time, taking the least controversial and widely beneficial portion first. I think that approach will empower the State to collect the tax revenue it so desperately needs sooner rather than later.

Sincerely yours,

Martine Aceves-Foster
(808) 262-5383
1245 Ulunahele Street
Kailua, HI 96734
acevesfoster@gmail.com

LATE

Aloha,

My name is Scott Brazwell, and I appreciate the opportunity to speak with you today.

I have worked in senior leadership positions here in the Hospitality field and my wife, Cheri, and I have lived in Hawaii for last 15 years. We love Hawaii. It Is our home.

I have recently retired. Home sharing has allowed my wife and I to continue to contribute to our community through doing the work we have dedicated our lives to. Not only has it provided the supplemental income needed for us to stay in our home, it allows us and our guests to contribute financially to the local economy. Equally important, we have built long lasting relationships with people wanting to experience a different type of stay in Hawaii, and with the local business owners we support. This has become an integral part of our lives.

We support common sense regulations for short term rentals and I have been voicing this opinion at a number of County government meetings over the past year. We want our business legitimized. We pay our taxes and we are proud of our contributions to our community.

I oppose SB1292, even though it will allow services like Airbnb to collect and remit accommodations as well as general excise taxes on behalf of our host community. Legislators have combined the tax collection bill with other

provisions that impose incredibly harsh penalties and onerous mandates on hosts, property owners, and the platforms. Additionally, the bill, as drafted, violates federal law by requiring companies like Airbnb to turn over private information for hosts to local governments.

Counties around the state have been working are already working on short-term rental regulations. This bill would impose additional, unnecessary requirements on hosts. It would also create confusion as it would duplicate the role of County government, which administers local land use laws.

I am asking you to please oppose SB1292.

Mahalo

MAUI
CHAMBER OF COMMERCE
VOICE OF BUSINESS

HEARING BEFORE THE HOUSE COMMITTEE ON
TOURISM & INTERNATIONAL AFFAIRS
HAWAII STATE CAPITOL, HOUSE CONFERENCE ROOM 312
TUESDAY, MARCH 12, 2019 AT 9:00 A.M.

To The Honorable Richard H.K. Onishi, Chair;
The Honorable Daniel Holt, Vice Chair; and
Members of the Committee on Tourism & International Affairs;

TESTIMONY IN SUPPORT OF SB 1292 SD2
RELATING TO TRANSIENT ACCOMMODATIONS

Aloha, my name is Pamela Tumpap and I am the President of the Maui Chamber of Commerce, with approximately 650 members. I am writing share our support of SB 1292.

We support a level playing field and a fair and equitable marketplace. All accommodations should be required to pay the transient accommodations tax and general excise tax. Therefore, we support this bill to amend the definition of “transient accommodations” to include transient vacation rentals and other forms of transient accommodations. We also appreciate the additional requirements for hosting platforms to ensure transient accommodations are compliant and appropriate taxation is collected in our state.

We appreciate the opportunity to testify on this matter and ask that this bill be passed.

Sincerely,

Pamela Tumpap

Pamela Tumpap
President

To advance and promote a healthy economic environment for business, advocating for a responsive government and quality education, while preserving Maui’s unique community characteristics.

LATE

SB-1292-SD-2
Submitted on: 3/11/2019 3:45:06 PM
Testimony for TIA on 3/12/2019 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Ellen Floyd	Individual	Oppose	Yes

Comments: