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Tax Base

With the rise of businesses such as Uber, Lyft, and Airbnb, a new business model is emerging that state and local laws do not adequately address. Christopher Lutz, of Horwood Marcus & Berk Chartered, discusses specific sectors of this “sharing economy” and explains how governments can work with these industries to create a cooperative resolution. Doing so would foster business innovation and generate more revenue for localities and states, Lutz says.

Legitimizing the Sharing Economy: Reconciling the Tension Between State and Local Policy Concerns and Innovation



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Introduction

The “sharing economy” involves matching up owners of latent high value assets with customers in need of those assets. This could involve a car ride, a room to sleep, a neighbor’s lawn mower, or even someone’s time. Part of what makes the sharing economy so unique is the relative levels of convenience and cost-effectiveness it facilitates. That convenience, however, is not without its critics.

To a certain extent, criticism of a new and dynamic business model is neither surprising nor interesting. Entrenched interests threatened by up-and-coming

businesses are certainly acting intelligently and out of self-interest by attacking this emerging model. However, amid this rancor exist some legitimate concerns. Issues regarding regulation for the public safety, good public policy, and taxation arise in the context of the sharing economy in a manner that is fairly unique. The sharing economy, it seems, has converted customers into their own businesses, and whether they should be subject to the same rules governing businesses operating in similar lines of work is a legitimate question. Often lost in this debate, however, is the extent to which old regulations and taxes fail to adequately contemplate these new sharing economy business models.

Given the breadth of this new business model, the opportunities it provides to the underemployed, and the potential revenue involved, its abolition is improbable. This article will discuss generally how governments can reach mutually beneficial solutions with respect to the sharing economy. Moreover, it will provide a more specific analysis of how states have, have not, and should go about treating two of the most prominent segments of the sharing economy: ridesharing and homesharing. This article will also discuss a less common, but equally interesting segment: mealsharing. As recent legal battles have shown, this regulatory arena is anything but tidy.

State and Local Government Regulatory Concerns

Broadly defined, state and local government regulatory concerns fall into three general categories: public safety, sound public policy, and taxation. Obviously, these three areas will often overlap. With respect to public safety, the concerns are clear. Un-vetted drivers, homeowners, home cooks, you name it, constitute the majority of suppliers of services in the sharing economy. Given the requisite licensing required for these suppliers' professional competition, this is a fair concern. Indeed, in every state, taxi drivers, hotel operators, and restaurants must be licensed and satisfy certain standards. Licensure, then, provides at least some level of confidence that customers will have a safe experience.

To a certain extent, such safety concerns are overblown. In the context of ridesharing, for instance, companies such as Uber, Inc. and Lyft provide detailed information regarding drivers. They will provide the driver's name, contact information, a picture, and previous reviews of that person's performance. The case is the same in the context of homesharing services and, perhaps to a lesser extent, mealsharing services. It is a fair point, however, that customers should not have to wait until a passenger of a ridesharing service reports a drunk driver, a guest at someone's home reports dismal conditions, or a mealsharing customer gets E. coli before potential customers can be made aware to avoid a particular vendor.¹ The goal of good safety regulations should be to avoid unsafe situations in the first place. Nonetheless, the transparency that characterizes the sharing economy demonstrates that the same regula-

tory concerns that govern many seemingly similar industries may not apply. Moreover, a primary justification for regulation of industry is the lack of parity in bargaining power between sellers and consumers in the consumer economy of the twentieth century. In the context of the sharing economy, however, there is a significantly greater level of parity between buyers and sellers, thus allowing the market to more effectively regulate itself. To the extent public health and safety concerns remain, addressing those concerns, as some state examples show, provides a blueprint toward reconciling the competing interests between protecting the public welfare and encouraging innovation.

Other public policy concerns are where the real battle over the legitimacy of the sharing economy will be fought. The sharing economy is not one monolithic thing, and different public policy concerns will invariably favor different approaches. For instance, the New York State "Multiple Dwelling Law" provides that intensive occupation and overcrowding of multiple dwelling rooms is contrary to public policy, menacing the "health, safety, morals, welfare, and reasonable comfort of the citizens of" New York.² Other industries, such as the ridesharing industry, however, would appear to be perfectly situated to resolve particular public policy concerns, such as vehicle emissions and traffic congestion.³

In light of the varying public policy concerns with respect to each industry affected by the rise of the sharing economy, there can be little doubt that which sharing economy segments should be encouraged and which should be discouraged will remain an ongoing debate. I will note, however, that regulations rarely, if ever, lead the charge of innovation. Ironically, in the context of the sharing economy, regulations seem stuck in the mud of the twentieth century. There can be little doubt, for instance, that early, pre-industrial communities bound together through the sharing of assets and a communal struggle. It was with the massive rise of consumerism brought on in the twentieth century that necessitated many of the regulations to which state and local governments now cling. Query whether many of these regulations have now run their course.

As far as public policy is concerned, aside from the many areas of debate, the fact that the sharing economy adds value to pre-existing assets must be taken into account. It is somewhat staggering, then, that so many state and local governments appear reticent to seem business friendly toward a model that is not only relatively environmentally friendly and socially conscious, but that also inures directly to the benefit of constituents and may provide a vast new source of tax revenue. It is no secret that many customers who use various sharing economy services pay no transaction taxes. Moreover, few vendors of these services, I suspect, report the income earned from such endeavors. This failure to collect tax and report receipts, however, most likely does not stem from a desire to skirt tax obligations. Instead, this failure is rooted primarily in local and state governments' unwillingness to legitimize the underlying business activities being performed. Absent legitimation of the underlying business activities, sharing economy vendors, along with the companies that fa-

¹ For instance, few would suggest that the online review service, Yelp, should supplant state and local government departments of public health with respect to regulating more traditional hotels or restaurants.

² NY CLS Mult D Section 2.

³ City of Chicago, Finance Committee Transcript, Feb. 7, 2006, P. 87 (discussing the carsharing industry).

cilitate their services, would be foolish to report tax. Given the ambiguity surrounding whether the companies facilitating those services have any tax obligation with respect to transaction taxes, and the lack of sophistication on the part of the vendors as well as the sporadic nature of any particular vendor's transactions, this failure to collect tax may not only be understandable, but justified.

New taxes are almost never politically popular. However, adequately complying with tax laws can imbue legitimacy in fledgling industries. The rise of the sharing economy, therefore, provides state and local governments the potential to fortify a new type of industry and generate additional revenue, within reason.⁴

The States' Approaches So Far

Different state and local governments have taken notably different legal approaches regarding taxing and regulating the sharing economy. While many state and local governments have not acted through legislation or regulation in addressing different business models, they have attempted to squeeze new business models into pre-existing rules. In other contexts, state and local governments have shown great willingness to encourage new development, albeit sometimes in an uneven fashion. This section will assess state and local governments' legal treatment of ridesharing, homesharing, and mealsharing. How governments have dealt with each of these industries is often reflective of the unique geographic, demographic, and political inclinations of the respective jurisdictions. An understanding of the varying approaches these jurisdictions have taken will begin to reveal the manner in which governments may move toward reconciling their differences with varying industries within the sharing economy. At the very least, it illustrates the compromising legal waters through which vendors and facilitators of the sharing economy must navigate.

Ridesharing. On July 14, 2014, the Illinois General Assembly sent H.B. 4075 to the governor for approval. Titled the Ridesharing Arrangements and Consumer Protection Act, the bill amended the Illinois Vehicle Code to require, among other things, ridesharing providers to obtain mandatory commercial insurance and chauffeur's licenses. Notably, the bill generally occupied the field of legislation relating to ridesharing, preempting local regulations. Under the new law, the ridesharing apps would have been treated as dispatchers that were required to obtain a commercial ridesharing dispatcher's license, which required proof of the requisite level of insurance. The law also drew a distinction between commercial ridesharing arrangements where an individual used his or her car more than 18 hours per week. If use exceeded 18 hours per week, the vehicle was required to be of a certain age and to be commercially registered. Finally, under the law, the "dispatch-

ers" assumed all liability for any claims in which a dispute existed as to whether the loss or injury occurred while a vehicle involved in the incident giving rise to the claim was made available for dispatch or while a commercial ridesharing arrangement passenger was in the vehicle.

With 2014 being an election year, the so-called "Uber bill" was much maligned by the Republican candidate for governor, Bruce Rauner. Criticizing the bill, Mr. Rauner claimed that "Pat Quinn shouldn't sign this bill; it sends another signal that Illinois is closed to innovation."⁵ Not to be outdone, then-governor Pat Quinn vetoed the bill, stating that he was "vetoing the legislation because it would have mandated a one-size-fits-all approach to a service that is best regulated at the local level."⁶ The governor cited a Chicago ordinance which he claimed demonstrates that local governments could adequately manage the regulatory concerns regarding ridesharing.

The Chicago ordinance, adopted on May 28, 2014, was certainly a more restrained form of regulation than H.B. 4075. Under the Chicago ordinance, ridesharing drivers fall into one of two categories: those who average 20 or less hours a week (Class A drivers), and those who drive more than an average of 20 hours a week (Class B drivers).⁷ Both classes are subject to a background check and a \$10,000 and \$25,000 license fee respectively. While both classes are subject to vehicle inspections, Class B drivers are subject to an annual third party 21-point inspection. Class B vehicles also generally may not be more than six years old, and Class B drivers are required to obtain public chauffeur licenses. In addition, the ordinance addresses surge pricing and requires individual drivers to obtain commercial general liability insurance with limits of not less than \$1 million per occurrence. Finally, all drivers would be subject to the ground transportation tax.⁸

The mayor's office stated that the "ordinance provides consumer protections, improves passenger safety, meets customer demand while promoting innovation and recognizing the different services and providers throughout our entire public vehicle industry."⁹ Representatives of some ridesharing companies, similarly, expressed their pleasure with the ordinance. A spokesman for Lyft said that the "vote in support of ridesharing in Chicago is a welcome development and driven by the public's desire for safe and reliable transportation alternatives."¹⁰ While the Mayor's office and ridesharing companies claimed victory, the Chicago ordinance

⁵ Erin Carlson, *Quinn Vetoes Uber Bill in a Win for Ride-Share Companies*, NBC Chicago, Aug. 25, 2014, at <http://www.nbcchicago.com/blogs/ward-room/Quinn-Vetoes-Ride-Share-Bill-Illinois-Uber-272566381.html>

⁶ Governor Quinn Vetoes Uber Bill, Aug. 25, 2014, at <http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=12553>.

⁷ Municipal Code of Chicago Sections 9-115-030(a)(1) and (2).

⁸ See generally Municipal Code of Chicago Sections 9-115-010, et seq.

⁹ Transportation Network Providers Ride Share Ordinance Passes City Council, Office of the Mayor, City of Chicago, May 28, 2014, at <http://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2014/May/05.28.14AppRideshare.pdf>.

¹⁰ Mary Ann Ahern, *City Council Passes Regulations on Rideshare Industry*, NBC Chicago, May 29, 2014, at <http://>

⁴ State and local governments tend to get a little overly excited at the prospect of new revenue. One study, for instance, showed that carsharing services, such as those provided by Zipcar, Inc., are taxed on average about 1.7 to 2.2 times the general sales tax rate in cities. See Alice Bieszczat, *The Taxation of Carsharing: Is Public Policy Consistent with the Public Benefits of Carsharing?*, Chaddick Institute for Metropolitan Development, June 2011.

was not without its detractors. Alderman Anthony Beale, for instance, filed a motion to delay the vote, contending that the city should have waited for Illinois legislation to pass (the same legislation that was eventually vetoed). He went on to say that the “ordinance will hurt the hard-working men and women who are driving cabs every single day. . . We, I feel, are turning our backs on them with this particular ordinance.”¹¹

California, however, dealt with ridesharing companies slightly differently than Illinois. On Nov. 14, 2012, the California Public Utilities Commission (CPUC) issued a press release indicating that it had issued \$20,000 citations to the “charter-party carriers” Lyft, SideCar, and Uber for illegally operating. The CPUC stated that the carriers were required to obtain operating authority from CPUC. It contended that the companies did not have evidence of public liability and property damage insurance, there was no evidence of workers’ compensation insurance in effect, the companies failed to enroll drivers in the Department of Motor Vehicles Employer Pull Notice Program, and the companies failed to pre-employment test and enroll drivers in the Controlled Substance and Alcohol Testing Certification Program.¹² On Jan. 13, 2013, the CPUC entered into an operating agreement with the companies, allowing them to operate while it proceeded with rulemaking.¹³ The CPUC subsequently abated the penalty citations it had issued to the charter-party carriers, and on Sept. 19, 2013, adopted regulations governing ridesharing companies¹⁴ in California. These regulations required the ridesharing companies to obtain a license from the CPUC, to require each driver to undergo a criminal background check, establish a driver training program, implement a zero tolerance policy on drugs and alcohol, hold commercial liability insurance requiring a minimum of \$1 million per incident coverage for

incidents involving vehicles and drivers in trans to or during a trip, and to conduct a 19-point car inspection.¹⁵ The CPUC regulations, however, were far from exclusive, and issues have remained regarding ridesharing companies’ compliance with other regulators, such as airports that require certain permits.

In September 2014, California adopted legislation formally setting the level of insurance required for ridesharing companies, and formally granting regulatory jurisdiction over the ridesharing industry to the CPUC.¹⁶ After some debate, the ridesharing companies have generally come to support the California legislation. However, even with the comprehensive regulations of the ridesharing industry promulgated in Rulemaking 12-12-011, new issues have cropped up. In August 2014, many of the ridesharing companies began to introduce a carpooling feature in which multiple passengers would be subject to individual fares in one vehicle. The CPUC, however, issued notices to Uber, Lyft, and Sidecar, indicating that the carpooling services violated the law, and if the companies wanted to add a carpooling feature, they would have to request an adjustment to their existing permits with the CPUC or petition the state legislature to modify the law.¹⁷ Notwithstanding these remaining issues, at least according to the San Francisco Municipal Transportation Agency, the introduction of the ridesharing industry in San Francisco has resulted in a drop of 65 percent in standard taxi trips over a period of 15 months. San Francisco is currently in the process of gauging the adequate level of regulation to impose on the ridesharing industry.¹⁸

The trends in Illinois and California are occurring across the U.S. A particularly illustrative debate, for instance, is occurring between the mayor of Madison, Wisconsin, and an alderman, who disagree over the extent to which ridesharing companies should be treated like traditional taxi companies.¹⁹ As will continue to be the case, state and local government regulations are unable to keep up with the ridesharing industry’s advances. At a minimum, however, it appears that, in order to obtain legitimacy, ridesharing companies have been amenable to adopting certain safety screening requirements as well as certain insurance obligations. Whether states are willing to compromise, in light of entrenched interests in maintaining the status quo for the traditional taxi industry, is still an open question. However, given the ubiquitous nature of the ridesharing industry, it would seem that more states will fall in line and promulgate similar baseline regulatory requirements. In addition to increasing public safety and legiti-

www.nbcchicago.com/blogs/ward-room/chicago-city-council-rideshare-uberx-lyft-260974811.html

¹¹ Hal Dardick and Jon Hilkevitch, *Chicago Rideshare Regulations Approved*, Chicago Tribune, May 28, 2014, <http://www.chicagotribune.com/news/local/politics/chi-chicago-rideshare-regulations-approved-20140528-story.html>

¹² CPUC Cites Passenger Carriers Lyft, Sidecar, and Uber \$20,000 Each for Public Safety Violations, Nov. 14, 2012, at [http://www.cpuc.ca.gov/NR/rdonlyres/00BF2F95-21B8-4C72-A268-](http://www.cpuc.ca.gov/NR/rdonlyres/00BF2F95-21B8-4C72-A268-D8057BD16DFD/0/)

[D8057BD16DFD/0/CPUCcitesPassengerCarriersLyftSideCarandUber20000EachforPublicSafetyViolations.pdf](http://www.cpuc.ca.gov/NR/rdonlyres/00BF2F95-21B8-4C72-A268-D8057BD16DFD/0/CPUCcitesPassengerCarriersLyftSideCarandUber20000EachforPublicSafetyViolations.pdf)

¹³ CPUC Enters Into Operating Agreement with Uber, Jan. 31, 2013, at <http://www.cpuc.ca.gov/NR/rdonlyres/F013B3B9-ED4E-4554-9C34-E468C9DAED88/0/CPUCEntersIntoOperatingAgreementwithUber.pdf>

¹⁴ Note that in California, “ridesharing” is actually a term of art which refers to “two or more persons travelling by any mode, including, but not limited to, carpooling, vanpooling, bus pooling, taxi pooling, jitney, and public transit.” Cal. Vehicle Code Section 522. In California, ridesharing is exempt from the CPUC’s regulations. Moreover, under Cal. Gov’t. Code Section 53075, “[n]o local agency may impose a tax upon, or require a license for, the conduct of ridesharing which uses a motor vehicle with a seating capacity of not more than 15 persons, including the driver, if the ridesharing purpose is incidental to another purpose of the driver of the ridesharing vehicle.” The CPUC has specifically addressed this, however, and concluded that because these sharing economy models are for profit, they are not exempt under the ridesharing exemption. California, instead, refers to these companies as “Transportation Network Companies.”

¹⁵ CPUC Rulemaking 12-12-011.

¹⁶ California AB 2293.

¹⁷ Dara Kerr, *California Deems Carpooling Via All Rideshare Services Illegal*, CNet, Sept. 12, 2014, at <http://www.cnet.com/news/california-deems-all-ride-share-carpooling-services-illegal/>

¹⁸ One of the serious and outstanding concerns with a decline in taxis in San Francisco is that ridesharing companies may not comply with disabled passengers’ needs, and that a suffering taxi business may be incapable of handling the needs of its disabled passengers.

¹⁹ Alex Arriaga, *Soglin and Resnick Rideshare Proposals Differ on Key Points*, The Badger Herald, Aug. 23, 2014, at <http://badgerherald.com/news/2014/08/23/city-decide-alternative-regulations-taxicabs-tncs/#.VFu47xbq-lo>

mizing a new industry, these regulations will also result in a boon to local tax revenues.²⁰

Homesharing. The concerns that the homesharing industry faces are somewhat similar to those of the ridesharing industry. At the core of the issues is that the homesharing industry is generally acting without state or local government authority. As with ridesharing, the homesharing industry has put itself in an “ask for forgiveness rather than permission” sort of position. The poster boy for this industry, and this approach, has undoubtedly been Airbnb, Inc.

Airbnb facilitates the rental of living space for short and long term in almost 40,000 localities across the globe. It is easy to imagine, then, the cobwebs of bureaucracy in which Airbnb must operate in order to obtain legal status. The company’s primary strategy has been to work with local governments in order to solidify the legality of Airbnb’s and its vendors’ operations in a particular jurisdiction. Some jurisdictions may require Airbnb to collect the lodging tax on behalf of its vendors; still, others may have outdated laws that do not envision the homesharing model, and still impose the tax collection responsibility directly on those renting out rooms in their homes. In some situations, it is inevitable that Airbnb’s coming forward to state and local government regulatory authorities will result in those authorities scrutinizing its vendors.

At least with respect to tax, the issues that the homesharing industry faces are similar to those of the online travel companies (OTCs).²¹ The issue in those cases, generally stated, was whether the OTCs should collect tax at the wholesale rate that they paid to the hotels, or whether they should actually apply the tax to the marked-up price they charged to their customers.²² The tension in these cases arises from the manner in which lodging taxes are imposed. Most states impose their lodging taxes upon persons engaged in renting hotel rooms to transients for less than a particular period of time, typically 30 consecutive days. Thus, if the hotels are renting out the room at a particular rate, it would

²⁰ Of course, any revenue generated through ridesharing should be generated in a non-discriminatory manner. In New York, for instance, Uber has teamed up with more traditional limousine services to advocate for a repeal of New York’s sales tax on transportation service. Currently stalled in the New York State Assembly, S4920A would repeal the state’s transportation tax. The justification for this repeal is largely rooted in a 2010 amendment to the tax, which exempts liveries in New York City, but leaves other car services subject to tax. Thus, the ridesharing companies and traditional limo and car services contend that New York should, at a minimum, put the tax rates on an even level with those charged for taxis. See Jennifer De Paul, *Uber and Limo Services Fight New York Transportation Sales Tax*, State Tax Today, Oct. 24, 2014.

²¹ For background on the debate between state and local governments and online travel companies regarding the taxability of hotel rooms, see Breen M. Schiller, *Mind the Gap: The Current Debate Between States & Municipalities and Online Travel Companies Over the Taxability of the Remittance Gap*, Journal Of State Taxation, January-February, 2011, pp. 75-81.

²² For example, see *Priceline.com, Inc. v. City of Anaheim*, No. 30-2009-00244120 (2/1/10); *Travelscape LLC v. South Carolina Dep’t of Revenue*, 08-ALJ-17-0076-CC (2/12/09); *City of Charleston v. Hotels.com, LP*, 520 F. Supp.2d 757 (D.S.C. 2007); *City of Fairview Heights v. Orbitz, Inc.*, 05-CV-840-DRH (S.D. Ill. 2006).

stand to logic that based on the statutory language in most states, it would be that rate subject to tax. In the case of OTCs, the hotels rent rooms out to the OTCs, who then basically sell those rental reservations to customers. In that sense, the OTCs are not themselves renting hotel rooms, and instead simply owe tax to the hotels based on the rate at which the OTC obtained the rental. States have gone both ways in this respect. In some states, courts have concluded that tax is owed at the wholesale rate. In other states, courts have held that the tax should be collected on the retail rate charged by the OTCs.

In the context of homesharing, there is another dynamic added to the OTC issue. Rather than renting out the room themselves, homesharing companies simply provide a platform, for which they charge a fee, for people to rent out rooms in their home. In that sense, rather than questioning what constitutes the taxable base, the crucial inquiry is whether homesharing companies should be subject to tax collection or payment responsibilities at all. Given the language in many states’ lodging tax provisions, homesharing companies have a tenable position that they are not required to collect tax, and the obligations fall directly to their vendors. While it is likely that in states where the vendors are deemed to be subject to tax, the homesharing companies will eventually begin collecting tax on their vendors’ behalf, this distinction will have an important impact on companies such as Airbnb’s ability to come into compliance with state laws prospectively; principally, Airbnb should not be liable for historic taxes owed.

Perhaps the two most notable jurisdictions, based on their polarity, regarding the recent trends in the taxation and regulation of homesharing are New York City and Portland, Oregon. In Portland, Airbnb saw an opportunity to obtain legitimacy. Prior to September 2014, all rentals of rooms in people’s homes for less than thirty days were deemed illegal. As part of its negotiations with the city, Airbnb began collecting Portland lodging tax on July 1, 2014, and, after almost a year of lobbying, the Portland City Council passed legislation that would allow residents to rent out rooms, under certain circumstances, if they obtained a \$180 city permit as well as allowed the city to conduct safety inspections of their homes. The ordinance, however, restricted the extent to which vendors could rent out their homes. For instance, vendors may not rent out more than two bedrooms and vendors may not rent out rooms in multifamily apartment buildings.²³ Even these limitations, however, may be subject to change.

As a result of obtaining legitimacy from Portland, Airbnb shortly thereafter began collecting the Oregon Lodging Tax as well. An analysis of the Oregon Lodging Tax, however, may supply an answer as to why Airbnb’s lobbying efforts in Portland were more successful. Unlike many of the states discussed above, the Oregon Lodging Tax, which became effective October 2013, specifically applies to lodging providers as well as “transient lodging intermediaries.” The law is very clear that the tax collection responsibility falls on whomever actually collects payment from the customer. Thus, in Oregon, there was little doubt that Airbnb would be the party responsible for collecting the tax.

²³ See generally Portland Planning and Zoning Code Sections 33.207.010 et seq.

Contrast Oregon with New York. Initially, New York was one of the states where the OTCs were only required to collect tax on the wholesale rate charged by the hotel. However, effective Sept. 1, 2010, New York passed a law which specifically applied the tax to “room remarketers.”²⁴ A “room remarketer” is defined as “a person who reserves, arranges for, conveys, or furnishes occupancy, whether directly or indirectly, to an occupant for rent in an amount determined by the room remarketer, directly or indirectly, whether pursuant to a written or other agreement.”²⁵ Under this new law, and its accompanying explanations,²⁶ however, it is highly debatable whether homesharing services are subject to tax obligations at all. Thus, unlike in Oregon, Airbnb likely has no lodging tax obligations under New York law (although its vendors likely do).

In October 2013, the New York State Attorney General subpoenaed Airbnb, seeking information regarding the approximately 15,000 hosts who rent rooms through Airbnb in New York. At this point, Airbnb attempted to persuade New York City to pass regulations similar to those that Portland would eventually pass, thus bringing the company into compliance regarding the primary concern cited by the Attorney General in his subpoenas. The city, however, has fallen in lock-step with the state, and has pursued Airbnb vendors as well.

Part of the difficulty for the homesharing industry in New York City is the sheer density of the city, and the dearth of affordable housing that accompanies that density. In its pursuit of alleviating these concerns, as well as the safety concerns attendant to the increasing density that homesharing brings, New York has effectively thrown out the baby with the bathwater, conflating the bulk of the homesharing industry with illegally operated hotels. Based on Airbnb’s estimates, New York’s unwillingness to compromise has cost the state and New York City approximately \$21 million in revenue.

Mealsharing. Thus far, this discussion has addressed the two juggernauts of the sharing economy: ridesharing and homesharing, Uber and Airbnb. Mealsharing is a similarly revolutionary concept that, to date, this author has not yet experienced. Admittedly, the mealsharing industry is in its infancy and may not have the staying power that ridesharing and homesharing appear to possess. However, given the outsized importance the restaurant industry has in many local economies, as well as the corresponding public health issues that surround the industry, the mealsharing industry may yet prove to be the most unwieldy segment of the sharing economy.

The tradition of dinner parties and cooking for friends has never been subject to state or municipal regulation. Before the sharing economy had a name, underground supper clubs permeated urban scenes. However, if any of the fledgling companies seeking to be the next Uber of mealsharing manage to figure out a scalable model for the mealsharing industry, they will undoubtedly catch the attention of state and local regulatory authorities. Licenses for serving food, liquor li-

censes, clean establishments, all of these concerns will be at the forefront of the sharing economy discussion. As with every other segment of the sharing economy, these new businesses will undoubtedly forge ahead, ignoring permission and later asking for forgiveness. For now, perhaps that is the best path. It seems unlikely that governments can do anything better for the mealsharing industry than to stay out of its way. However, if the mealsharing economy does in fact become robust, will state and local authorities have learned the lessons from ridesharing and homesharing? Will traditional restaurants lead the charge against the development of such an economy, or will chefs leaving their day jobs come home and supplement their income by having strangers over to their homes? This is all new and exciting, and it remains to be seen what the future of mealsharing will look like. One can only hope, however, that the cultural exchange, not to mention the income opportunities, attendant to such an economy is not stamped out in the name of traditional regulatory concerns.

Moving Toward a Mutually Beneficial Resolution

As can be seen in both the context of ridesharing and homesharing, businesses are not antagonistic to complying with regulations or to complying with tax obligations. However, to the extent complying with archaic laws would make the development of these new and dynamic industries untenable, it is understandable that these businesses would rather ask for forgiveness than permission. For instance, a startup in the mealsharing industry would never get off the ground if it required its vendors, people cooking in their home kitchens, to obtain the licenses required for a traditional restaurant. Obviously, regulation of the mealsharing industry, as with the ridesharing economy, requires new rules that allow for flexibility. The introduction of such rules, then, will allow state and local governments to harness the development and economic efficiency that accompanies the sharing economy without hampering its growth.

It is certainly possible that state and local governments, as New York and New York City appear to have done, may conclude that they simply do not want a particular industry to flourish. Even in these jurisdictions, however, it appears unreasonable and untenable to simply forbid the wave of growth that has accompanied the sharing economy. I suspect, however, that most jurisdictions value the role that the sharing economy will play in the economy as a whole, and are more concerned with striking a balance between legitimate regulatory concerns and encouraging growth. In that sense, there are a few reasonable steps which state and local jurisdictions may take in order to encourage growth while grappling with appropriate regulatory approaches.

Perhaps the single most important step in reaching a mutually beneficial resolution between state and local authorities and the various segments of the sharing economy is to re-cast the perspective toward the sharing economy. As has been seen, companies like Airbnb and Uber are not necessarily trying to obtain competitive advantages by refusing to collect tax or submitting to permit processes. In fact, just the opposite is the

²⁴ N.Y. Tax Law Section 1101.

²⁵ *Id.*

²⁶ See New York Technical Service Bureau Memorandum TSB-M-10(10)S (8/13/2010).

case; submitting to tax and other regulatory requirements legitimizes their businesses, and undoubtedly increases their value. The justification for not submitting to certain taxes and regulations, instead, most likely stems from the inapplicability of those laws to these emerging business models. Thus, state and local governments should be conservative with the issuance of penalties and citations to these industries. This is not to suggest that those in flagrant violation of the law should not be punished; rather, where old regulations clearly never envisioned such new industries, state and local jurisdictions should be understanding with the imposition of penalties. Also important, local governments in

particular must recognize that many of the traditional public policy concerns that necessitated regulation of similar industries initially may be obviated by the self-regulating and transparent nature of the sharing economy. At a minimum, the bargaining power between vendors in the sharing economy and their customers indicates a considerably lesser need for regulation than the power dynamics of the consumer economy that characterized much of the twentieth century. Such an understanding will allow state and local governments to work together to harness the sharing economy in such a way that benefits vendors, customers, and the public fisc.