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

ON THE FOLLOWING MEASURE:
H.B. NO. 419, H.D. 2, PROPOSED S.D. 1, RELATING TO TRANSIENT ACCOMMODATIONS.

BEFORE THE:

SENATE COMMITTEES ON ENERGY, ECONOMIC DEVELOPMENT, AND TOURISM AND ON PUBLIC SAFETY, INTERGOVERNMENTAL, AND MILITARY AFFAIRS

DATE: Wednesday, March 20, 2019 **TIME:** 2:50 p.m.

LOCATION: State Capitol, Room 414

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

Chairs Wakai and Nishihara and Members of the Committees:

The Department of the Attorney General provides the following technical comments.

This bill:

(1) Provides that a county shall be eligible to receive an unspecified amount for fiscal year 2019-2002 from the State for the purpose of enforcing all applicable laws and ordinances relating to transient accommodations and short-term vacation rentals, provided that no funds shall be released to a county until it has complied with specified conditions;

(2) Amends the definition of "transient accommodations" to include terms defined by the counties;

(3) Makes it unlawful for a hosting platform to provide, and collect a fee for, booking services in connection with transient accommodations located in the State if the operator or plan manager is not registered with the Department of Taxation;

(4) Requires each transient accommodations broker, hosting platform, and booking service to transmit quarterly reports of anonymized and

aggregated Hawaii listing data to the Department of Business, Economic Development, and Tourism;

(5) Permits 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

(6) Requires 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.

1. This bill adds a new section in chapter 237D, Hawaii Revised Statutes (HRS), in which it provides that the definition of "booking service" and "hosting platform" have the same meanings as in section 237D-1, HRS. Page 10, lines 19-20; page 11, lines 9-10. The definitions in section 237D-1, HRS, however, already apply to chapter 237D, HRS. We recommend that these provisions on page 10, lines 19-20, and page 11, lines 9-10, be deleted.

2. It appears that the bill often refers to "booking services" as a person but, under the bill, "booking services" is a function and it is the hosting platforms who provide booking services. Page 8, lines 1-20. Thus, we recommend that the term "booking services" be used consistently to refer to the function – not the person who provides "booking services."

3. Page 18, line 18, refers to "the citation process," but does not specify which citation process. We recommend clarification.

4. The bill provides that a registered tax collection agent shall be issued separate "certificates of registration" under chapter 237, HRS, 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 22, line 20, through page 23, 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 22, line 20, through page 23, line 4, be amended as follows:

> A registered tax collection agent shall be issued [~~separate certificates~~] a certificate 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.

5. This bill frequently refers to both "transient accommodations brokers" and "hosting platforms" in the same provision. It, however, is unclear whether it is necessary to refer to "hosting platforms" when it already refers to "transient accommodations brokers." It appears that although not all "transient accommodations brokers" may be "hosting platforms," all "hosting platforms" may be "transient accommodations brokers."[1] If this interpretation correctly reflects the intent of the bill, we recommend that the definition of "transient accommodations broker" in section 237D-1, HRS, expressly include "hosting platforms" and that references to "hosting platforms" be deleted in provisions in which "transient accommodations brokers" are already referenced. If a "hosting platform" is not necessarily a "transient accommodations broker," we recommend clarification.

We thank you for the opportunity to comment on this bill.

[1] A "transient accommodations broker" means "any person or entity, including but not limited to persons who operate online websites, online travel agencies, or online booking agencies, that offers, lists, advertises, or accepts reservations or collects whole or partial payment for transient accommodations or resort time share vacation interests, units, or plans." HRS § 237D-1. A "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 or plan manager may officer a transient accommodation." Page 8, lines 1-13.

DAVID Y. IGE
GOVERNOR

JOSH GREEN M.D.
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To: The Honorable Glenn Wakai, Chair
and Members of the Senate Committee on Energy, Economic Development, and Tourism

The Honorable Clarence K. Nishihara, Chair
and Members of the Senate Committee on Public Safety, Intergovernmental, and Military Affairs

Date: Wednesday, March 20, 2019
Time: 2:50 P.M.
Place: Conference Room 414, State Capitol

From: Linda Chu Takayama, Director
Department of Taxation

Re: H.B. 419, H.D. 2, Proposed S.D. 1, Relating to Transient Accommodations

The Department of Taxation (Department) supports the intent of Part II of H.B. 419, H.D. 2, Proposed S.D. 1, and offers the following comments regarding the tax provisions for the Committee's consideration.

The following is a summary of key tax provisions of Proposed S.D. 1, which has a defective effective date of July 1, 2099:

Hosting Platform-Booking Services Liability

- Defines "booking service" and "hosting platform";
- Hosting platforms are liable for civil fines for collecting fees for booking services 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; and
- Authorizes the Department to require, by subpoena, hosting platforms to provide the names and TAT numbers of operators.

The Department supports these provisions of Part II of the bill. These provisions will aid the Department in enforcement of the TAT by penalizing hosting platforms that provide booking

services to unregistered operators.

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 applicable land use permit or registration identification 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 misdemeanor for operating a transient accommodation without a TAT license; and
- Imposes civil fines for operating a transient accommodation without a TAT license.

The Department supports the intent of the proposed amendments to section 237D-4, HRS. However, the Department notes that proposed section 237D-4(h), HRS, imposes reporting requirements on transient accommodations brokers, platform hosts, and booking services. The subsection requires the reports be provided to the DBEDT, and provides a penalty for noncompliance. Because the report is to be provided to DBEDT, rather than the Department of Taxation, it may be more appropriate to place this requirement and the penalty for noncompliance outside of Title 14, HRS.

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 and TAT on behalf of all of its operators and plan managers for transient accommodations booked directly through the registered agent; and
- The registered agent's operators and plan managers will be required to be licensed under chapters 237 and 237D, HRS.

Reporting Requirements

- The registered tax collection 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 upon request.

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 concept of GET and TAT being collected and remitted by a tax collection agent.

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.

DAVID Y. IGE
GOVERNOR

RODERICK K. BECKER
DIRECTOR

ROBERT YU
DEPUTY DIRECTOR

EMPLOYEES' RETIREMENT SYSTEM
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
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ADMINISTRATIVE AND RESEARCH OFFICE
BUDGET, PROGRAM PLANNING AND
MANAGEMENT DIVISION
FINANCIAL ADMINISTRATION DIVISION
OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

TESTIMONY BY RODERICK K. BECKER
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
TO THE SENATE COMMITTEES ON ENERGY, ECONOMIC DEVELOPMENT, AND TOURISIM AND PUBLIC SAFETY, INTERGOVERNMENTAL, AND MILITARY AFFAIRS
ON
HOUSE BILL NO. 419, H.D. 2, PROPOSED S.D. 1

March 20, 2019
2:50 p.m.
Room 414

RELATING TO TRANSIENT ACCOMMODATIONS

House Bill No. 419, H.D. 2, Proposed S.D. 1, makes the following amendments:

Part I:

- Provides that a county shall be eligible to receive funds from the State for the purpose of enforcing all applicable laws and ordinances relating to transient accommodations, provided that no funds shall be released to a county until it has satisfactorily complied with specified conditions; and
- Allocates an unspecified amount from transient accommodations tax (TAT) revenues to implement this measure;

Part II:

- Amends the definition of "transient accommodations" to include additional forms of transient accommodations and other terms that the counties may have defined;
- Makes it unlawful for a hosting platform to provide, and collect a fee for, booking services regarding transient accommodations if the operator or plan manager is not registered with the Director of the Department of Taxation;

- Requires anonymous, periodic reports by transient accommodations brokers, hosting platforms and booking services to the Department of Business, Economic Development and Tourism of transient accommodations listings;
- Allows a transient accommodations broker to register as a general excise tax or TAT collection agent for its operators and plan managers; and
- Requires 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.

While the Department of Budget and Finance (B&F) takes no position on Part II of this measure, the department offers the following comments on Part I. First, Part I requires the Governor to instruct the Director of Finance to review whether a county's compliance with the specified conditions is satisfactory within 30 days of receiving written notification from the mayor of a county. B&F does not have the expertise to conduct a comprehensive review to determine if a county's efforts to fulfill the specified conditions are "satisfactory" and to specify actions that a county must take to achieve "satisfactory" compliance, if necessary. B&F understands that the intent is for it only to determine that the county has performed certain functions. Thus, we recommend removal of the term "satisfactory." Furthermore, there is no deadline for a county to submit their written notification; thus, B&F may not have sufficient time to conduct a review should a county submit their notification late in the fiscal year.

With regards to the allocation to the counties, our understanding is that this is a one-time allocation.

Thank you for your consideration of our comments.

Tuesday March 19th, 2019

Senate Committee on Energy, Economic Development, and Tourism
Senator Glenn Wakai, Chair; Senator Brian T. Taniguchi, Vice Chair

Senate Committee on Public Safety, Intergovernmental Affairs, and Military Affairs
Senator Clarence K. Nishihara, Chair; Senator Glenn Wakai, Vice Chair

Wednesday March 20th, 2019, 2:50 P.M.
Conference Room 414

TESTIMONY IN OPPOSITION TO HB 419, HD2, SD1 Proposed

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

On behalf of Airbnb, I wanted to take the opportunity to share our concerns regarding HB 419, HD2, SD1 Proposed. 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 HB 419, HD2, SD1 Proposed 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 which 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 HB 419, HD2, SD1 Proposed is akin to the ordinance in place in San Francisco. That is not accurate. HB 419, HD2, SD1 Proposed 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, many of the provisions of the bill, state level measures to enforce local legislation, have been outpaced by regulations that have been adopted in Hawaii and Honolulu counties. Late last year, Hawaii County adopted Bill 108 that sets up a registration system for vacation rentals and B&B homes. Additionally, on March 18, 2019, the Planning Committee of

[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).

the Honolulu City Council adopted Bill 89 CD1 which also puts in place regulations for both TVUs and B&B homes and establishes local enforcement and registration measures. 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. HB 419, HD2, SD1 Proposed 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, HB 419, HD2, SD1 Proposed 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. 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.
- Additionally, the bill allows the Department of Taxation to impose harsh civil penalties on operators of transient accommodations. As an example, on Oahu, if a local resident lives full time in their home outside of a resort area, but occasionally rents out a room in their house to generate extra income, that local resident would potentially be subject to civil penalties with little clarity on the

process of appeal. Such a vague and open-ended penalty will only further complicate a system that is struggling to keep up with market realities.

- 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.

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

March 20, 2019

Senate Committee on Energy, Economic Development, and Tourism
The Honorable Glenn Wakai, Chair
The Honorable Brian T. Taniguchi, Vice Chair

Senate Committee on Public Safety, Intergovernmental and Military Affairs
The Honorable Clarence K. Nishihara, Chair
The Honorable Glenn Wakai, Vice Chair

RE: HB 419, HD 2, SD 1 Proposed, Relating to Transient Accommodations

Dear Chair Wakai, Chair Nishihara and distinguished members of the Senate Committees on Energy, Economic Development, and Tourism and Public Safety, Intergovernmental and Military Affairs:

On behalf of Expedia Group – the globe leading travel technology platform[1] – I'd like to thank you for the opportunity to comment on HB 419, HD 2, SD 1 Proposed. Consistent with our commitment to collaborate with the State of Hawai`i to create reasonable regulation of the state's vibrant vacation rental ecosystem, we'd like to explore concerns with the current proposal before the legislature and best practices for a fair and effective path forward.

I. HB 419, HD 2, SD 1 Proposed Is Flawed

Expedia Group welcomes the opportunity to engage with the state on ways to encourage and enhance tax compliance. Therefore, we generally support the tax collection and remittance provisions in HB 419, HD 2, SD 1 Proposed. However, we cannot support the bill in its current proposed form. The bill appears to be based in large part on a prior, less-refined iteration of SB 1292, SD 2, HD 1.[2] As such, it incorporates the flaws in that bill and includes provisions that violate law and that will not withstand judicial scrutiny. It also includes provisions that will harm the state's economy and drive many vacation rental property owners "underground" to avoid onerous regulation.

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

The provisions of the bill requiring hosting platforms to disclose confidential information in "periodic returns" are improper. *See* bill at Part II, Subpart B, Sections 8 and 9.[3] Federal law requires Expedia Group and its affiliates to keep confidential all the personal information of homeowners and travelers who

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

[2] Even the current form of SB 1292 contains provisions that violate state and federal law. *See* Expedia Group's testimony on SB 1292, SD 2, HD 1.

[3] Such confidential information includes operators' names, addresses, and general excise tax and transient accommodations tax registration numbers; for each property, the address, number of nights rented, nightly rate, amount of tax remitted, and amount of tax reported on the 1099 form. *Id.* The bill further provides that such confidential information shall be made available to county officials. *Id.*

use their websites. Specifically, the Stored Communications Act ("SCA") prescribes the rules that must be followed before a company can disclose information to a governmental entity.[4] To protect the privacy of online communications, Congress passed the SCA, which "creates a set of Fourth Amendment-like privacy protections by statute, regulating the relationship between government investigators and service providers in possession of users' private information." Orin S. Kerr, A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It, 72 Geo. Wash. L. Rev. 1208, 1212 (2004). "The Act reflects Congress's judgment that users have a legitimate interest in the confidentiality of communications in electronic storage at a communications facility." *Theofel v. Farey-Jones*, 359 F.3d 1066, 1072–73 (9th Cir. 2004). Our concerns are not merely theoretical: the SCA allows individuals whose information is provided to a governmental entity in violation of the statute's requirements to sue for damages. 18 U.S.C. § 2707. Intentional violations can be punished by both statutory and punitive damages and attorneys' fee awards.

The SCA limits the forms of process a government entity may use to obtain information from HomeAway or VRBO, as an ECS and RCS, depending on the type of information sought. It divides electronic information into two distinct categories: (1) the contents of users' communications, and (2) non-content customer records. 18 U.S.C. § 2703(a)-(c). When a government entity seeks the contents of communications, the protections of the SCA are strongest. *See* 18 U.S.C. § 2703(a)–(b). A warrant based upon probable cause is required for communications that have been in the electronic storage of an ECS for 180 days or less. *Id*. § 2703(a), (b)(1)(A), (c)(1)(A). If the government seeks non-content customer "records," the government generally must either obtain a court order authorizing disclosure, or demonstrate that the customer consented to disclosure. *Id*. § 2703(c)(1)(B)–(C). Section 2703 permits the disclosure of basic information—which, as explained above, is limited to a customer's name and address, and other discrete categories—only if the government employs an administrative, grand jury, or trial subpoena. *Id*. § 2703(c)(2).[5] Thus, in *HomeAway.com, Inc. v. City of Portland*, the court held that the SCA barred the City's attempt to obtain user information from HomeAway without obtaining an appropriate subpoena or court order. Here, the bill similarly seeks user information without such due process.

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[4] The SCA restricts government entities' ability to compel disclosure of the contents of users' communications and information from an electronic communications service ("ECS") or a remote computing service ("RCS"). *See, e.g.*, 18 U.S.C. § 2703(a)-(c); *see also id*. § 2702(a). In simple terms, an ECS is any service that allows users to communicate electronically with one another, while a RCS is any service that stores or processes information submitted by users. *See* 18 U.S.C. §§ 2510(15), 2711(2). A single service may satisfy both definitions.

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

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

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

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

In addition to the SCA violations, the provisions of the bill noted above also violate the U.S. and Hawai`i Constitutions. It is well-established that constitutional privacy protections extend to electronic communications and protect against government searches. The U.S. Supreme Court has warned against allowing technological advances to "erode the privacy guaranteed by the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 34 (2001); *see also Marshall v. Barlow's Inc*., 436 U.S. 307, 311 (1978) (Fourth Amendment protects business property no less than residential property).

The court has held that "searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2452 (2015) (municipal code provision requiring hotel operators to provide guests' information to police is facially unconstitutional). Here, the bill requires forced disclosure of confidential information without any due process and therefore violates the U.S. and Hawai`i Constitutions.[6]

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

The bill encourages the various counties to adopt additional and possibly inconsistent ordinances and rules governing vacation rentals. *See* bill at Part II, Subpart B, Sections 8 and 9. As we have witnessed, such allowance leads to misguided regulations, including the new Maui Charter amendment that imposes ruinous daily fines of $20,000 and that violates the constitutional prohibition against excessive fines. Here, the Legislature is uniquely positioned to prevent such misguided regulations and to enact and enforce a comprehensive regulatory scheme at the state level.

II. Expedia Group's Proposal

As an alternative to HB 419, HD 2, SD 1 Proposed, and to demonstrate our commitment to the State of Hawai`i, we would like to provide best practices from across the country that would create a regulatory scheme that both regulates the industry in reasonable ways and assures full compliance with tax laws.

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

The key features are as follows:

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

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

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

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

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

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

c. Platforms will remove any existing listing that does not display a TAT number, and will prohibit any new listings that do not display a TAT number;[7]

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

e. To allow the State to determine the validity of the TAT numbers supplied by the owners, and to ascertain the owner or host of each property, platforms will send to the State, on a quarterly basis, a list that matches URLs of every vacation rental listing on its site together with the TAT number for that listing;[8] and

f. To provide the State with visibility into the amount of vacation rental activity occurring within its borders, platforms will send to the State, on a quarterly basis, aggregated data of (1) the total number of vacation rental listings on their sites during the previous quarter, and (2) the total number of nights booked in vacation rentals through their sites during the previous quarter.[9]

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

Thank you for the opportunity to provide comments on HB 419, HD 2, SD 1 Proposed, and please reach out with any additional questions.

Mahalo,

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

[7] This provision is consistent with the enforcement provisions in the bill. *See* bill at Part II, Subpart B, Section 6.

[8] This would be a simpler method to obtain the information sought under the bill "by subpoena." *See* bill at Part II, Subpart B, Section 6.

[9] This is similar information sought under the bill by "quarterly reports" of aggregated data. *See* bill at Part II, Subpart B, Section 7.

HB-419-HD-2
Submitted on: 3/16/2019 2:05:46 PM
Testimony for EET on 3/20/2019 2:50:00 PM

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

Comments:

LEGISLATIVE TAX BILL SERVICE

TAX FOUNDATION OF HAWAII

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

SUBJECT: TRANSIENT ACCOMMODATIONS, Pay Counties for TVR Enforcement

BILL NUMBER: HB 419, HD-2

INTRODUCED BY: House Committee on Finance

EXECUTIVE SUMMARY: Provides that a county shall be eligible to receive funds from the State for the purpose of enforcing all applicable laws and ordinances relating to transient accommodations, provided that no funds shall be released to a county until it has satisfactorily complied with specified conditions. Makes an allocation from TAT revenues.

SYNOPSIS: Provides that a county may receive $_____ for the purpose of enforcing all applicable laws and ordinances relating to transient accommodations and short-term vacation rentals. The county must first, however, (1) establish a real property tax rate that applies only to such uses; (2) develop a process to issue special use permits to (and collect all applicable taxes from) property owners for such uses; (3) establish a registry to track compliance by, and any complaints concerning, special use permittees; (4) establish an expedited process to address alleged violations by permittees; (5) establish an appeal process for parties denied a special use permit; and (6) enact ordinances that implement (1) through (5). Budget & Finance is tasked with administering this system.

Requires reports from counties receiving funds for enforcement of transient accommodations and short-term vacation rentals ordinances.

EFFECTIVE DATE: July 1, 2099.

STAFF COMMENTS: This bill deals with transient vacation rental (TVR) activity. Some property owners figured out that they could help make ends meet by renting their space, or part of it, to tourists, and were aided in their efforts by platform companies such as AirBnB, VRBO, and Flipkey. The platform companies realized that general excise and transient accommodations taxes were due on such rentals and offered to collect these taxes and pay them over to the State, thinking that tax compliance among TVR owners was, let's say, not widespread.

The bill resulting from those efforts, HB 1850 (2016), passed the Legislature, which was motivated by the prospect of increasing tax compliance and collecting lost revenue. However, the bill was vetoed by Governor Ige, citing objections from the counties that many of the TVRs violated county zoning laws (even though the platform demanded and got representations from the owners that they were in compliance). Legislative efforts to resurrect the "AirBnB bill," as it was called, focused around trying to force the platform companies to suppress any TVR advertising unless the owner could prove compliance with county zoning laws. The owners pointed out that the counties often didn't enforce the laws and had no processes in place for certifying to any owner that the owner's property was compliant with county laws. The counties

responded with all-too-familiar excuses of being resource constrained. This bill proposes to break the logjam.

Digested 3/15/2019

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8000 • FAX: (808) 768-6041
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KIRK CALDWELL
MAYOR

KATHY K. SOKUGAWA
ACTING DIRECTOR

TIMOTHY F. T. HIU
DEPUTY DIRECTOR

EUGENE H. TAKAHASHI
DEPUTY DIRECTOR

LATE

March 20, 2019

The Honorable Glenn Wakai, Chair
and Members of the Committee on Energy,
Economic Development, and Tourism
The Honorable Clarence K. Nishihara, Chair
and Members of the Committee on Public
Safety, and Military Affairs
Hawaii State Senate
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chairs Wakai and Nishihara, and Committee Members:

Subject: House Bill No. 419, proposed SD1
Relating to Transient Accommodations

The Department of Planning and Permitting (DPP) **supports, with comments,** House Bill No. 419, Proposed SD 1, which adds new requirements for transient accommodations under the Hawaii Department of Taxation (DoTax).

We understand the desire to collect transient accommodations tax and general excise tax on those short-term operations that, until now, have skirted this obligation. As such, we do not object to requiring hosting platforms to become tax collection agents.

We appreciate the monetary incentive offered by Part I of the Bill for certain county regulatory measures for transient accommodation. We do have comments on it:

- References to "special use permits" need clarification. Is this a reference to the special use permit established under Chapter 205, HRS, Land Use, or is it a generic reference to county zoning permits? Most transient accommodations do not require a special use permit under Chapter 205, as it pertains to uses in the State Agricultural District
- If not already adopted, it may be difficult to adopt new ordinances, put new rules and procedures in place, and expend allocated funds in less than a year

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

1. Assigns the DoTax new responsibilities in administering tax obligations of transient

accommodation operators and managers. We welcome this additional regulatory oversight, including the imposition of progressive fines for violations.

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

3. Adopts regulations for the advertising of transient accommodations.

4. Allows sharing data from the DoTax with county mayors and planning departments.

We do respectfully ask that the data submitted to DoTax include the number of nights stayed per booking. The City's definition of transient accommodations is not identical to the TAT threshold of 180 days. The City defines short-term rentals as stays of less than 30 days. Therefore, any stay longer than 30 days would not be considered short-term by the City, but would be required to pay TAT.

Also, if the county has a registration or certificate program, this should be included as a prerequisite to obtaining a certificate from the DoTax. This will greatly aid in our enforcement program.

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

We respectfully ask that House Bill No. 419, Proposed SD1, move forward with the above requested amendments.

Thank you for the opportunity to testify.

Very truly yours,

Kathy Sokugawa
Acting Director

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
Senate Committee on Energy, Economic Development, and Tourism and the
Senate Committee on Public Safety, Intergovernmental, and Military Affairs

March 20, 2019; 2:50 pm
Conference Room 414

LATE

In consideration of
House Bill 419 HD2
Relating to Transient Accommodations

Honorable Chairs Glenn Wakai and Clarence K. Nishihara, and Members of the Committees:

The County of Kaua'i, Department of Planning provides its **comments in support of HB419 HD1**, which proposes to provide counties with State funds for the purpose of enforcing all applicable laws and ordinances relating to transient accommodations if it complies with specified conditions.

The County of Kaua'i has prioritized regulation of transient accommodations and short-term rentals and currently bans transient accommodations outside of established Visitor Destination Areas. Regulations prohibiting transient accommodations that are located outside of the County's 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.

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, we anticipate approximately 800 to 1,200 of these units to be located outside of our Visitor

Destination Areas. Thus, the additional support for our efforts to regulate illegal transient accommodations offered through HB419 HD2 is very much needed and appreciated.

The County of Kaua'i has already invested much of its resources on monitoring and shutting down illegal transient accommodations. As such, the County is already close to complying with the conditions specified in HB419 HD2. However, we respectfully request that certain concerns be addressed:

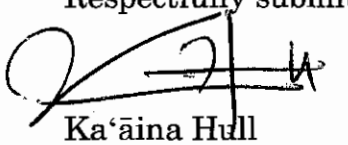
1. A "special use permit" does not exist in Kaua'i's comprehensive zoning ordinance nor the State's land use laws. Under Hawai'i Revised Statutes (HRS) § 205-6, "special permits" exists for uses with in the agricultural district; however, the County of Kaua'i has already determined that transient accommodations should not be permitted on Kaua'i's agricultural lands. Instead, we suggest that the reference to "special use permits" be amended to "zoning permits issued pursuant to the respective county zoning ordinances."

2. The current process to appeal denials of zoning permits is subject to the administrative appeal process pursuant to HRS Chapter 91 and circuit court proceedings. As much as we would like to expedite the appeal process, appeals are often subject to delay due to reasons out of the control of the county. For example, although the County procured and contracted with a hearing's officer with expertise in administrative appeals, attorneys representing illegal transient accommodations filed various motions to disqualify the hearing's officer. Thus, the appellate process was delayed at least an additional year. Therefore, we request that "expedited" be deleted from the requirement to establish a process for addressing appeals.

In addition, the County of Kaua'i seeks to further its enforcement priorities by preventing host platforms from booking transient accommodations that are not in conformance with county land use laws. The recent 9th Circuit Court of Appeals decision in HomeAway.com, Inc. v. City of Santa Monica that was filed on March 13, 2019 upheld several obligations of hosting platforms, including: (1) "disclosing certain listings and booking information regularly;" (2) "refraining from completing any booking transaction for properties not licensed and listed on the registry;" and (3) "refraining from collecting or receiving a fee for facilitating or providing services ancillary to a vacation rental or unregistered home-share." Likewise, the County of Kaua'i seeks to impose similar regulations and requests explicit authority under the appropriate section in HRS Chapter 46. Possible enabling language could read as follows:

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

Respectfully submitted,



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

AHLA
AMERICAN HOTEL & LODGING ASSOCIATION

LATE

March 19, 2019

The Honorable Glenn Wakai
Chair, The Committee on Energy Economic Development and Tourism

The Honorable Clarence Nishihara
Chair, The Committee on Public Safety, Intergovernmental and Military Affairs

Regarding: Testimony in support of HB419 SD1

Aloha Chair Wakai and Chair Nishihara,

For more than 100 years, the American Hotel & Lodging Association (AHLA) has been the foremost representative of and advocate for the U.S. lodging industry. We advocate for our members so they can do their best at what matters most: serving guests, employees and their communities. With more than 150 members in Hawaii representing 110,000 employees, this is a job we take very seriously.

We appreciate the valuable work you have been doing to ensure that Hawaii's tourism industry continues to thrive. Specifically, your commitment to the eradication of illegal short-term rentals in Hawaii. Study after study has shown that the vast majority of short-term rentals in our State are owned and operated by out-of-State commercial hosts who are renting whole units. In many cases, these law breakers are operating 20 or more illegal whole home rentals. This is not home sharing; these are illegal hotels which destroy the aloha in our communities and drive up the cost of housing for our residents. Please accept this testimony as our organization's express support for your Committee's efforts to sufficiently regulate short-term rentals in our communities. Specifically, we offer our support for the SD1 to HB419 being consdered by your joint-committee today.

Just this month, the 9th Circuit Court of Appeals ruled against HomeAway and Airbnb and their claims of CDA 230 protections in their litigation against the city of Santa Monica. This is an enormous win for Hawaii as we work to regulate illegal short-term rentals. In brief, this ruling upheld Santa Monica's short-term rental law, which was modeled after San Francisco's short-term rental law. This ruling means policy makers

across the country can and should hold hosting platforms responsible for illegal transactions that take place on their websites. The SD1 to HB419 offered by Chair Wakai is in large part modeled after these proven and legally defensible enforcement provisions.

This bill will make possible the purging of illegal whole home rentals from the market by while at the same time creating a pathway for legal rentals to be listed for rent and taxed appropriately. If successful, HB419 SD1 could add as many as 10,000 or more units back to the housing pool in Honolulu alone, while at the same time opening up revenue opportunities for the State and our Counties through taxation and regulation of legal operators of community based transient accommodations. As amended, HB419 SD1 seeks to strike the right balance of enforcement while allowing legally permitted short term rental opportunities, giving our visitors a choice in their selection of accomodation while prioritizing the needs and preferences of our kama‘aiana.

The AHLA team is available to respond to any information requests that you or your team may have. Thank you for your continued leadership on behalf of Hawaii’s visitor industry, our hotel owners, operators, and our many valuable employees.

Mahalo,

Kekoa McClellan
Spokesperson, AHLA Hawaii

HAWAI'I LODGING & TOURISM ASSOCIATION

LATE

Testimony of

Mufi Hannemann
President & CEO
Hawai'i Lodging & Tourism Association

Senate Committees on:
Energy, Economic Development, and Tourism
Public Safety, Intergovernmental, and Military Affairs

House Bill 419 HD2 SD1 Proposed: Relating to Transient Accommodations

Chair Wakai, Chair Nishihara, and members of the Committees:

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.

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.

Hawai`i Lodging & Tourism Association
2270 Kalakaua Avenue, Suite 1702, Honolulu, Hawai'i 96815 · Phone: (808) 923-0407 · Fax: (808) 924-3843
info@hawaiilodging.org · www.hawaiilodging.org

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. In addition to the movement of their neighbor island counterparts, the Honolulu City Council is also progressing measures that take a hard look at regulating the transient vacation rental market and inserting strong land use and enforcement language. To this end, we appreciate the language in part 1 of this measure which would provide financial assistance from the State to the county governments to enforce land use and zoning laws, with the condition that the counties have implemented certain TVR enforcement and regulatory measures.

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 safeguard against the proliferation of illegal rentals in our communities.

Thank you.

1638691-1

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LATE

March 20, 2019

SENATE COMMITTEE ON ENERGY, ECONOMIC DEVELOPMENT, AND TOURISM
Senator Glenn Wakai, Chair, Senator Brian T. Taniguchi, Vice Chair

SENATE COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL, AND MILITARY AFFAIRS
Senator Clarence K. Nishihara, Chair, Senator Glenn Wakai, Vice Chair

HEARING DATE: Wednesday, March 20, 2019
TIME: 2:50 p.m.
PLACE: Conference Room 414

Re: LETTER ON BEHALF OF AIRBNB OPPOSING HOUSE BILL NO. 419 HD2 PROPOSED SD1.

Dear Senators:

We write on behalf of our client, Airbnb, in opposition to House Bill No. 419 HD2 Proposed SD1 ("*HB 419 HD2 Proposed SD1*"). Although we support HB 419 HD2 Proposed SD1's improvements over prior versions of this bill, and its intent to permit hosting platforms to act as tax collection agents, which would further tax collection purposes, these purposes cannot overcome the fact that HB 419 HD2 Proposed SD1 impermissibly violates federal law and runs afoul of other constitutional protections.

HB 419 HD2 Proposed SD1 contains problematic language that would render it invalid, unworkable, and unenforceable. The current language of HB 419 HD2 Proposed SD1 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. HB 419 HD2 Proposed SD1 is therefore preempted by these federal laws, and would thus be unenforceable if passed.

Section 230 of the Communications Decency Act

Although a state may regulate in various areas, it must do so in a manner that does not conflict with federal law. Section 230 is considered the cornerstone of the legal framework that has allowed the internet to thrive, and it "protects websites from liability for material posted on the website by someone else." *Doe v. Internet Brands, Inc.*, No 12-56638, 2016 WL 3067995, at *3 (9th Cir. May 31, 2016). It does so through two key provisions. First, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Second, "[n]o liability may be imposed under any State or local law that is inconsistent with this section." *Id.* at § 230(e)(3). As the United States District Court for the District of Hawaii observed, "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." *Sulla v. Horowitz*, No. CIV. 12-00449 SOM, 2012 WL 4758163, at *2 (D. Haw. Oct. 4, 2012) (quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003)).

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

The Stored Communications Act

In 1986, Congress enacted the SCA, 18 U.S.C. Chapter 121 §§ 2701-2712, to give persons using internet platforms statutory protection, similar to the Fourth Amendment of the U.S. Constitution, against access by the government to stored electronic private information held by those internet platforms, without due process such as a search warrant. Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1209-13 (2004). The SCA limits the government's ability to compel internet platforms to disclose information in their possession about their users, and limits the internet platform's ability to voluntarily disclose information about their users to the government, absent a subpoena, warrant, or court order. The SCA contains both criminal and civil penalties for

violations. Numerous courts have held that the SCA applies to internet platforms and websites. *See e.g., Brown Jordan Int'l Inc. v. Carmicle*, 846 F.3d 1167 (11th Cir. 2017); *Crispin v. Christian Audiger, Inc.*, 717 F.Supp.2d (C.D. Cal. 2010); *Campbell v. Facebook, Inc.*, 315 F.R.D. 250 (N.D. Cal. 2016).

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

HB 419 HD2 PROPOSED SD1 impermissibly violates Section 230

HB 419 HD2 Proposed SD1 violates Section 230 because it seeks to make hosting platforms responsible for the content and veracity of information provided by its 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. HB 419 HD2 Proposed SD1 has 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, HB 419 HD2 Proposed SD1 makes hosting platforms responsible for the content included in advertisements prepared by users. Proposed §§ 237D-4(c) and (d) of Subpart B HOSTING PLATFORM LIABILITY, 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 *applicable land use permit or 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.* (Emphasis added).

Sections 237D-4(c) and (d) make hosting platforms require users to include certain content in every advertisement. Although hosting platforms are not specifically enumerated as persons subject to a citation, the entire section is titled "Hosting Platform Liability" and any advertisement that does not comply with the statute is "unlawful". In other words, hosting platforms who conduct business with operators and plan managers are potentially subject to penalties for allowing the posting of advertisements that do not contain certain required content. This violates Section 230. 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) make certain types of advertisements posted on a hosting platform's website unlawful, these provisions clearly violate Section 230.

Additionally, §§ 237__(i) and 237D__(i) of Sections 8 and 9 of Subpart C attempt to hold hosting platforms liable for content provided by its users, as each provision states that:

> (i) When conducting business with an operator or plan manager with respect to a property for lease or rent, *transient accommodations brokers, hosting platforms, and booking services shall*:
>
> ...
>
> (2) R*equire the operator or plan manager to provide* the transient accommodations broker, hosting platform, or booking service with the operator['s] or plan manager's *transient accommodations registration identification 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, hosting platform, 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.* (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.

HB 419 HD2 PROPOSED SD1 impermissibly violates the SCA.

HB 419 HD2 Proposed SD1 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 Sections 8 and 9 of Subpart C provide that:

> (g) A registered tax collection agent shall file periodic returns in accordance with section 237-30 [237D-6] and annual returns in accordance with section 237-33 [237D-7]. Each periodic return required under section 237-30 [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 general excise tax license number [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 chapter 237D [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 237-34 [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, HB 419 HD2 Proposed SD1 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 HB 419 HD2 Proposed SD1 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[1] of the U.S. Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]"

The right to privacy in both state and federal law protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" The U.S. Supreme Court has held that "searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge are *per se* unreasonable ... subject only to a few specifically established and well-delineated exceptions." *City of Los Angeles, Calif. v. Patel*, 135 S.Ct. 2443, 2452 (2015). Here, §§ 237-__(g) and 237D-__(g) of Sections 8 and 9 of Subpart C 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 HB 419 HD2 Proposed SD1 violate the constitutional right to privacy and are unenforceable.

Conclusion

For the foregoing reasons, the problematic language of HB 419 HD2 Proposed SD1 renders it invalid, or at the least, completely unworkable for hosting platforms. We therefore urge that HB 419 HD2 Proposed SD1 be held. Thank you for your consideration.

Very truly yours,

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

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

Maui Hotel & Lodging
ASSOCIATION

Testimony of
Lisa H. Paulson
Executive Director
Maui Hotel & Lodging Association
on
HB 419 HD 2
Relating To Transient Accommodations

COMMITTEE ON ENERGY, ECONOMIC DEVELOPMENT AND TOURISM
COMMITTEE ON PUBLIC SAFETY, INTERGOVERNMENTAL AND MILITARY AFFAIRS
Wednesday, March 20, 2019, 2:50 pm
Conference Room 414

Dear Chairs Wakai and Nishihara; Vice Chair Taniguchi 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 is **in support of HB419 HD2**, which provides that a county shall be eligible to receive funds from the State for the purpose of enforcing all applicable laws and ordinances relating to transient accommodations, provided that no funds shall be released to a county until it has satisfactorily complied with specified conditions. Makes an allocation from TAT revenues. Requires reports from counties receiving funds for enforcement of transient accommodations and short-term vacation rentals ordinances. (HB419 HD2)

MHLA is in support of establishing a level playing field for all visitor accommodations. There are 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. This Bill would help Maui County with funding for its enforcement.

Maui County has already made significant strides in cracking down on illegal vacation rentals, including the purchase of software to research/locate illegal operators and levying stiffer fines. Additional funding from the State would aid greatly in our enforcement efforts.

Thank you for the opportunity to testify.

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INTERNATIONAL

March 20, 2018

LATE

Hon. Glenn Wakai
Chair, Committee on Economic Development, Tourism and Technology
Hawaii State Senate
415 S. Beretania Street, Room 216
Honolulu, Hawaii 96813

Hon. Clarence Nishihara
Chair, Committee on Public Safety, Intergovernmental and Military Affairs
Hawaii State Senate
415 S. Beretania Street, Room 214
Honolulu, Hawaii 96813

Re: Support for HB 419 HD2, Proposed SD1- Relating to Transient Accomodations

Aloha Chairmen Wakai and Nishihara,

On behalf of Marriott International's 36 properties and nearly 5000 employees in the state of Hawaii, we applaud the Hawaii State Senate's pursuit of a workable framework related to the taxation and regulation of short-term rentals in our state that will restore a level playing field within the local lodging industry and promote compliance with rules designed to protect and preserve Hawaii's communities.

We feel state action is critical to ensure transparency on the part of both rental operators and websites that facilitate rentals, to aide counties in their efforts to enforce local regulations, and to establish an equitable tax collection process for all parties who engage in the lodging business.

Best practices related to these areas exist and can be borrowed from other jurisdictions that have successfully addressed the proliferation of short-term rentals. A comprehensive approach is necessary to ensure only lawful rental units are on the market, and that applicable taxes are collected and remitted.

Increasingly, short-term rental units in Hawaii are owned by non-residents, real estate investors or commercial operators, and not by local homeowners attempting to occasionally supplement their income. Many are whole-unit rentals available full-time – essentially, unlicensed or illegal hotels — which take workforce housing supply off the local market and change the character of

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Hawaii's neighborhoods. As shown by a March 2017 study by CBRE, 85% of Airbnb's revenue on Oahu now comes from these commercial operations. This segment of the marketplace must be regulated accordingly.

It is critical that Hawaii strike the right balance between the goals of ensuring fair competition within the lodging sector, short-term rental compliance with tax and local land use laws and preserving lodging options for visitors to our beautiful islands.

Thank you for your consideration.

Mahalo nui loa,

Doug Chang
General Manager
The Ritz-Carlton Residences, Waikiki Beach

cc: Honorable Members, Senate Committee on Public Safety, Intergovernmental and Military Affairs
Honorable Members, Senate Committee on Economic Development, Tourism and Technology

HB-419-HD-2
Submitted on: 3/20/2019 10:23:42 AM
Testimony for EET on 3/20/2019 2:50:00 PM

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
ANGELA TSENG	Individual	Oppose	Yes

Comments:

Aloha Chairs, Vice Chairs, and Members of the Committee

I recognize the need for tax collection but oppose HB419, HD2, SD1. I used to be a network planner at Hawaiian Airlines, and I am now a short-term rental host operating legal vacation rental units in Downtown Honolulu.

I often talk stories with the uncles and aunties on the Chinatown neighborhood board, and those stories confirm the necessity of tourism dollars in our neighborhood. For example, as more farmers markets appeared all over Honolulu, Chinatown's fruit and vegetable vendors began to lose business, as local patrons now shop closer to home. Luckily. the drop in local buyers is backfilled by the rise in visitor clients. The best part, however, is that many of these small businesses are our neighborhood's watchmen, monitoring and reporting homeless and drug activities throughout the day. They know our police officers by their first names and have them on speed dial. To keep my neighborhood vibrant and safe is why I recommend my guests at eat at Maguro Brothers, shop at Roberta Oaks, and go on walking tours with the Hawaii Heritage Center. I see the value created by short term rental guests in my neighborhood every day.

I want to emphasize how much the Chinatown community is looking forward to the opening of Kehaulike rail station, as it will significantly infuse new traffic and reduce the presence of local drug lords. As the rail is dependent on the collection of transient accommodation tax, I request that the collection of TAT to be done in the most efficient and ethical manner possible, so that the residents, business owners, and community members outside of the resort zone can benefit from rising visitors and visitor spend. Let the City & County enforce the land use ordinance without encroaching on individual privacy.

Thank you