

THE SHARING ECONOMY: A TAXING EXPERIENCE FOR NEW ENTREPRENEURS, PART I

HEARING BEFORE THE COMMITTEE ON SMALL BUSINESS UNITED STATES HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS SECOND SESSION

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TUESDAY, MAY 24, 2016

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 11:00 a.m., in Room 2360, Rayburn House Office Building, Hon. Steve Chabot [chairman of the Committee] presiding.

Present: Representatives Chabot, Luetkemeyer, Hanna, Gibson, Brat, Radewagen, Knight, Curbelo, Kelly, Velázquez, Clarke, Chu, Hahn, Meng, and Adams.

Chairman CHABOT. The Committee will come to order. Good morning. We want to thank everyone for being here, and a special thanks to our witnesses who have taken time away from their busy schedules to be here with us today. We are really looking forward to their testimony.

We are here to examine an exciting new phenomenon in our society, the sharing economy. This new economy goes by many names—app, gig, on-demand, peer-to-peer, online platform, and collaborative. We have even heard it called the “Uber economy.” Some of you may have even taken Uber or Lyft to get to this hearing today. No matter what you call it, the sharing economy is changing the face of American entrepreneurship and small businesses before our very eyes. The dizzying pace of this change has presented many new opportunities and new challenges for the millions of Americans who participate in it. These new platforms have dramatically changed the ways companies provide goods and services, giving their workers unprecedented freedom and independence. This new generation of workers wants to set their own hours and decide which jobs to take. They may work with one on-demand platform or multiple platforms. They may work alone or pool their resources with others. This is the essence of economic liberty and a testament to the power of the free market.

However, in their enthusiasm, these entrepreneurs are running smackdab into the buzz saw of an outmoded tax code that is not designed to accommodate them.

The tax compliance challenges they face have gone largely unacknowledged so far, but as we are hearing from a growing chorus of entrepreneurs, these tax challenges present new and unnecessary obstacles for our small businesses. Some of these new entrepreneurs fail to file their taxes altogether and, when they do, they

often pay too much. They do not know that they can deduct certain expenses or they do not have the records to back up their deductions, putting them at risk for an audit.

Unfortunately, the IRS has not been part of the solution for entrepreneurs in navigating this new sharing economy. Too often, it has been part of the problem. Our current tax system is not working for these new small businesses. In many ways, it is working against them. We can do better. We must do better.

Today, we will explore some of these problems and discuss some potential solutions with this distinguished panel. We are very much looking forward to hearing from the panel here today, and I would now like to yield to the Ranking Member, Ms. Velázquez from New York, for the purpose of her opening statement.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Technology has long been a catalyst for entrepreneurship. In keeping with this trend, development of the sharing economy has created new challenges for entrepreneurs to sell goods and services. Innovators are harnessing the web to create platforms and markets that allow the selling, renting, and trading of everything from apartment space, to transportation, to artisan craft goods. The numbers strongly suggest that this new sharing economy is here to stay. More than 1.5 million internet users have used TaskRabbit to hire people for odd jobs. As of September 2015, the Uber app was available in 60 countries and 300 cities worldwide, and it is estimated to fulfill one million rides daily.

One reason for this sector's rapid growth may be rooted in broader economic struggles. With job growth still sluggish, enterprising Americans and dislocated workers are seeking new ways to replace revenue. Others seek more flexibility and work-life balance. Renting out rooms and providing lifts in their car have all become ways for ordinary Americans to experiment with entrepreneurship.

While the explosive growth of these networks has created new opportunities, the rapid rise raises questions. While many of the workers in the shared economy enjoy flexibility, they must be protected from unscrupulous business practices. Most of the businesses operating in the shared economy classify their workers as independent contractors, not employees. Such a classification saves businesses money through reduced benefits and tax withholdings. Business and courts have long struggled with trying to determine whether certain workers are employees or independent contractors. The courts are currently overflowing with lawsuits over whether companies have misclassified employees and they are prevalent in the sharing economy. As always, the challenge is ensuring businesses and employees are protected without questioning and discouraging promising innovation.

Control is a critical factor to this question. If the employer controls the worker, how can the worker be truly independent? With the rise of the sharing economy, this question has become harder to answer as workers are connected to consumers through online intermediaries. Our current approach to answering this question seems to be failing at the expense of hardworking Americans and our nation's tax revenues. One study estimates it costs the United States \$54 billion in underpayment of employment taxes and \$15 billion in unpaid FICA and unemployment taxes.

It is important that as this technological revolution advances, government policy keeps pace. It is also important this committee fully understands what is happening in the new sharing economy and has a grasp on how we can minimize risk for employees while maximizing growth and productivity for small businesses. Today's hearing will give us that opportunity.

I would like to thank all of our witnesses for taking the time to be here. Your perspectives will add significant value as the committee seeks to learn more about the sharing economy.

With that, Mr. Chairman, I yield back.

Chairman CHABOT. Thank you very much.

Ms. VELAZQUEZ. Thank you.

Chairman CHABOT. She yields back.

If Committee members have opening statements prepared, I would ask that they be submitted for the record.

Now I will take just a moment to explain our timing system, how it works. It is pretty simple. You get 5 minutes each, and then we will ask questions for 5 minutes. There is a lighting system on your table there to assist you in that. A green light will be on for 4 minutes, and then the yellow light will come on to let you know that you have about a minute to wrap up. The red light will come on and we will ask you to stop. You do not have to stop midsentence, but if you could wrap up we would appreciate it.

I would now like to introduce our distinguished panel here this morning. I will introduce all four of the witnesses before we get started.

Our first witness is Caroline Bruckner, Executive in Residence of Accounting and Taxation and Managing Director at Kogod Tax Policy Center at American University here in Washington, D.C. In that capacity, she directs a team of small business tax policy experts, economists, and researchers. Ms. Bruckner previously served as chief counsel for the U.S. Senate Committee for Small Business and Entrepreneurship from 2009 to 2014. We welcome you here this morning.

Our second witness will be Rob Willey, who is Vice President of Marketing at TaskRabbit in San Francisco, California. TaskRabbit connects users who want to outsource errands to anyone willing to complete them for a fee. The company started in 2008 and currently operates in 18 cities in the U.S. as well as London. With over 15 years of experience in marketing, Mr. Willey has created marketing campaigns for several global clients, including Nike, Cadillac, and Nokia. We also welcome you here this morning.

Our third witness will be Morgan Reed, who is Executive Director at ACT, the App Association where he specializes in application development issues. In addition to testifying to the Subcommittee on Health and Technology last year, Mr. Reed has also testified before the U.S. Senate and has written several white papers on app development. He also serves on the Advisory Council of the Mobile Health Information Management Systems Society. I will now like to yield to the Ranking Member, Ms. Velázquez, to introduce our fourth and final witness.

Ms. VELAZQUEZ. Thank you, Mr. Chairman. It is my pleasure to introduce Mr. Joe Kennedy, Senior Fellow at the Information Technology and Innovation Foundation. For almost 3 decades, he

has provided legal and economic advice to senior officials in the public and private sector involving technology, competitiveness, and the social contract. Mr. Kennedy previously served as the Chief Economist for the U.S. Department of Commerce and as the Senior Economist for the Joint Economic Committee. He holds a law degree and a master's degree in Agriculture and Applied Economics from the University of Minnesota, and a Ph.D. in Economics from George Washington University. Welcome to the committee. Thank you.

Chairman CHABOT. Thank you very much.

Ms. Bruckner, you are recognized for 5 minutes.

STATEMENTS OF CAROLINE BRUCKNER, EXECUTIVE-IN-RESIDENCE, ACCOUNTING AND TAXATION, MANAGING DIRECTOR, KOGOD TAX POLICY CENTER; ROB WILLEY, VP MARKETING, TASKRABBIT; MORGAN REED, EXECUTIVE DIRECTOR, ACT THE APP ASSOCIATION; JOE KENNEDY, SENIOR FELLOW, INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION

STATEMENT OF CAROLINE BRUCKNER

Ms. BRUCKNER. Thank you for the invitation to join you today to discuss the tax compliance challenges of small businesses driving a sharing economy. My name is Caroline Bruckner. I am on the faculty at American University Kogod School of Business. I am also the Managing Director of the Kogod Tax Policy Center which conducts nonpartisan research on tax and compliance issues specific to small businesses and entrepreneurs.

At Kogod, we are currently focused on the tax and compliance issues impacting America's latest iteration of small business owners who are renting rooms, providing ridesharing services, running errands, and selling goods to consumers and business transactions coordinated online and through ad-based platforms developed by companies such as Airbnb, Etsy, Uber, Lyft, TaskRabbit, Instacart, and others.

We released our research yesterday in a report titled "Short-changed: The Tax Compliance Challenges of Small Business Operators Driving the On-Demand Platform Economy" to shed light on these issues as Congress moves forward with tax reform.

Having spent more than a year investigating these growing problems, we report on what the existing debate has yet to acknowledge: that for tax purposes, on-demand platform economy service providers and sellers are, in fact, small business owners, and there are millions of them working and earning income in ways that are not readily identifiable by existing government research or publicly-available taxpayer filing data. We argue that these issues should be considered by Congress and the IRS, not only because millions of American taxpayers are needlessly burdened trying to comply with an antiquated, outdated tax system, but also because inaction has very real implications on Treasury and IRS' ability to fairly and efficiently collect taxes.

A number of findings we reviewed and included in our research are particularly relevant to today's discussion, including, first, more than 2.5 million Americans are earning income in the on-de-

mand platform economy as small business owners every month. This reflects the explosive growth of the on-demand platform economy but is just the latest example of a 66.5 percent increase in alternative work arrangements for U.S. workers from 2005 to 2015.

Second, although people do cycle in and out of the on-demand platform economy, during months in which people are actively using platforms to earn income, average monthly income ranges from \$533 to \$314 per month.

Third, by and large, the majority of individuals in the on-demand platform economy work less than 15 hours per week.

As part of our research, we spoke with dozens of individuals currently participating in the on-demand economy and initiated a survey of the members of the National Association of Self-Employed (NASE). Our objective was to assess whether tax compliance challenges exist even among a group of taxpayers who by their own self-selection as members of NASE are experienced, self-employed small business owners. Their responses indicate a significant lack of understanding of the information available regarding self-employed tax filing obligations. Specifically, our survey revealed that among respondents who had earned income with an on-demand platform company in 2015, which was approximately 22 percent of all of our respondents, approximately one-third did not know whether or not they were required to file quarterly estimated payments with the IRS on their on-demand platform economy income; 43 percent were unaware as to how much they would owe in taxes and did not set aside any money for taxes on that income; and almost half did not know about any tax deductions, expenses, or credits that could be claimed related to their on-demand platform earnings.

As a result, a significant percentage of these taxpayers could face potential audit and penalty exposure for failing to comply with filing rules that are triggered by relatively low amounts of earned income. Costs to taxpayers can also be quantified in terms of time spent preparing returns and chasing down questions to complex tax questions from the IRS. But we heard time and again from taxpayers, on-demand platform companies, and tax preparers that the small businesses operating in the on-demand economy generally want to be honest and pay what they owe, but that the tools and resources do not exist. Indeed, more than 60 percent of our survey respondents who worked for an on-demand platform company in 2015, reported that they did not receive a Form 1099-K or 1099-MISC from their on-demand platform, which likely means the IRS did not either. This is not surprising given that it is entirely consistent with both the Form 1099-MISC filing instructions and the statutory requirements for filing a Form 1099-K.

The current tax administration system is not working for a significant percentage of on-demand platform small business operators or Treasury or IRS. At the root of this problem is a lack of information and understanding of tax filing obligations, which is compounded by an information reporting regime that results in widespread confusion, and these tax challenges are only going to continue to grow to impact more and more self-employed small business owners. Our assessment of the general confusion state of play when it comes to filing taxes on that income earned from on-

demand platform work was consistently reinforced by interviews with tax preparers, industry experts, and our own survey. Everyone is losing under the current rules. Both the on-demand economy players and the IRS deserve greater efficiency and less hassle. We can do better.

Again, I thank you for the opportunity to join today's discussion and for the work you do on behalf of America's small businesses.

Chairman CHABOT. Thank you very much.

Mr. Willey, you are recognized for 5 minutes.

STATEMENT OF ROB WILLEY

Mr. WILLEY. Mr. Chairman, Ranking Member Velázquez, and members of the House Small Business Committee, I am Rob Willey, Vice President of TaskRabbit. Thank you for the invitation to testify today. More importantly, thank you for the interest in the topic that captures the legal, regulatory, and public policy challenges that confront millions of individuals that look to platforms like ours to improve their daily lives.

Founded in 2008, by Leah Busque, our founding member, we set out to revolutionize every day work. Now, most of us have probably figured out one day or another that we needed a time to have someone help us with yardwork, fix a shelf in our house, paint a room, or possibly mow our lawns, and today we have recognized and realized that opportunity. With New York being our largest market and London being our fastest growing market, we today have over 50,000 taskers with 5,000 active at any given time, helping everyday people accomplish these everyday types of tasks.

Now, with that said, we are looking to change the face of the industries by consistently representing our taskers and their everyday needs. With that, we have promoted and consistently support our taskers with flexible prices, with flexible hours, in flexible locations, on an average of \$35 an hour. This is what we call everyday work for everyday people.

With that said, only 10 percent of our taskers work full-time. Overall though, the average monthly income for taskers should triple year over year. This part-time flexible nature of our work done by our taskers is consistent with the larger platform economy.

A February 2016 study by the JPMorgan Chase Institute found that the overwhelming majority of an estimated 2.5 million Americans who earned income as small business owners using platforms like ours did so to supplement their incomes and better support themselves and their families.

With little to no barriers to entry, the on-demand platform economy has become an important option at a time when income volatility continues to change individuals and families. On-demand platforms like ours create a new earning option that is accessible to millions of Americans. Of course, the emergence of the platform economy has sparked an intense debate on the classifications of workers versus independent contractors. The current classification system was defined around a much different economic and technological era and has been shaped mostly by decades of regulations and court cases. As a result, it fuels uncertainty about what we can or cannot do to support our taskers while preserving their flexibility and independence in accessing our platform.

As Professor Caroline Bruckner noted, many platform economy participants either do not know or are not fully aware of both their tax obligations and tax benefits as a result of earning income on platforms like TaskRabbit.

We at TaskRabbit have no reason to doubt that significant numbers of taskers are facing these types of challenges. For many of our taskers, when they sign up to join our platform, they are making their first forays into the world of self-employment. Some may understand that earning a certain level of income triggers that quarterly estimated payment filing requirements but many do not.

It is in TaskRabbit's interest to see our taskers gain a better understanding of tax compliance and planning. Greater flexibility and transparency with respect to tax planning would help maximize return on tasker participation in our networks. It is their freedom as entrepreneurs.

Today's topic is just one of many where our taskers could benefit from better training. Our taskers are also looking for direction on how to better market themselves and their services, access health care, and plan for retirement. We at TaskRabbit would like to be a resource, a partner, and a collaborator for them. We urge Congress and relevant government agencies to look at innovative approaches to support their participation in this emerging platform marketplace.

As a pioneer of this emerging market, TaskRabbit welcomes the opportunity to work with policymakers as our company grows and matures. We consider this engagement rewarding on many levels. Just last month, for example, we became the first technology company to announce we would follow the diversity principles outlined by the Congressional Black Caucus in its TECH 2020 initiative.

Mr. Chairman and Ranking Member Velázquez, we thank you for you and your Committee's interest in taking the time to understand our business and how it is changing what we call the future of work. We appreciate the bipartisan interest in the platform economy, most notably by the Sharing Economy Caucus, co-chaired by California Congressmen Darrell Issa and Eric Swalwell.

We hope we can channel this bipartisan energy towards constructive policy solutions that will further enable TaskRabbit and the platform economy to continue to innovate and grow and further empower small business owners and entrepreneurs to efficiently and effectively provide services across the country. Thank you.

Chairman CHABOT. Thank you very much.

Mr. Reed, you are recognized for 5 minutes.

STATEMENT OF MORGAN REED

Mr. REED. Chairman Chabot, Ranking Member Velázquez, and distinguished members of the Committee. My name is Morgan Reed, and I am the Executive Director of ACT the App Association. Thank you for holding this important hearing.

The App Association represents more than 5,000 small business app makers and connected device companies across the United States. Our member companies have enabled the rise of the sharing economy by leveraging the connectivity of smart devices.

Sharing economy companies have grown rapidly over the past decade because they allow instantaneous communication, secure

transactions, and personalized relevance to consumers. Moreover, these same factors allow small businesses and tens of millions of Americans to earn more for their families with flexibility and autonomy, all powered by the smartphone in your pocket. But these opportunities will cease to exist if Federal regulations hinder the continued growth of the sharing economy.

I want to highlight three tax policy actions that affect our members. First, Congress and the Internal Revenue Service should take great care to ensure the federal tax code enables, rather than stifles the sharing economy, specifically, the treatment of all sharing economy workers as employees under the federal tax code would be detrimental, especially to small businesses.

Second, small businesses need certainty and transparency in the tax resolution process, including the ability to settle disputes with the IRS in an effective and efficient manner. Legislation like that proposed by Senator Rob Portman can help ensure that outcome.

Finally, Congress should ensure fairness by guaranteeing that Internet sales taxes are based on the seller's location. We call on Congress to reject proposals that would force businesses to become tax experts for thousands of state and local jurisdictions across the United States.

But beyond specific policy requests and legislative language, I would like to take a moment to illustrate how the move to the sharing economy is far more than a repackaging of existing services. The popular media tends to describe the sharing economy in terms of companies that displace or disrupt an existing business model. eBay replacing the classifieds or the yard sale, UberX replacing the taxi, and VRBO replacing hotels. But this is a false, or at least limited, dichotomy.

The sharing economy not only replaces but also creates new concepts in how people engage and interact. For example, our member, NomFul, a Chicago-based small business utilizes a sharing platform to connect nutrition coaches from across the country to consumers seeking a healthier lifestyle. Using NomFul's service, dedicated coaches answer questions, set benchmarks, and help consumers meet their health goals, but they do not merely connect you to a nutrition expert. NomFul fundamentally switches the paradigm by getting users to change bad habits through ongoing relationships, not just the once a month meeting you would receive with traditional care. Users can take pictures of the food they are eating, share it with their coach, and get real-time feedback and reinforcement. Coaches get insight about the existing habits of the user so that they can step in before a bad decision is made, actively working to prevent diabetes and other health problems. In short, creating healthy habits is relationship dependent.

NomFul does not exist without the tools that create our modern sharing economy. You would merely have individual nutrition coaches trying to change years of bad habits with static information given in isolated 60-minute sessions, and there is no possible way that every nutrition coach and registered dietician would provide their own software to provide these new tools, nor could a company writing the software afford to hire an army of nutrition coaches and then hope to create a user base. The only way it works is through a sharing platform, one that allows users to find the

help they need and for the coaches to be able to take as many or as few clients as they want. So as you see, NomFul replaces no existing industry.

There is a story like NomFul's in every single district in America. Each one of you received a packet of baseball cards with companies from your district. Now, not all of them are sharing economy businesses but they are all part of the revolution taking place, one that is moving hi-tech beyond just big companies. In fact, our most recent study showed that 82 percent of the top app companies are small businesses, most of which bail from places other than Silicon Valley.

The companies that you have in hand are looking to grow and succeed, each with their own vision of what success looks like. But the success of the sharing economy is predicated on an empowered workforce, one that can choose to drive for Uber and for Lyft, to open up a bricks and mortar location and provide products or services online, and for platforms to be able to attract users through better training, tools, and clients without triggering a change in tax status.

We urge Congress to ensure that the rules we follow make sense in an age where the neighborhood yard sale is now nationwide and where a daily client may not live in the same country. The app ecosystem enables the sharing economy and offers incredible benefits to each and every American, and I look forward to working with you to help advance measures that empower innovation.

Chairman CHABOT. Thank you very much.

Mr. Kennedy, you are recognized for 5 minutes.

STATEMENT OF JOE KENNEDY

Mr. KENNEDY. Thank you for the opportunity to testify before you on the subject of taxes and the sharing economy.

ITIF's approach to this topic is driven by three considerations. The first is that while the sharing economy is growing rapidly, it still represents only a small fraction of an increasingly diverse labor market.

Second, internet platforms are delivering tremendous value to both consumers and workers. In a survey of over 4,600 workers from 11 platform companies, only 7 percent said they were dissatisfied with their experience. Workers earned an average of \$7,900 over the previous 12 months, which accounted for 22 percent of their total household income. The average hourly earnings was \$28.

The third consideration is that the traditional employee/independent contractor distinction no longer serves much purpose for a growing share of today's labor market. Largely by default, the common law test has become the basis for determining whether all of the major Federal and state labor laws apply. The result is a large amount of uncertainty and litigation which discourages companies from supporting gig economy workers and consumers in a variety of ways.

Some of the ways that companies have said that they would like to support their independent contractors include training and access to business and financial advice. Such efforts could be enormously valuable to workers who are, after all, for all intents and purposes, running their own businesses. Within the tax field, help

with tax advice, recordkeeping and withholding would be especially important. The tax laws are enormously complex. Workers need to make a number of important decisions, including what form of business to create, whether to set up a new savings plan, and what salary to pay themselves. They need to determine what expenses are deductible and begin keeping the necessary records, and they need to complete their tax filings in a timely manner. In a survey, 20 percent of online workers listed understanding tax and legal obligations as one of their top challenges. In addition, these platform companies could add value to both workers and consumers by setting prices, handling transactions, letting parties rate each other, and conducting background checks. Yet, such activities are often used as evidence of an employer-employee relationship.

Public policy should encourage companies to support their workers' careers, irrespective of the work relationship. If a company offers withholding to all workers, or pays for access to tax or business advice, or extends benefits to independent contractors, why would we want to discourage that by insisting that it must also be subject to minimum wage, collective bargaining, and unemployment insurance legislation?

In a recent ITIF report, I argue that there are three approaches that Congress can take to begin modernizing the nation's labor laws. The best option would be for Congress to amend each federal labor law by replacing the common law test with a clearer one specific to that particular piece of legislation. The second approach would be to define a third category of workers somewhere between an employee and an independent contractor. Finally, Congress could give platforms devoted to personal services a temporary exemption from most labor laws. The worker of many of these platforms are clearly independent contractors anyway under the common law test. The small size of the gig economy and the temporary nature of the exemption reduce any risk to the broader labor markets.

The world around us is rapidly changing. Work arrangements will continue to diversify as companies respond. Congress cannot dictate the shape of future work arrangements. It can, however, play a large role in helping workers get the kind of support they need to have good careers that fit into their increasingly complicated lives.

Thank you again for the opportunity to appear before you.

Chairman CHABOT. Thank you very much. We appreciate the testimony from all the panelists here this morning, and now we will ask questions. I recognize myself for 5 minutes.

Ms. Bruckner, you testified that more than 60 percent of your survey respondents did not receive a Form 1099-K or a Form 1099-MISC. What changes would you suggest to improve reporting to benefit both workers and the IRS?

Ms. BRUCKNER. I think that the first thing that we should do is recognize that the instructions for the Form 1099-MISC directs people to use the Form 1099-K for credit card reporting or payments made by credit card, and that creates a tax reporting loop-hole for income that is earned that is less than \$20,000, because there are certain income thresholds for using the Form 1099-K. The IRS should immediately reconsider those instructions on the

Form 1099-MISC and see if it can be used for credit card payments less than the income threshold for \$20,000.

Chairman CHABOT. Okay. Do you have a sense of how many folks are not complying with the tax code because it is too complicated—in the shared economy I am talking about—that it is too complicated and too cumbersome versus, “I am not going to pay my taxes”?

Ms. BRUCKNER. That is a good question. I do not have a hard number on that, but I can tell you anecdotally from when we talk to folks that are in the sharing economy or when we talk to tax preparers that specialize in advising folks who earned income with platform-related work, they were immediately confused as to whether or not they had to pay taxes on their income earned because in many instances they did not get any 1099 at all.

Chairman CHABOT. Okay. Very good. Thank you.

Mr. Willey, I will move to you now. We have heard a lot today about the tremendous projected growth of the sharing economy in the coming years. What are TaskRabbit’s own estimates of the growth that you might expect to see in your company and what areas do you see as having the best growth potential?

Mr. WILLEY. If history is any indication of the future, which we believe it is, year over year to date we are growing at 4X on a revenue basis. We are also growing our task—we have 15,000 organic applications from our taskers on a month-to-month basis. Both of those indicate that, one, we are still in the very early days of what the sharing economy could look like; and two, TaskRabbit is well-positioned to be a figurehead of growth.

Chairman CHABOT. Thank you.

Mr. Reed, I will move to you at this point. We discussed the complexity of all this, how hard it is to get information, how to figure out how to comply with the IRS code under existing code. Very confusing. Is it possible that there is some enterprising entrepreneur out there that could come up with an app, form their own company, to solve this problem rather than the government figure it out for them?

Mr. WILLEY. Well, I think that it is a two-pronged test. One, yes, absolutely. In fact, there have been some early-to-market applications that attempted to make the switch. One of the real discoveries that we found is that an application that is on your device to help you with taxes is one that you likely only turn to at that moment of panic. What really we are seeing now is the fact that you have to do an integrated application. You need to be able to pull in the information from TaskRabbit into your tax preparation software on an ongoing basis so that you can keep track of it. And, in fact, that leads to one of the confusing elements we have all been discussing. If TaskRabbit or NomFul or any of these companies were to provide that kind of interactivity and that ongoing information flow and training, well, that might trigger the case of them being considered employees.

So on the one hand, it is very hard to put together an application that draws the right information, and on the other, our platforms are concerned about the liability they may take on by providing us the very thing that we need to satisfy the first question you asked, how do we get people to pay their taxes?

Chairman CHABOT. Thank you. I have time for one more question. Mr. Kennedy, I will turn to you on this one. Even if we were able to implement a temporary legislative and regulatory moratorium on the sharing economy as you have suggested, you correctly point out that there are myriad of relevant state and local laws that bear on this sector. How would you address inconsistencies between federal action versus state and local?

Mr. KENNEDY. I would say two things to that. The first is I think there is room for an increased dialogue between the federal government and the states about what the common rule should be. We would like, ideally, for there to be consistency at the federal and state levels, so encouraging reform at the state level that matches reform at the federal level would be important. The second is that Congress can, to some extent, preempt state laws using the Commerce Clause. There is room for debate about where that line is, but I think there is scope for preempting a lot of the state legislation now.

Chairman CHABOT. Okay. Thank you very much. My time is expired. The Ranking Member is recognized for 5 minutes.

Ms. VELAZQUEZ. Thank you, Mr. Chairman.

Mr. Kennedy, in your testimony you touch on this issue but I would like to hear more discussion on it. There is a level of complexity inherent in operating a business that straddles the boundary between wage employment and self-employment. What can be done specifically in tax law to overcome these challenges? Is it creating a new hybrid definition of an employee or amending the IRS Safe Harbor Rule?

Mr. KENNEDY. My personal inclination would be to amend the Safe Harbor Rule to create a brighter line between where a particular law applies and where it does not apply so people know which side they are on. For people who would only make a little bit of money on these platforms, you could raise the threshold so that they do not need—they still need to report the income and pay taxes on it but they do not need to make, say, quarterly payments. There are two hopefully minor reforms that would make a difference.

Ms. VELÁZQUEZ. Thank you.

Ms. BRUCKNER, there has been some concern from traditional brick-and-mortar businesses about the emergence of the sharing economy business model and how it affects fairness. While I do not advocate one business model over the other, how do we ensure that actions taken to foster entrepreneurship through new methods do not disadvantage businesses that invested time and money to conform to existing regulations when classifying their workers?

Ms. BRUCKNER. The first thing that you can do is promote understanding of what your tax filing obligations are because people view unfairness when they think that other people are not paying their fair share. If we take actions on outreach and education on what income you need to pay taxes on and promote what your tax filing obligations are, then you are creating an opportunity for people to actually pay their fair share and creating transparency and making sure that folks, be they in a sharing economy or working for a brick-and-mortar business, are both paying their fair share.

Ms. VELAZQUEZ. Mr. Reed, do you have any comments on that?

Mr. REED. Well, I think what we all have seen, what the studies have shown from Ms. Bruckner and Mr. Kennedy is that that paradigm of bricks-and-mortar store as a standalone entity is almost nonexistent. Sure, there is a corner bodega that sells ice cream and sundries that will probably always be very isolated, but in nearly every other business, you are going to have a mixed economy. I started a bike store when I was younger. I still own part of a bike store, well, we sell part of our equipment online. We get rid of stuff that we did not sell in the year online. We use services like eBay, et cetera. What I am finding is even your corner independent bike store is probably going to have an interaction in this sharing economy. While it is important to preserve the rights and the capabilities of those brick-and-mortar stores, we have to understand that we are merging into an always connected, always online, and candidly, always selling economy.

Ms. VELAZQUEZ. Mr. Kennedy, your views on that?

Mr. KENNEDY. I think somebody who has paid a million dollars for their medallion in New York probably feels a bit aggrieved that Uber is competing, but I think if you look at it objectively, Uber is a better model. They are reducing prices. They are serving neighborhoods that traditionally have not been served so well. The riders seem to think it is a better experience. The answer, I think, is not to go backwards into the traditional model but to free up the traditional taxicabs and brick-and-mortar businesses so that they can participate more in the online experience. You see the taxicabs actually starting to put out their own apps now. Reforming some of the traditional laws and traditional regulation would be a more appropriate response.

Ms. VELAZQUEZ. Thank you.

Ms. Bruckner, if workers are found to be misclassified, what are the current penalties under the tax code? Would they then be penalized automatically under other laws, like the Fair Labor Standards Act as well?

Ms. BRUCKNER. Our research did not look at the misclassification legal implications. We think that that is a part of the debate that impacts a very small segment of the overall sharing economy and that there are much larger, broader implications for the growing numbers of independent contractors, freelancers in general. Our research focuses specifically on the existing tax compliance challenges of those folks that are operating as self-employed, small business owners generally. There is, absolutely, misclassification that occurs in every industry at every paygrade and there are extensive legal ramifications, but we focus first and foremost on the smallest of the small business owners and what their tax challenges are.

Ms. VELAZQUEZ. Thank you. Thank you, Mr. Chairman.

Chairman CHABOT. The gentlelady yields back. Thank you.

The gentleman from New York, Mr. Gibson, is recognized for 5 minutes, except he is not here. Okay. Who is next on our side?

Okay. The gentleman also from New York, Mr. Hanna, is recognized for 5 minutes.

Mr. HANNA. Thank you. This is a fascinating topic. The underground economy, as you know, is growing. Part of this whole conversation has to do with noncompliance. You said \$2.5 billion are

unreported potential income, and yet there is unanimity that the tax code, if not encouraging this, is not caught up to the issue. So you have the government's desire to eliminate the notion of independent contractors so they all fall under the auspices of the companies that are helping them open these businesses; right? Yet that does not solve the problem, I am interested that there is an issue there. The IRS, people are not sending 1099s because they do not require them, so who is really breaking the law here? Are they looking at the credit card threshold? If they are, how would they even know it? I mean, let's face it. People are saying uniformly that people are not complying, implying that they are uninformed, but we all know that we have to pay taxes. We all know that if we have income, we owe somebody something or at least a report saying we fell under certain—so I do not buy that people do not know that they owe something to someone.

Ms. Velázquez said that there is a subtle incentive to make everybody a private contractor because look at what you avoid, the whole FICA issue, the health insurance, all those things. So I think it is a really complicated issue. I am interested in any response you might have, Ms. Bruckner, because who would not want to be like TaskRabbit saying these are all independent contractors and we are not responsible for anybody. I mean, that would be ideal for you. You just collect your percentage and move on, but yet, it is a problem. It is a big problem.

Mr. Reed?

Mr. REED. Having been a small business owner and having been on both sides of this, I am not sure I would completely agree with the concept that everybody would love to have independent contractors. As somebody who owned a small business, one of the things, one of the reasons I hired people to be employees is that I could count on them to be there. As I pointed out, lots of drivers drive for both Uber and for Lyft, and so you essentially have your employees in a state of competition with you; right? You are having to constantly offer incentives, find new ways to entice them to stay and not jump ship. One of the advantages that you have when you own a business and have employees is there is an opportunity cost to having them there, but it allows you to do different—

Mr. HANNA. No, I am not arguing.

Mr. REED. So I think that we are making that decision on kind of an ongoing basis because TaskRabbit has employees, do you not?

Mr. WILLEY. Thank God I am one of them.

Mr. REED. Exactly.

Mr. HANNA. But the premise is the same. I agree with you. I have had hundreds of employees myself. I am new to this job. So I get it. But we have to find a way to disincentivize the companies from doing that inappropriately, and at the same time find a way to help people pay what they are owed, because the IRS cannot run around chasing down everybody who owes them \$500.

Mr. WILLEY. I do not argue that we need to create the right set of incentives for both companies and for 1099 or taskers, as we call them, contractors, to have the right benefits and right access to whatever they choose. But legitimately right now, our taskers are telling us the one thing they value most is flexibility. In order for us to provide that flexibility, they need to be 1099 contractors. One

of the negating factors however, to them filing their taxes or receiving training in any other regard—whether that be professional services, learning how to be better handymen, understanding how to market themselves—is this inability to work directly with them around training. That is ultimately one of the barriers, the issue we are talking about today, and more broadly around how to interact with this workforce in a meaningful way.

Mr. HANNA. Do you agree with that, Mr. Kennedy?

Mr. KENNEDY. Yes. I would also add that if you are talking about withholding taxes or providing, say, healthcare benefits, the economic evidence is that the employee ultimately pays for that in reduced take-home pay. So it is not really the employee that is bearing the burden; it is possibly the employer.

One of the reasons I suggested the temporary exemption is because there is real scope for the companies to come forward in certain areas and have a closer relationship with their employees. Tax is one of them because all the records are electronic, and so providing the IRS with the information is almost costless. But the companies are afraid that this will come back to bite them later in the form of a disgruntled worker saying they were misclassified or an agency coming and saying you did not do this or that.

Mr. HANNA. Sure. With workman's comp there is a big incentive to that.

Chairman CHABOT. The gentleman's time is expired. The gentleman is granted an additional minute to wrap up.

Mr. HANNA. Oh, thank you. Thank you, Chairman.

I get all that, but just one last thing. The Affordable Care Act. Regardless of how you feel about it, it impacts it in an enormous way with people in marginal positions and income, the potential to have the cost of that particular health care grow is incredible to me, just from what we read all the time.

So thank you. My time is expired. Thank you.

Chairman CHABOT. The gentleman's time is expired.

The gentlelady from California, Ms. Hahn is recognized for 5 minutes.

Ms. HAHN. Thank you, Mr. Chairman, Ranking Member Velázquez for holding this hearing. I agree with my colleague, Mr. Hanna. This is an interesting topic and certainly there are a lot of changes underfoot in how small businesses are operating, how they are going to be paying taxes, how they impact the consumer. It is really interesting.

One of the things, I wanted to ask you Professor Bruckner, because you noted in your testimony that 22 percent of the members of the National Association of the Self-Employed responded that they work with an on-demand platform company, like Uber or Airbnb, and of that 22 percent, almost half did not know about any tax deductions, expenses or credits that they could claim related to their on-demand platform income. While most of the discussion so far has been whether or not they are paying their taxes, in general, what kind of tax deductions or credits can be claimed for those in that industry? Also what can we do to maybe better educate this group on the availability of some of these savings?

Ms. BRUCKNER. That is a great question. Starting off with the most obvious answer is when you drive for a business, in many in-

stances you can deduct the miles that you drove. The question is do you deduct actual miles that you drive or do you deduct using a standard deduction formula that is in the tax code? In addition, depending on where you work, if you are selling goods online but you produce those goods from outside of your home, can you take advantage of the home office tax deduction? Are there other startup expenses that you might qualify for under the code for being able to expense in becoming your own small businesses? It was really surprising to us that this experienced, self-identified, self-employed population was not aware. At least half of them were not aware of these potential deductions and expenses and even tax credits that could apply to them, which means that they could be very well leaving money on the table when they go to file their taxes.

Ms. HAHN. Thank you.

I was going to ask Mr. Willey from TaskRabbit, I know we are talking about taxes in this session, but, since you are here, love the business model, love the concept, you know, if only our kids would do their chores we would not have to hire taskers. But one of the concerns that some of us have is background checks of some of those who are now becoming taskers and coming into our homes. Can you walk us through how TaskRabbit vets and administers the background checks for these taskers?

Mr. WILLEY. Sure. Trust and safety, holistically, is clearly one of our company's biggest priorities, and I think it is important to state that as we look at a variety of things that happen in the marketplace every day. Clearly us recruiting and/or onboarding taskers is something that operationally we look at every day to make sure it is the best process possible. In doing so, like I mentioned, 15,000 taskers or potential taskers apply to work in the marketplace every month. What that includes is the submission of a form online with basic contact information, which includes their Social Security Number, then we do a background check, which currently they pay for. Then, based on that process, they come in person for a one-hour orientation to learn the processes and procedures of our marketplace, as well as how to use the tasker app in order to answer for potential work.

Ms. HAHN. Thank you. Let me also follow up, am running out of time. It is fascinating that we are talking about \$35 an hour. I mean, that is like five times—

Mr. WILLEY. The federal minimum wage.

Ms. HAHN.—the federal minimum wage. It is incredible. You have stated that thousands of applications are coming to you really without any direct recruiting or marketing. I am thinking about, particularly in the district that I represent in Los Angeles, there are a lot of folks who are looking for work. Many of the neighborhoods are low-income neighborhoods. How can you reach out to some of those other communities in our country who seem to me would be perfect to fill some of these jobs? What can you do to help people find some of these good-paying jobs?

Mr. WILLEY. It is a good question actually, and we thank you for your support and that of the City of Los Angeles. You are one of our largest markets. I think you are right. There is more potential and opportunity for us to broaden outreach, to have a broader portion of the market or the population find new work opportuni-

ties, and we consistently support that with, one, a livable wage. That is most important to us. Two, is the flexibility, because 90 percent of our taskers do not work full-time in the marketplace, so they are allowed to create other new work opportunities. I would say the third thing, which is the most important, is this idea of transferability of skills. If we can consistently train those that work as taskers in the marketplace with broader skillsets for them to take on and in the future then do bigger, broader things, not only does our existing marketplace benefit, but as do consumers and what we call clients to receive better services.

Chairman CHABOT. The gentlelady's time has expired.

Ms. HAHN. Thank you very much, and I yield back.

Chairman CHABOT. Thank you.

The gentleman from Mississippi, Mr. Kelly, is recognized for 5 minutes.

Mr. KELLY. Thank you, Mr. Chairman, and I thank the Ranking Member, and I thank this distinguished panel. I really appreciate you being here today.

I am going to vary a little bit. People do not like change, and governments do not like change, and so I am talking to some of the other comments that I have heard. This is a system that works but it is different. I see the same thing with overtime rules with small businesses. What governments do not understand, they try to make fit into their mold, into their box, and the net reality is it does not work in that box. They have to adapt to the sharing system and to the small businesses and not try to adapt them to the rules that apply to everyone else. If we do that, if we try to force small businesses or sharing economies to be a part of the regular tax process or agency process, what happens is you fail because we try to insert ourselves. We need to change, not ask you to change.

What I find interesting is that the sharing economy is very tangible. The other thing that I find very interesting is it applies to people either as a second job or a supplemental income, not as their primary, so a lot of times they are paying taxes in a primary job. They have healthcare in their primary job. But it is very flexible. I think Mr. Reed, you hit it, flexibility is the key. We absolutely have to be flexible because most of these people are students. They are retirees. They are stay-at-home moms. They are soldiers' wives. They are people who may be moving locations or either tied to a location and tied to other duties, and so that flexibility is the most important. What can we as a Small Business Committee do to make it easier to make sure that the people who want to and should pay their taxes pay them, but also that we keep open that flexibility? I will start with you, Ms. Bruckner.

Ms. BRUCKNER. I think holding a hearing on this is a good start. First and foremost we need to be educating other members of Congress about the sharing economy and about the fact that it is just not a millennial phenomenon. If you talk to the platform companies, some of the fastest growing cohorts that they see across the board are baby boomers. This is affecting all sectors of our population, and as you point out, generally, these are people that are doing this part-time or as a secondary source of income. The hassles that they have to face complying with their tax code obligations are things that we definitely should consider moving forward

with. How do we make life better for the American taxpayer going into tax reform?

Mr. KELLY. Any other comments from the panel?

Mr. REED. I think that one of the key elements that we have touched on considerably is ensuring that the IRS allows us to provide the training so that we get these people to understand their obligations. It is ironic that here we are, having a panel about how do we get people to pay their taxes, and yet, as Mr. Willey has talked about, and as our members have discussed, we are concerned that in order to make it easier for them to understand how to pay their taxes we might actually destroy the very business model that allows them to have that flexibility. If there is one conundrum out there that exists, it is the idea that we could find ourselves in the wrong classification trying to help the IRS do their job.

Mr. KELLY. This is one of the things, I think the sharing economy is great, just like I think small business is great. Sometimes I think people are threatened, and rather than try to get better at what they do, and you know, if you are getting your tail kicked, you do not make the other team change their rules or quit playing; you get better at what they are doing and you steal or copy or whatever you want to call it, and you get like them.

I am going to go back. Professor Bruckner, while the federal government works to catch up to assist the needs of a growing sector of the economy, is there anything that this Committee or various agencies involved can do educationally to inform taxpayers while we work to make the guidance more clear? What should we be doing in the meantime?

Ms. BRUCKNER. The number one thing that the IRS can do is start working through its relationships with third-party preparers and with tax preparers, educating them. Because, in many instances, they do not even know how to advise customers that come in and need help with their taxes related to their sharing economy income. Leveraging those third-party relationships and increasing outreach and education to even tax preparers and folks that are engaged in that industry would be a great start.

Mr. KELLY. Finally, Mr. Reed, I am going to let you comment if there is time, but one of the things is sales tax, it is a big issue. We cannot just say it is better where it originates or better where it ends up because a lot of localities and county governments and county municipalities rely on that sales tax to have governments and other things that perform functions and service their people for services, police and fire department. We need to have a healthy discussion on that to determine what the best answer is. With that, I yield back, Mr. Chairman.

Chairman CHABOT. Thank you. The gentleman yields back.

The chair would be remiss if I did not mention an irony of this. We are talking about the IRS here this morning, what we need to do to adjust, and the Committee that I left to come here, currently, the topic there is whether or not we should impeach the IRS commissioner right now. It kind of boggles your mind. But that being said, for the record, we will now recognize the gentlelady from North Carolina, Ms. Adams, who is the Ranking Member of the In-

vestigations, Oversight, and Regulations Subcommittee for 5 minutes.

Ms. ADAMS. Thank you, Mr. Chair, and thank you, Ranking Member Velázquez for hosting the hearing, and thank you, also, to the participants today.

The sharing economy is certainly a new aspect of our economic system that we must pay close attention to in order to properly provide effective oversight with regard to worker classification.

Ms. Bruckner, to start, worker classification is nothing new in labor law. In fact, last year, Utah and Arizona forced construction companies who were labeling workers as independent contractors instead of employees to pay more than \$700,000 in back wages and damages. What makes the sharing economy harder to regulate than the traditional workforce?

Ms. BRUCKNER. I think what is different and unique about the sharing economy is that when you look at it for tax policy purposes, you are not just looking at companies like TaskRabbit or Lyft or Uber, who raised some of those issues, or that is where the debate has been. We also look at it in terms of Etsy or Airbnb, folks who generally you would not even think to put in the same sentence as a misclassification debate. It is much bigger when you look at how these people are earning income and file or are obligated to file for U.S. tax purposes. It is a different question and that is what our research endeavors to point out.

Ms. ADAMS. Okay. There are quite a few federal and state laws that define the employer-employee relationship and that of an independent contractor. Is it possible that a worker could be deemed an employee under one law and an independent contractor under another?

Ms. BRUCKNER. That possibly could happen, but I think that misclassification happens in all different kinds of industries and in all different types of circumstances. Those are issues that we do not address specifically in our research. We focus really on how the existing tax code is not working for American taxpayers that are just trying to earn some income in the sharing economy.

Ms. ADAMS. Thank you. Would you know if there would be tax implications for situations like that?

Ms. BRUCKNER. I venture to guess that there are tax implications, but I by no means cover that in either my testimony or in the report that we put out.

Ms. ADAMS. Okay. What role does technology play in blurring the line between an employee and an independent contractor do you think? Mr. Reed? What about you?

Mr. REED. It is safe to say, and I have a suspicion that all of us would agree, that the technology that we have is what empowers the sharing economy. Let's use location as the most obvious example. Without the ability to know the location, TaskRabbit cannot figure out who to assign, who can get there quickly, how long will it take them? The entire function of the sharing economy works because I can take up those spaces in between your other job, your other task, when you drop the kids off for daycare, and I can make it work both in space and time. Without the power that our smartphone provides, we do not have the sharing economy.

Ms. ADAMS. Would anyone? Mr. Willey?

Mr. WILLEY. I completely agree with that. I think TaskRabbit was founded in 2008, which was the first year that the iPhone 1 launched. I do not think there is any luck in that planning. I think technology certainly empowers us both from matching taskers with what we call clients or consumers, but also building supply and demand in order to do this in a real-time, high-quality experience. Both of those things are simply empowered by mobile technology.

Ms. ADAMS. Thank you. Mr. Reed, the sharing economy model relies on the infrastructure of their platform. What should these businesses do to ensure that their infrastructures' growth keeps pace with that other company?

Mr. REED. Well, we would always encourage the companies to figure out ways to make it more enticing for the people providing the service to be part of it, and that gets down to training, providing easy access to the client that you need to find. I thought it was interesting that Ms. Bruckner brought up eBay, Etsy, this entire universe of physical goods and the sale of physical goods. The key elements that platforms need to provide are, first, easy access to a customer who wants their service. The second thing is a trustworthy space. If there is one thing that drives our ecosystem to success or failure it is the trust the client places in it. We hear it over and over. Do I trust the person giving me a ride? How do I know the tasker coming to my house should be let in the front door? Building a platform that enables trustworthiness and the ability to get those two merged together is a critical, critical element.

Ms. ADAMS. Thank you very much. Mr. Chair, I yield back.

Chairman CHABOT. Thank you. The gentlelady's time is expired.

I want to thank the witnesses for being here today, and I just have one final question. Mr. Willey, I would like to ask you this. I noted that you have an office in London, and I happen to be on the Foreign Affairs Committee. I am wondering how is the U.S. doing compared to the rest of the world on the shared economy? Are we ahead of the game? Are we behind? Are we about where we would want to be? If you want to comment on how things are going around the globe.

Mr. WILLEY. Sure. I can comment for the U.K. and for London, specifically. As it relates to our business, there is no doubt that the United States is a head of where the rest of the world is in terms of the sharing economy and its adoption of its services. That said, the fastest growing emerging markets in the world in the sharing economy are not in the United States. Specifically for us, London is our fastest growing market. There are different dynamics in these markets, whether it be around taxes or health care, that create nuances as to how companies go to market and how do they work with their taskers within their marketplace that create actually new opportunities for companies like TaskRabbit. Expansion is a very interesting and I think new opportunity for companies like TaskRabbit. It will be done, at least by us, very carefully as we understand the marketplace dynamics.

Chairman CHABOT. Where is the cutting edge around the world? Is there one or a couple countries that are particularly ahead of the game?

Mr. WILLEY. I think when you look at population density you have to very clearly see that those markets have obvious opportunities simply based on the fact that sharing economy companies need to match supply and demand in ideally very high population cities. Those cities, China, India, are areas where I think the cutting edge of the sharing economy is clearly looking to grow. Like I mentioned, those nuances for those cities and for those countries are very different than the U.S.

Chairman CHABOT. The Ranking Member is recognized.

Ms. VELÁZQUEZ. Thank you. I would like to ask a follow-up question. When you mentioned health care and taxes, it is related to London or just other countries? And why?

Mr. WILLEY. It is related to other countries, specifically in London. Forgive me, I am not an expert in U.K., and I am not a lawyer. But, I know when we look at our marketplace in London, even our services, or what we call our mix, are different. Our number one service in London is handyman services, which is a different number one service than say we have in Los Angeles, or that we have in San Francisco. Part of that is based on, one, the city dynamics, two, that is also based on those that are available and willing and wanting to work in that capacity. A lot of it has to do with health care and the availability of it. It also has to do with general sort of city service behavior. We see lots of nuances between these cities, which is why when we look at deploying TaskRabbit globally, those are very cautious and careful decisions that we need to work in partnership with federal and state or country governments to do so with always the benefit and the welfare of our taskers in mind.

Ms. VELÁZQUEZ. Thank you.

Chairman CHABOT. Thank you. The gentlelady yields back.

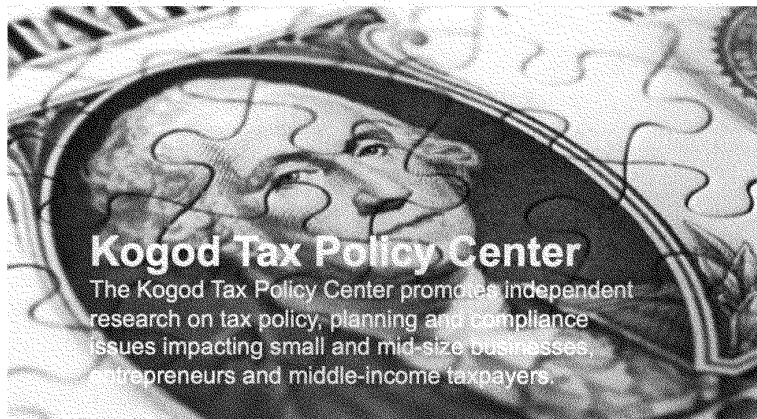
In closing, I would just comment that we have heard a lot of evidence here regarding the current tax law and outdated IRS policies that are ill-suited to the burgeoning sharing economy and the companies and workers who are directly participating. It seems clear that we need to figure this out and adjust accordingly. I am pleased that our distinguished panel has undertaken the task of researching and identifying many of the challenges presented as well as suggesting some possible solutions. The rise of the sharing economy is a very exciting development, and we need to ensure that our outmoded legal system does not strangle this new engine for growth in its infancy. We look forward to working with all of you to modernize our system, to boost the economy, and increase employment opportunities for many Americans.

I ask unanimous consent that members have 5 legislative days to submit statements and supporting materials for the record.

Without objection, so ordered. If there is no further business to come before the Committee, we are adjourned. Thank you.

[Whereupon, at 12:12 p.m., the Committee was adjourned.]

APPENDIX



“The Sharing Economy:
A Taxing Experience for New Entrepreneurs Part I”

U.S. House of Representatives
Committee on Small Business

May 24, 2016

Testimony of Professor Caroline Bruckner,
Executive-in-Residence, Accounting and Taxation
Managing Director, Kogod Tax Policy Center,
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Thank you for the invitation to join you to discuss the tax compliance challenges of small businesses driving the sharing economy. My name is Caroline Bruckner and I am a tax professor on the faculty at American University's Kogod School of Business. As part of my responsibilities at American University, I am also the Managing Director of the Kogod Tax Policy Center, which conducts non-partisan research on tax and compliance issues specific to small businesses and entrepreneurs. The Center develops and analyzes solutions to tax-related problems faced by small businesses and promotes public dialogue concerning tax issues critical to small businesses and entrepreneurs.

Prior to my appointment at Kogod, I served from 2009 until 2014 on the staff of the U.S. Senate Committee on Small Business and Entrepreneurship (the "Committee"), ultimately as Chief Counsel. During my tenure with the Committee, I handled tax, labor and budget issues, and worked with small business stakeholders across the country and political spectrum to develop small business tax legislation, including the Small Business Jobs Act of 2010 (P.L. 111-240), which provided more than \$12 billion of tax relief for small businesses.

At Kogod, we are currently focused on the tax and compliance issues impacting America's latest iteration of self-employed small business owners who are renting rooms, providing ride-sharing services, running errands, and selling goods to consumers in business transactions coordinated online and through app-based platforms developed by companies such as Airbnb, Etsy, Uber, Lyft, Taskrabbit, Instacart and others (the "sharing economy" or "on-demand platform economy"). Although the on-demand platform economy has experienced extraordinary growth since its inception, surprisingly little has been done to understand the tax compliance challenges this new frontier presents, or how the on-demand platform economy impacts Treasury and IRS' ability to fairly and efficiently administer the U.S. tax code.¹ Our research, which we released in a report titled, "Shortchanged: The Tax Compliance Challenges of Small Business Operators Driving the On-Demand Platform Economy," targets the tax compliance challenges of these small businesses and endeavors to shed light on these issues as Congress moves forward with tax reform.

Having spent more than a year investigating this growing problem, we report on what the existing literature has yet to acknowledge: that, for tax purposes, on-demand platform economy service providers and sellers are, in fact, small business owners. And there are millions of them working and earning income in ways that are not readily identifiable by existing government research or publicly-available taxpayer filings.² In particular, we explore why it's tough to measure how pervasive the tax problems of these small businesses are because existing government research and methodologies for measuring the smallest of small businesses

fall short. We argue that these issues should be considered by Congress and the IRS—not only because millions of American taxpayers are needlessly burdened trying to comply with an antiquated, outdated tax system—but also because inaction has very real implications on Treasury and IRS’ ability to fairly and efficiently collect taxes. A number of findings we review in our research are particularly relevant to today’s discussion, including: the scope of the on-demand economy workforce, their average monthly income and hours worked.

- Scope of the On-Demand Platform Economy: More than 2.5 million Americans are earning income in the on-demand platform economy as small business owners every month.¹ “Even at the low end, both in terms of participation and dollars earned, [on-demand] platforms grew by about 50% per year, making it by far the *fastest growing segment of the labor market*.”² In fact, the number of individuals operating as small businesses in the on-demand platform economy is set to double to seven million Americans by 2020, if not more.³ The explosive growth of the on-demand platform economy is the latest example of a 66.5% increase in alternative work arrangements for U.S. workers from 14.2 million in 2005 to 23.6 million in 2015.⁴
- Average Income of On-Demand Economy Small Businesses: Although people do cycle in and out of the on-demand platform economy, during the months in which people are actively using platforms to earn income, their earnings “represented a sizeable but still secondary source of income.” Average monthly income from active participation ranges from \$533 to \$314, with the higher amounts usually stemming from working in connection with platforms such as Uber, Handy, TaskRabbit (labor platforms) as opposed to other platforms such as eBay, Airbnb (capital platforms or sellers and accommodation providers).⁵
- Average Hours Worked of On-Demand Economy Small Businesses: Although studies to date have identified a core constituency of small business operators (ranging from 25% to 30%) that tend to work for on-demand platforms full-time and earn more, by and large, the majority of individuals in the on-demand platform economy work 12 hours per week.⁶

Notwithstanding the on-demand platform economy’s unprecedented growth and adoption by more than 86.5 million U.S. adults as consumers and service providers and sellers in just a few short years,⁷ the economic activity and growth of these small business owners has largely gone unacknowledged by most government measures for tracking small business activity.⁸ In fact, many of these taxpayers don’t

necessarily realize they are small business owners or what their tax filing obligations are until tax time or they receive an IRS notice.

As part of our research, we spoke with dozens of individuals currently participating in the on-demand economy and initiated a survey of members of the National Association of the Self-Employed (NASE). Our survey was designed to gauge existing self-identified self-employed workers' participation in the on-demand economy (e.g., how many hours worked; how much income earned) as well as respondents' understanding of their tax filing obligations (e.g., whether respondents kept records for their expenses or received a Form 1099 from their on-demand platform company).¹¹

Our intention in conducting the survey was not to prepare a statistically reliable estimate of the entire American population of the self-employed or freelancers or all workers in the on-demand platform economy. Instead, our objective was to assess whether tax compliance challenges exist—even among a group of taxpayers, who, by their own self-selection as members of NASE, are self-employed small business owners. During March 2016, NASE invited approximately 40,000 members to participate in the survey and received 518 responses.

The population we surveyed can be generally considered experienced, self-employed taxpayers when viewed in terms of their NASE membership, and yet their responses indicate a significant lack of understanding and information available regarding self-employed tax filing obligations in addition to undue tax compliance burdens for reporting income earned in the on-demand platform economy. Specifically, our survey revealed that among respondents who had earned income working with an on-demand platform company in 2015, which was approximately 22% of all of our respondents:

- Approximately one-third did not know whether they were required to file quarterly-estimated payments with the IRS on their on-demand platform income;
- 36% did not understand what kind of records were needed for tax purposes for business income and expenses generated from working with a sharing economy partner;
- 43% were unaware as to how much they would owe in taxes and did not set aside money for taxes on that income; and
- Almost half did not know about any tax deductions, expenses or credits that could be claimed related to their on-demand platform income.

Taken together with our additional research, our findings suggest that, at best, many small business owners are shortchanged when filing their taxes; at worst, they fail to file altogether. Moreover, a significant

percentage of these taxpayers could face potential audit and penalty exposure for failure to comply with filing rules that are triggered by relatively low amounts of earned income.

Under current tax rules, when self-employed taxpayers are expected to owe at least \$1,000 in taxes and aren't subject to withholding, advance payments of estimated tax are due to the IRS throughout the year in the form of quarterly-estimated payments.¹² It just doesn't take that much income to trip over these filing requirements.

Consider if a ride-sharing driver netted \$7,500 in income from working with an on-demand platform in 2015. That amount alone could translate to \$1,039 just in self-employment tax due (\$859 Social Security tax and \$201 Medicare tax), which, in turn, would trigger quarterly-estimated payment obligations—without even calculating any income tax owed. It's not so hard to imagine a taxpayer who went to file taxes in April 2016 and learned, not only did she fail to make quarterly-estimated payments in 2015 on her ride-sharing income, but that she also owed estimated taxes for the first quarter of 2016.

Costs to taxpayers can also be quantified in terms of time spent preparing returns and chasing down answers to complex tax questions from the IRS. In her annual report to Congress, the National Taxpayer Advocate noted that during the 2015 tax filing season, only 37% of taxpayer calls routed to customer service representatives overall, and the hold time for taxpayers who got through averaged 23 minutes.¹³

We heard time and again from taxpayers, on-demand platform companies and tax preparers that small businesses operating in the on-demand economy “generally want to be honest and pay what they owe, but the tools and resources don't exist.”¹⁴ Indeed, more than 60% of our survey respondents who worked for an on-demand platform company in 2015 reported that they did not receive a Form 1099-K or Form 1099-MISC from their on-demand platform, which likely means the IRS didn't either.¹⁵ This is not surprising given that it is entirely consistent with both the Form 1099-MISC filing instructions and the statutory requirements for filing a Form 1099-K. Nevertheless, evidence from our research suggests that the existing information reporting regime results in a lack of information that correlates to an undue burden on a significant portion of the 2.5 million on-demand platform economy operators in terms of compliance costs. Almost half of our survey respondents indicated that they spent between 10 to 35 hours or more preparing their taxes for 2015.

The current tax administration system isn't working for a significant percentage of on-demand platform small business operators or Treasury or IRS. At the root of this problem is a lack of information and

understanding of tax filing obligations, which is compounded by an information reporting regime that results in widespread confusion. And these tax compliance challenges are only going to continue to grow and impact more and more self-employed small business owners. Indeed, as some financial industry analysts have observed, “the vast majority of U.S. entrepreneurial activity is small—nano small, [a]nd the ranks of self-employed ‘solopreneurs’ are growing fast, with 53 million Americans freelancing today, and upwards of 66 million Americans, or 40% of the workforce by 2020.”¹⁶ To be fair, not all of the millions of Americans who are projected to be freelancing by 2020 would necessarily be small businesses in the on-demand economy, but a good percentage of them will be.¹⁷ At the same time, tax practitioners report that “while many do not know it, renting a home short-term is basically running a small business and this requires tax compliance.”¹⁸ And make no mistake, the individuals who are earning income from powering the on-demand platform economy are carrying on a trade or business as small business owners for U.S. tax purposes.¹⁹

Our assessment of the general confusion state of play when it comes to filing taxes on income earned from on-demand platform work was consistently reinforced by interviews with tax preparers, industry experts and our survey. At a minimum, the IRS should explore strategies in which it could leverage third parties and/or revise the information reporting regime to eliminate the guesswork that serves as the basis for many of the tax returns filed for income earned participating in the sharing economy. Everyone is losing under the current rules. Both on-demand economy players and the IRS deserve greater efficiency and less hassle. We can do better. Again, I thank you for the opportunity to join today’s discussion and for the work you do on behalf of America’s small businesses.

¹⁶ A primary reason for why policymakers, tax and labor experts, and the online platforms companies have been slow to tackle the simmering tax issues underlying this evolving marketplace is the looming question of whether workers who provide services for customers via online platforms are really misclassified employees. Those issues are currently being litigated in courts in a number of jurisdictions across the country. We argue that because the research to date consistently shows that millions of taxpayers are participating in the on-demand platform economy as small business owners, and millions more are set to join their ranks, for purposes of tax reform, review of the existing tax compliance challenges these taxpayers face is warranted, notwithstanding the outcome of a specific misclassification case. See Johana Bhuiyan, *Why the Uber Drivers’ Lawyer Settled Their Fight to Become Employees*, <re/code> (Apr. 30, 2016), <http://recode.net/2016/04/30/uber-drivers-employees-contractors-lawyer>.

¹⁷ See e.g., *Letter from the U.S. Department of the Treasury to Sen. Mark Warner*, Tax Analysts (Oct. 27, 2015) Doc 2015-25376.

¹⁸ Diana Farrell & Fiona Greig, *Paybooks, Paydays, and the On-demand Platform Economy: Big Data on Income Volatility*, JP Morgan Chase Institute, (February 2016), <https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf>.

¹⁹ JP Morgan Chase Institute, *The Online Platform Economy: What is the Growth Trajectory?* Insight blogpost, (May 2, 2016), <https://www.jpmorganchase.com/corporate/institute/institute-insights.htm>.

²⁰ Steve King & Carolyn Ockels, *Emergent Research Survey of On-Demand Economy (ODE) Workforce* (2016) (unpublished raw data). See also, Rob Wile, *There Are Probably Way More People in the ‘Gig Economy’ Than We Realize*, Fusion (July 27, 2015),

<http://fusion.net/story/173244/there-are-probably-way-more-people-in-the-gig-economy-than-we-realize/>.

⁶ Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015*, (Mar. 29, 2016), http://scholar.harvard.edu/files/lkatz/files/katz_krueger_cws_v3.pdf?m=1459369766.

⁷ Farrell, *supra* at n. 3.

⁸ See King, *supra* at n. 5. See also, Farrell, *supra* at n. 3.

⁹ Catherine Sullivan Burson-Marsteller, *Forty-Five Million Americans Say They Have Worked in the On-Demand Economy, While 86.5 Million Have Used It*, Aspen Institute, (Jan. 6, 2016) <http://www.aspeninstitute.org/news/2016/01/06/forty-five-million-americans-say-they-have-worked-demand-economy-while-865-million>.

¹⁰ This is not altogether surprising given that while nonemployer small businesses constitute “nearly three-quarters of all businesses...they contribute less than 4% of overall sales and receipts data...[and] due to their small economic impact, these firms are excluded from most other Census Bureau statistics.” *Nonemployer Statistics*, Census Bureau (2016), <https://www.census.gov/econ/nonemployer/index.html>.

¹¹ 2016 Kogod Survey of National Association of the Self-Employed Membership (April 2016) (unpublished raw survey data, National Association of the Self-Employed).

¹² *Form 1040 Estimated Tax for Individuals*, Internal Revenue Service (Apr. 16, 2016), <https://www.irs.gov/uac/Form-1040-ES-Estimated-Tax-for-Individuals-1>.

¹³ *National Taxpayer Advocate Service*, Internal Revenue Service (Apr. 4, 2016) <http://www.taxpayeradvocate.irs.gov/reports/fy-2016-objectives-report-to-congress/news-release>.

¹⁴ Interview with Derek Davis, Founder, www.sharedeconomycpa.com (Apr. 13, 2015). Davis is the Founder of www.sharedeconomycpa.com, a company he launched in 2014 to specialize in providing tax preparation services for individuals participating in the on-demand platform economy. Since its founding, SharedEconomyCPA.com has grown 300%.

¹⁵ The current instructions to the Form 1099-MISC clearly state that “[p]ayments made with a credit card or payment card and certain other types of payments, including third party network transactions, must be reported on Form 1099-K...and are not subject to reporting on Form 1099-MISC.” *2016 Instructions to Form 1099-MISC*, Internal Revenue Service, <https://www.irs.gov/pub/irs-pdf/i1099misc.pdf>. At the same time, the Form 1099-K has its own the 200 transaction/\$20,000 income threshold for payments made by credit card. *2016 Instructions to Form 1099-K*, Internal Revenue Service (2016), <https://www.irs.gov/pub/irs-pdf/i1099k.pdf>. Taken together with the instructions for the filing requirements for Form 1099-MISC, the existing information reporting regime effectively creates a \$19,399 tax reporting loophole, which is the difference between \$20,000 and \$601—the income thresholds for Forms 1099-K and 1099-MISC. Kelly Phillips Erb, *Credit Cards, the IRS, Form 1099-K and the \$19,399 Reporting Hole*, *Forbes Magazine* (Mar. 28, 2016) <http://www.forbes.com/sites/kellyphillips/2014/08/29/credit-cards-the-irs-form-1099-k-and-the-19399-reporting-hole/#369f81916c57>.

¹⁶ Arjan Schutte & Colleen Poynton, *1099 Problems And W2s Ain't One: The 1099 Economy's Problems, Advantages, and Outlook*, CB Insights Blog, (Sept. 15, 2015) <https://www.cbinsights.com/blog/1099-economy-opportunities-threats> (citing, *Intuit 2020 Report*, Intuit (Oct. 2010) http://http.download.intuit.com/http.intuit/CNOC/intuit/futureofsmallbusiness/intuit_2020_report.pdf).

¹⁷ Anna Louie Sussman & Josh Zumbrun, *Contract Workforce Outpaces Growth in Silicon Valley Style 'Gig' Jobs*, *The Wall Street Journal* (Mar. 25, 2016) <http://www.wsj.com/articles/contract-workforce-outpaces-growth-in-silicon-valley-style-gig-jobs-1458948608>. See also, Katz & Krueger Report, *supra* at n. 6.

¹⁸ David McAfee, *Airbnb, Hosts Face Compliance Issues, Practitioners Say*, Bloomberg BNA Daily Tax Report (Oct. 22, 2015), http://news.bna.com/dtlo/DTLNBW/split_display.adp?fedfid=78043755&yname=dtlnot&wap=512146000&searchid=27264877&docrpeid=1&type=date&mode=doc&split=0&scm=DTLNBW&pg=0.

¹⁹ Carrying on a trade or business has been defined by the courts and IRS administrative guidance as the act of “engag[ing] in the selling of goods or services,” as a “livelihood or in good faith to make a profit,” in a “regular, frequent and continuous” manner. (*Deputy v. DuPont*, 308 U.S. 488 (1940). Clear profit motive of small businesses has been confirmed by industry surveys that have

identified the desire to make more money as the primary reason the majority of people work in the on-demand platform economy. See Emergent Research Survey, *supra* at n. 5. Further, in explaining what a trade or business is for purposes of determining whether a taxpayer is self-employed, the IRS Self-Employed Individuals Tax Center explains that a taxpayer does “not have to carry on regular full-time business activities to be self-employed...[h]aving a part-time business in addition to your regular job or business also may be self-employment.” *Business Activities*, Internal Revenue Services (Apr. 16, 2016), <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Business-Activities>).

Shortchanged

The Tax Compliance Challenges of
Small Business Operators Driving
the On-Demand Platform Economy

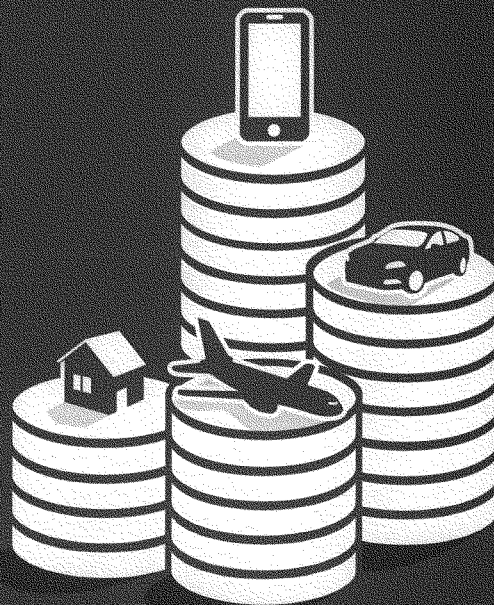
Written by Caroline Bruckner,
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POLICY CENTER



Executive Summary

The last time Congress enacted substantial tax reform—in 1986—only 8.2% of American households owned personal computers. Today, more than 87% of American adults own a mobile phone and on-demand platforms like Uber, Etsy, Lyft, Airbnb, HomeAway, Amazon, and TaskRabbit have become household names by connecting businesses and consumers. Although millions of Americans are engaging in the on-demand platform economy every day as sellers and service providers, the tax compliance challenges this new frontier presents have gone relatively unnoticed. At the same time, these challenges will grow with this fastest growing segment of the labor economy—creating unnecessary and ongoing burdens for the small business operators who power the on-demand economy.

This report, in keeping with the mission of the Kogod Tax Policy Center to conduct non-partisan research on tax issues specific to small businesses and entrepreneurs, identifies the tax compliance challenges the on-demand economy presents for its small business operators. Having spent more than a year investigating this growing problem, we report that:

- More than 2.5 million U.S. taxpayers are participating in the on-demand platform economy as small business owners every year, and that number is set to more than double in the next few years.
- At best, these small business owners are shortchanged when filing their taxes; at worst, they fail to file altogether. In addition, these taxpayers face potential audit and penalty exposure for failure to comply with filing rules that are triggered by relatively low amounts of earned income and inconsistent reporting rule adoption.
- The current tax administration system isn't working for a significant percentage of these small business taxpayers or Treasury or IRS. The existing tax rules effectively create a \$19,399 reporting tax loophole impacting millions of taxpayers (the difference between the income thresholds triggering Forms 1099-K and 1099-MISC reporting), resulting in widespread confusion among taxpayers.
- The current state of play is one of unnecessary burden, potential audit and penalty exposure for on-demand platform economy players. We can do better.

Introduction

The last time Congress enacted substantial tax reform—in 1986—only 8.2% of American households owned personal computers.¹ In 2014, 87% of American adults owned a mobile phone, of which 71% were smartphones (Internet-enabled).² Companies like Uber, Etsy, Lyft, Airbnb, HomeAway, Amazon, and TaskRabbit have become household names by connecting businesses and consumers through online and app-based platforms. In the past 10 years, the Internet and smartphones have fundamentally changed the way Americans purchase goods and services in cashless transactions. Today, we book travel with our thumbs.

Since its launch in 2008, Airbnb hosts have accommodated more than 60,000,000 guests worldwide. In the United States, the overall Airbnb host community has grown 85% year-over-year, with the typical host earning \$7,350 in supplemental income per year on just a single property.³ As of February 2016, Uber reported that it has more than 500,000 drivers, who earned more than \$3.5 billion in take home wages in the first three quarters of 2015.⁴ Data from the first major study of the “on-demand platform economy” using financial transactions found that in the last three years, an estimated 10.3 million people earned income from being either service providers or sellers using an online platform intermediary.⁵

More than 2.5 million Americans are earning income by renting rooms, giving rides, running errands, and selling goods as small business owners every month.⁶ What’s more, the explosive growth of the on-demand platform economy is the latest example of a 66.5% increase in alternative work arrangements for U.S. workers from 14.2 million in 2005 to 23.6 million in 2015.⁷

But while the on-demand platform economy has experienced extraordinary growth since its inception, surprisingly little has been done to understand the tax compliance challenges this new frontier presents, or how the on-demand platform economy impacts Treasury and IRS’ ability to fairly and efficiently administer the U.S. tax code.⁸ This report, in keeping with the mission of the Kogod Tax Policy Center to conduct non-partisan research on tax and compliance issues for small

businesses and entrepreneurs, targets the tax challenges of the on-demand economy’s small business operators and endeavors to shed light on these issues as Congress looks to move forward with tax reform.

Having spent more than a year investigating this growing problem, we report on what the existing Congressional tax reform debate has yet to acknowledge: that, for tax purposes, on-demand platform economy service providers and sellers are, in fact, small business owners. And there are millions of them working and earning income in ways that are not readily identifiable by existing government research. In particular, we explore why it’s tough to measure how pervasive the tax problems of these small businesses are because existing government research and methodologies for measuring the smallest of small businesses fall short.

We start by explaining just how pervasive the on-demand platform economy has become for consumers and the labor market, and the tax compliance challenges that go along with trying to adapt a twentieth-century tax code to a twenty-first century economy. We argue that these issues should be addressed—not only because millions of American taxpayers are needlessly burdened trying to comply with an antiquated, outdated tax system—but also because inaction has very real implications on Treasury and IRS’ ability to fairly and efficiently collect taxes.

Our Approach, Data & Methodology

In the course of conducting this research and drafting this report, we reviewed the existing academic and industry literature and surveys on the on-demand platform economy as a first step in approximating just how many millions of U.S. taxpayers are earning income as its small business operators. We compared data sets, research criteria and findings of the latest studies, searching for commonalities to provide insight as to why estimates of the number of U.S. taxpayers earning income as service providers and sellers in the on-demand platform economy vary so widely. We reviewed existing government research (e.g., publicly available taxpayer filing data, U.S. Census Bureau (Census) data, Bureau of Labor Statistics (BLS) data, U.S. Government Accountability Office (GAO) reports, U.S. Department of Treasury (Treasury) technical papers), and identified

the limitations in the existing government research with respect to identifying and tracking those small businesses participating in the overall economy.

We then talked to federal government economists at Treasury, the Small Business Administration Office of Advocacy (Advocacy), and GAO as well as other agency officials responsible for studying and writing government research on small businesses, the self-employed and economic trends as well as taxpayer filing data. We consulted the National Taxpayer Advocate and tax preparer industry experts directly to understand what hurdles and frustrations this group of small businesses face as they navigate their way through tax filing season. We conferenced with on-demand platform company executives, industry experts and academics to solicit their views on both the extent to which U.S. taxpayers are operating in the on-demand platform economy and how those numbers are projected to grow over the next decade.

Finally, we talked to more than 50 individuals currently participating in the on-demand economy and administered our own survey of members of the National Association of the Self-Employed (NASE).

Our survey was designed to gauge existing self-identified self-employed workers' participation in the on-demand economy (e.g., how many hours worked; how much income earned) as well as respondents' understanding of their tax filing obligations (e.g., whether respondents kept records for their expenses or received a Form 1099 from their on-demand platform company). We conducted the survey Mar. 10, 2016 through Apr. 1, 2016, through email invitation sent to members by NASE. We received 518 completed responses from the approximately 40,000 NASE members invited to participate in the survey, which constitutes a statistically representative sampling size of NASE members.

Our intention in conducting the survey was not to prepare a statistically reliable estimate of the entire American population of the self-employed or freelancers or all workers in the on-demand platform economy, but rather to assess whether tax compliance challenges exist—even among a group of taxpayers, who, by their own self-selection as members of NASE, are self-employed small business owners.⁹

Ultimately, we concluded that:

1. More than 2.5 million U.S. taxpayers are participating in the on-demand platform economy as small business owners every year, and millions more are set to join their ranks in the next decade.
2. For tax purposes, on-demand economy service providers and sellers are small businesses owners, but their numbers aren't reflected in government data designed to track small business owners. In fact, these taxpayers don't necessarily realize they are small business owners until tax time or they receive an IRS notice.
3. At best, these small business owners are shortchanged when filing their taxes; at worst, they fail to file altogether. Approximately one-third of our on-demand platform operator survey respondents didn't know whether they were required to pay quarterly-estimated payments and almost half were unaware of any available deductions, expenses or credits they could claim to offset their tax liability. These taxpayers face potential audit and penalty exposure for failure to comply with filing rules that are triggered by relatively low amounts of earned income. Compounding this problem is inconsistent reporting rule adoption that results in widespread confusion among taxpayers.
4. The current tax administration system isn't working for a significant percentage of on-demand platform small business operators or Treasury or IRS. More than 60% of our survey respondents who worked for an on-demand platform company in 2015 reported that they did not receive a Form 1099-K or Form 1099-MISC from their on-demand platform, which likely means the IRS didn't either. The current state of play is one of unnecessary burden, potential audit and penalty exposure for on-demand platform economy players. We can do better.

PART I

Defining the Relationship: Airbnb is not Instagram and Other Measurement Challenges

According to the latest industry statistics, as of January 2016, there were more than 3.97 million apps available for download across several different platforms (e.g., Microsoft, Google, Amazon) that generate more than \$120 billion.¹⁰ But not every smartphone app functions as part of the on-demand platform economy. Airbnb is not Instagram—they provide completely different services for users. Similarly, not every seller on eBay or Craigslist sells items regularly enough to be considered a business for tax purposes or generates enough income in any given year to trigger a tax filing requirement.

Some online sellers just sell a couple of used items online a couple of times a year, which generally doesn't trigger a tax filing requirement. At the same time, new on-demand platforms are being introduced every month. This acute reality presents one of the most confounding challenges for conducting tax research on these issues: *there is no singular definition or even consensus on how to define or measure the on-demand platform economy or the income that small businesses are deriving from it.* As a result, estimates of the number of small businesses operating in the on-demand platform economy are wildly inconsistent.

For example, one recent Time Inc./Aspen Institute survey found that more than 45 million Americans had—at least once—worked or offered services through a ride-sharing, accommodation sharing, task services, short-term car rental or food/goods delivery platform.¹¹ At the same time, other notable experts including Seth Harris and Alan Krueger—excluding seller and home accommodation platforms (e.g., ETSY, Airbnb)—estimate that 1.9 million individuals are earning income as service providers using apps.¹²

Still other labor survey experts have concluded that there are more than 3.2 million Americans currently working in the on-demand platform economy and project that number to more than double by 2020.¹³ The explanation for why these estimates range so

significantly is rooted in differences in definition. As illustrated in Table 1, including or excluding specific platforms can vary an estimate of the size of the on-demand platform economy and its players considerably.

Given our specific focus on the tax compliance challenges facing these small businesses, we think it makes sense for tax policy purposes to limit our analysis to platforms that generally reflect the following characteristics, which were developed by the first major study to track actual income earned using financial transaction data:

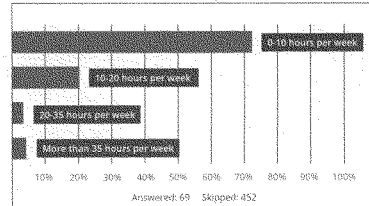
- platform directly connects service providers and sellers with consumers;
- platform processes payment electronically, using credit cards, debit cards or mobile payments;
- platform allows service providers to provide services or goods at provider discretion; and
- customers pay for a singular task or good.¹⁴

There is no question that out of a universe of 3.97 million apps, inevitably, there are some small businesses earning income from the on-demand platform economy that may not be captured by the foregoing criteria, but that would be included in publicly available taxpayer income filing data. However, Treasury has been explicit with Congress in explaining why existing aggregate tax data is “not very helpful in isolating trends in the on-demand economy or in the prevalence of its [workers and sellers].”¹⁵ In contrast, recent work using the foregoing criteria on the income of Americans participating in the on-demand platform economy has identified important trends that are particularly relevant to our report's focus, including:

- More than 2.5 million Americans are actively participating in the on-demand platform economy every month, which is 1% of the adult American population;
- Although people do cycle in and out of the on-demand platform economy, during the months in which people are actively using platforms to earn income, their earnings "represented a sizeable but still secondary source of income;"
- In any given month, on-demand platform income represents roughly 20 to 30% of total income of people actively earning income in the on-demand platform economy; and
- Average monthly income from active participation ranges from \$533 to \$314, with the higher amounts usually stemming from working in connection with platforms such as Uber, Handy, TaskRabbit (labor platforms) as opposed to other platforms such as eBay, Airbnb (capital platforms or sellers and accommodation providers).¹⁶

These monthly income averages are consistent with public reports from many of the on-demand platform companies themselves and tend to reflect the averages of hours worked. For example, in 2015, more than 75% of Lyft drivers reported working less than 15 hours per week, and more than half of Uber drivers worked less than 10 hours per week.¹⁷ Our survey found that among respondents with income from on-demand economy work in 2015, 72% worked, on average, less than 10 hours a week with their on-demand platform company and that 92% of respondents worked less than 20 hours per week with their on-demand platform company.¹⁸ We also found that of respondents operating in the on-demand platform economy, 88% earned less than \$15,000 in 2015.¹⁹ Although studies to date have identified a core constituency of small business operators (ranging from 25% to 30%) that tend to work for on-demand platforms full-time and earn more, by and large, the majority of individuals in the on-demand platform economy work 12 hours per week.²⁰

Q1 On average, how many hours a week did you spend providing services or selling products using the sharing economy company platform or app?



Q2 How much income did you earn in 2015 from your work with the sharing economy platform or app?

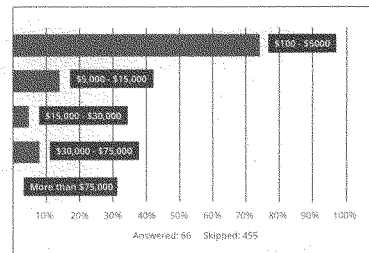


Table 1				
Industry Study	Types of On-Demand Platform Operators Surveyed	Survey Method	Study Period	Estimated Number of On-Demand Platform Operators
Aspen Institute/ Time/Burson- Marsteller	Examples of specific platforms included: Uber, Lyft, Airbnb, VRBO, HOMEAWAY, Handy.com, TaskRabbit, care.com, Instacart, POSTMATES, Caviar, Zipcar, car2go, Getaround	Online interview of 3,000 American adults	Nov. 16-25, 2015	45 million people (22% of American adults) have offered some good or service at some point in the on-demand economy
JP Morgan Chase Institute	Examples of types of platforms included in study: Uber, Lyft, TaskRabbit, eBay, Airbnb	Random sample of 1 million Chase customers with a checking account in every month during the Study Period. 260,000 individuals received income at least once from one of 30 distinct platforms	Oct. 2012 to Sept. 2015	2.5 million every month and 10.3 million (4.2% of adults) in the last 3 years; the total increased 47-fold over 3 years
Emergent Research	Operators from 11 specific platforms: Upwork, Work Market, Fiverr, MBO Partners, Visually, OnForce, Deliv, Wonolo, HourlyNerd, Uber, FieldNation	Survey of 4,622 On-Demand Economy Operators of specific platforms	Sept. 11, 2015 – Oct. 1, 2015	3.2 million per year; estimated to increase to more than 7 million by 2020
Krueger & Katz	Questionnaire asked workers whether they engaged in selling through an intermediary (e.g., Uber or TaskRabbit); <i>did not include questions about accommodation platforms</i>	Online survey of 6,028 individuals; 3,844 respondents	Oct. 19, 2015 – Nov. 4, 2015	0.5% of all workers identify customers through an online intermediary
NASE/Kogod Tax Policy Center	Examples of platforms included: Lyft, Uber, TaskRabbit, Handy, HourlyNerd, Airbnb, Etsy, eBay	Emailed survey to 40,000 NASE Members; 518 Respondents	Mar. 10, 2016 – April 1, 2016	22% of Respondents (112 NASE survey respondents) offered services or sold goods through an On-Demand Platform in 2015

A. Under the Radar: Small Businesses Operating in the On-Demand Platform Economy

Notwithstanding the on-demand platform economy's unprecedented growth and adoption by more than 86.5 million U.S. adults in just a few short years—Airbnb was founded in 2008,²¹ the economic activity and growth of these small business owners has largely gone unacknowledged by most government measures for tracking small business activity.²² At the same time, the problem isn't limited to government; tax practitioners report that “while many do not know it, renting a home short-term is basically running a small business and this requires tax compliance.”²³ And make no mistake, the individuals who are earning income from powering the on-demand platform economy are carrying on a trade or business as small business owners for U.S. tax purposes.²⁴

Even so, most federal government agencies that measure small businesses concede just how challenging it is to define “small business” as a distinguishable category of taxpayers and readily acknowledge “a consensus does not exist on a definition of small businesses, including which specific attributes or thresholds distinguish small businesses from other firms.”²⁵ For example, the IRS Small Business and Self-Employed division is responsible for administering returns for individuals with business income and businesses with less than \$10 million of income, which is one official threshold for defining small business. Alternatively, the U.S. Small Business Administration generally considers a small business to be an independent business with fewer than 500 employees, although even that definition can vary by industry.²⁶

Not unlike the numerous criteria used to measure the on-demand platform economy, how broadly (or narrowly) the term “small business” is defined can dictate results in terms of the data captured by a given government metric. For example, using taxpayer data, Treasury has developed a methodology to identify more than 23 million small businesses, however, SBA's Office of Advocacy, relying on Census data, has identified more than 28.2 million small businesses.²⁷

Making matters more complicated is the fact that some relevant government measures for the smallest of small businesses that would otherwise capture the business activities and income earned by on-demand platform participants use terms *other than* small business (e.g.,

nonemployers, self-employed, microbusinesses) in developing data used to measure small business activities.²⁸ These inconsistencies exist throughout the official government research as well as the U.S. tax code itself²⁹ and are a major reason why small businesses operating in the on-demand economy have yet to be reflected in government research on small business and economic trends. But it's not just inconsistent terms; it's inconsistent metrics that matter too.

For example, in a 2015 report to Congress on small business tax compliance issues, GAO concluded that most small businesses are individuals who report some individual business income as a sole proprietor (Schedule C) or as a landlord on a separate schedule (Schedule E).³⁰ This group of approximately 16 million small business taxpayers (69% of all small businesses), on average, earns \$100,000 (or less) per year and generates \$1.4 trillion of the total small business income reported to the IRS.³¹ However, it is very likely that GAO's analysis, which incorporated a 2011 Treasury methodology to identify small businesses, does not and would never include income from the majority of taxpayers earning income from operating in the on-demand platform economy. The reason is simple: even though there are more than 2.5 million individuals actively earning business income as small businesses owners working in the on-demand platform economy every month, they generally don't earn enough income under Treasury's methodology defining small businesses to be included in their ranks.³²

Specifically, the most comprehensive research on the income of on-demand platform economy active participants finds that monthly income averages range from \$533 to \$314, which translates to \$6,635 and \$3,768 annually. At those income levels, there's little chance that the average on-demand platform small business operator would meet Treasury's income thresholds (generally, more than \$10,000 in business income or \$5,000 in total business deductions) to be included in its small business measures.³³ In fact, these income thresholds would fail to capture the typical Airbnb host, who reports earning on average \$7,530 of annual income.

Our own survey found that 74% of respondents earned \$5,000 or less in 2015 from on-demand platform work.

B. The On-Demand Platform Economy And Its Players Will Continue to Grow

Although the government research on measuring and defining the on-demand platform economy is evolving, industry experts who have been tracking the on-demand economy's growth have estimated that it will continue its trend of double-digit growth through 2025.³⁴ In fact, the number of individuals operating as small businesses in the on-demand platform economy is set to double to seven million Americans by 2020, if not more.³⁵ Although Census has yet to publish data reflecting this accelerated growth, it has found that there is a steady rise in "nonemployer businesses," which would be consistent with industry studies on the on-demand economy.³⁶

"Even at the low end, both in terms of participation and dollars earned, [on-demand] platforms grew by about 50% per year, making it by far the *fastest growing segment of the labor market*."³⁷ This finding was recently corroborated by study of the rise of alternative worker arrangements from 1995 through 2015 that concluded that though the on-demand economy was "relatively small compared to other forms of alternative work arrangements...it is growing very rapidly."³⁸

Indeed, as some financial industry analysts have observed, "the vast majority of U.S. entrepreneurial activity is small—nano small, [a]nd the ranks of self-employed 'solopreneurs' are growing fast, with 53 million Americans freelancing today, and upwards of 66 million Americans, or 40% of the workforce by 2020."³⁹ To be fair, not all of the millions of Americans who are projected to be freelancing by 2020 would necessarily be small businesses in the on-demand economy, but a good percentage of them will be.⁴⁰

Our own survey of self-employed business owners found that approximately 22% of respondents (or a member of their household) had earned income in 2015 from operating in the on-demand platform economy from either providing services or selling goods.

PART II

Compliance Challenges of On-Demand Platform Operators: It's All about Timing & Communication

Overwhelming complexity and inefficiency are hallmarks of the current tax code and the Congressional record is replete with examples of how unduly burdensome the current system is across taxpayers' experience.⁴¹ And we know from talking to some on-demand platform operators and surveying others that their tax compliance challenges are compounded by an antiquated tax administration system. At the same time, many on-demand platform operators are first-time, small business owners and have little experience with the requirements of quarterly-estimated payments or self-employment taxes.⁴² This point is reflected in the findings of the first study of tax issues of ridesharing drivers conducted through tracking online forums where the authors determined that "many posters were new to filing taxes as independent contractors...[and] issues surrounding Schedule C filing and expense taking and documentation were often matters of first impression."⁴³

“ Although I just started driving last October, I am very confused on how to file. This is my first year filing my taxes separate from my parents.”

— Email from Ride-Sharing Driver to Tax Preparer, 2016

A. They Got 1099 Problems and Withholding Ain't One....⁴⁴

The U.S. tax system is basically a "pay-as-you-earn-system" of tax collection. For employees, a portion of income earned throughout the calendar year is deducted (i.e., withheld) from wages by employers and remitted to the IRS in pre-payment of employees' tax liability. However, small businesses operating in the on-demand platform economy are not subject to employer withholding and are, instead, responsible for making tax payments to the IRS for both federal income and self-employment taxes (i.e., Social Security and Medicare taxes).⁴⁵ As a result, small businesses operators in the

on-demand platform economy often have different pain points than their employee counterparts with respect to their tax filings. For example, small businesses actively participating in the on-demand platform economy don't receive IRS Form W-2 (wage and tax statements) that they can use to fill out their tax returns. Instead, on-demand platform economy operators are subject to an entirely different set of rules and forms (e.g., the IRS Forms 1099; Self-Employment Tax Form, Quarterly-Estimated Payments) that have very different taxpayer filing requirements and with respect to self-employment taxes, different tax rates.⁴⁶

Under current tax law, payments for more than \$600 for services provided by nonemployees (e.g., independent contractors, freelancers, small business owners) are generally reported to the IRS on a Form 1099-MISC by a payor, and a copy is provided to the service provider.⁴⁷ However, if payments are made via credit card or debit card, and the aggregate number of transactions to one service provider exceeds 200 and the payments exceed \$20,000, then the payor (or, in this case, platform processing customers' credit card payments) is required file a Form 1099-K to report the income to the IRS and send a copy to the payee.⁴⁸ Confusing, right? It gets worse.

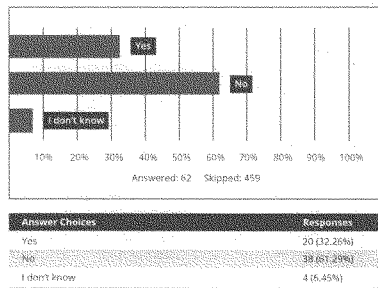
Some on-demand platforms only send a Form 1099-K to the IRS and small business operator if the service provider or seller satisfies both the 200 transaction/\$20,000 income thresholds.⁴⁹ This strategy is consistent with the IRS instructions on when sending Form 1099-Ks is appropriate as opposed to a Form 1099-MISC.⁵⁰ Other platforms send all of their small business operators a Form 1099-K, regardless of whether the small business owner meets the 200 transaction/\$20,000 income threshold.⁵¹ And in certain circumstances, a platform company will send both.⁵² This inconsistent reporting rule adoption among on-demand platform companies creates confusion among taxpayers about whether they can expect to receive a

Form 1099 at all. In fact, our survey found that only 32% of respondents who had earned income working with an on-demand platform economy in 2015 received a Form 1099-MISC or Form 1099-K from their on-demand platform company.⁵³

In addition, we are aware, from talking to tax preparers who specialize in advising individuals who earn income from the on-demand platform economy, that when taxpayers do not receive any Form 1099, they are immediately confused as to whether they have to report that income on their returns. Regardless of whether a taxpayer receives a Form 1099, they are still responsible for reporting income earned in connection with platform work and taxes on that income. Failure to receive a 1099 does not exempt a taxpayer from reporting the income on their tax return.⁵⁴

Q3

Have you received a Form 1099-K or Form 1099-MISC from the sharing economy platform or app you worked with in 2015?



B. The Big Short(change) Story

Compounding the confusion of what forms a small business can expect to receive from its on-demand platform company (if any) is the overall challenge of calculating actual taxable income and how much is owed as well as figuring out when taxes should be paid. Timing is everything—particularly when it comes to taxes. For small business owners who owe at least \$1,000 in taxes, bad timing can result in penalties.

1. Timing: Quarterly-Estimated Tax Payments

“Yep, I’ve been driving for two years while I’ve been going to school full-time getting my masters in transportation. Last year I grossed, let me think, maybe \$60,000? But I just gave my forms to my dad’s neighbor who does taxes on the side...What’s a quarterly-estimated payment?”

— Conversation with Ride-Sharing Driver, 2015

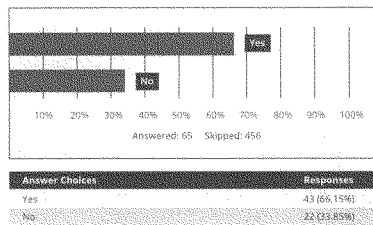
Under current tax rules, when small business owners are expected to owe at least \$1,000 in taxes and aren’t subject to withholding, advance payments of estimated tax are due to the IRS throughout the year.⁵⁵ These payments are due quarterly on April 15, June 15, Sept. 15 and Jan. 15 and are referred to as quarterly-estimated payments.⁵⁶ However, “[p]utting aside outright tax cheats, young workers are financially inexperienced and, increasingly, part of a gig economy—driving for Uber, funding their creative work through Patreon—typically don’t have their taxes withheld automatically and need to set up a program of quarterly-estimated tax payments on their own.”⁵⁷ Remember, it’s a “pay-as-you-earn” tax system.

In calculating whether a taxpayer needs to make quarterly-estimated payments throughout the year, taxpayers need to include both income taxes and self-employment taxes owed—minus any refundable credits—on income earned from on-demand platform work. Added together, income tax and self-employment tax can quickly reach the \$1,000 threshold triggering quarterly-estimated payments.

Consider if a ride-sharing driver netted \$7,500 driving for a platform company part-time in 2015. That amount alone could translate to \$1,060 just in self-employment tax due (\$859 Social Security tax and \$201 Medicare tax), which, in turn, would trigger quarterly-estimated payment requirements—without even calculating

any income tax owed. It just doesn't take that much income to trip over these filing requirements. What's more troubling is that a good percentage of even self-identified self-employed taxpayers are unaware of quarterly-estimated payment filing requirements. Our survey revealed that among respondents who had earned income working with an on-demand platform company in 2015, 34% did not know whether they were required to file quarterly-estimated payments with the IRS on that income.

Q4 Do you know whether or not you are required to file quarterly-estimated payments with the IRS?



For those who are supposed to make quarterly-estimated payments and don't, penalties apply—even when a taxpayer files a return before the April 15 filing deadline.⁵⁸ In fact, penalties may be imposed on any underpayment for the number of days it remained unpaid, or if a taxpayer doesn't pay enough estimated tax or if the payments weren't made on time. This would be a particularly unwelcome surprise for any taxpayers who were required to pay quarterly-estimated payments in 2015 and failed to do so. It's not so hard to imagine a taxpayer, who earned \$7,500 in 2015 in the on-demand platform economy, and then, when she went to file her taxes on April 18, 2016, found out that not only did she fail to make quarterly-estimated payments for all of 2015, but that she had also owed for the first quarter of 2016.⁵⁹

We followed up with one IRS Chief Counsel Office attorney operating in a field office about the incidence of failure to pay quarterly-estimated payments and were told, "I see it all the time. People get themselves into a hole and just can't get out of it when they fail to file their quarterly-estimated payments and then go to file their taxes. They owe way more than they can afford. They just walk away and don't file."⁶⁰

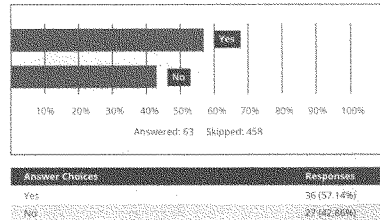
2. Communication: Self-Employment Tax Implications

Understanding the timing rules for when taxes must be paid on on-demand platform income is one thing, but actually calculating tax liability and including the 15.3% self-employment tax (i.e., 12.4% for Social Security and 2.9% for Medicare), can also be an unwelcome surprise for first-time small business filers. Like all other self-employed small businesses, on-demand platform small business operators are subject to self-employment tax and are required to file once they earn more than \$400 in net profit—even if this work is only a part-time gig.⁶¹

To encourage compliance, the tax law requires individuals with business income who want to claim business expenses to pay self-employment taxes.⁶² A key challenge for these small business owners calculating their self-employment tax is that they are actually required to pay more in Social Security and Medicare taxes on this income than their employee counterparts because employees split Social Security and Medicare taxes with their employers, who automatically deduct and send amounts owed to the IRS.⁶³ No such luck for small business operators in the on-demand platform economy, who are on the hook for the entire amount—although half of the self-employment tax is deductible.

As noted earlier, self-employment taxes can add up quickly and trigger quarterly-estimated payment obligations; even where business income is only a portion of a taxpayer's overall income, which is the case for the average on-demand economy small business operator.⁶⁴ At the same time, we learned from talking to on-demand platform economy small business owners and some tax preparers that while taxpayers generally understood they would owe income tax on any income earned, many were surprised to learn that self-employment taxes were due too. These insights were echoed in our survey responses indicating that among respondents who earned on-demand platform economy income in 2015, 43% were unaware as to how much they would owe in taxes and did not set aside money for taxes on that income.⁶⁵

Q5 Did you set aside money or are you aware of how much you owe in taxes on the income you earned from working through a sharing economy platform or app during 2015?



3. Communication: Expensing & Record Keeping

While actually forking over hard-earned income is likely the biggest complaint most taxpayers have, calculating how much is actually owed is a common compliance burden for small business operators in the on-demand economy. Moreover, identifying deductible business expenses and record-keeping are absolute musts in in order to properly determine how much a taxpayer actually owes.

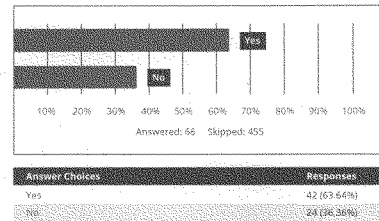
One of the most common business expenses that on-demand platform operators grapple with is how to calculate business expenses, such as miles driven or parking fees incurred. This tax compliance pain point is particularly acute for ridesharing drivers who use their personal cars to drive for on-demand platforms, but it also presents challenges for other types of platform work (i.e., running errands, purchasing supplies for customers). The tax code allows taxpayers to choose between taking a standard mileage deduction or deducting actual expenses incurred.⁶⁶ Research specific to the tax challenges of ridesharing drivers has identified mileage recordkeeping for business expensing as a frequent source of both confusion and frustration for drivers.⁶⁷

For small businesses earning income using on-demand platforms other than ridesharing, a range of potential deductions and record-keeping requirements apply. In the accommodation platform context, if taxpayers want to take advantage of a tax provision that allows individuals to rent all or part of their home for up to 14 days tax free, deductions aren't allowed.⁶⁸ However, for those small business owners who do rent their properties out for longer (e.g., the typical Airbnb host

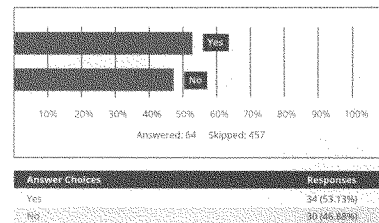
who rents their single property out for 66 days every year), deductible expenses include advertising, cleaning and maintenance, property insurance and taxes, service fees charged by the platform, and repairs.⁶⁹

For online sellers using platforms, expensing questions become complicated, depending on where they work. In some cases, folks working out of their homes may be entitled to a home office deduction, but claiming that deduction has its challenges, and if taxpayers elect to take a simplified method of determining the deduction, they could very well be leaving money on the table.⁷⁰ We found through our survey of self-employed business owners who earned money in 2015 working with an on-demand platform that 36% of respondents didn't understand what kind of records they needed to keep for tax purposes and 47% didn't know about any tax deductions, expenses or credits that could be claimed related to their on-demand platform income.⁷¹

Q6 Did you understand what kind of records you needed to keep for tax purposes for your business income and expenses generated from working with a sharing economy platform?



Q7 Do you know about any tax deductions, expenses or credits you could claim related to the income you earned working through a sharing economy platform or app?



In general, this finding is not that surprising as the tax code doesn't necessarily include all that many provisions specific to individuals with business income.

“When tax code provisions provide preferential treatment to small businesses, the provisions usually target expenses such as equipment investment (e.g., Section 179 expensing), cost of goods sold, (e.g., exceptions to inventory accounting), and start-up costs. Preferential [tax] treatment is not targeted towards individuals who provide only labor services. Those individuals generally do not benefit from provisions targeted to small businesses in the tax code.”⁷²

Some platform operators inevitably pay the price for their inexperience in filing as small business owners the first time they file, but then develop a system of recordkeeping and familiarity with the process that keeps them out of trouble.⁷³ Others aren't so lucky.

To be sure, the private sector has developed any number of products and apps targeted to relieving these expensing and recordkeeping burdens, and in speaking to tax preparers and industry experts, we know that there is an exponentially growing market for these products.

4. Timing: Cost of Compliance

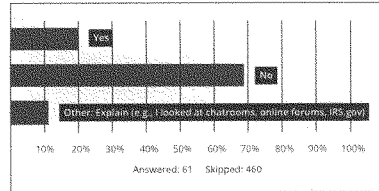
In 2014 testimony before the U.S. House of Representatives Small Business Committee, tax experts explained how tax compliance places a significant burden on small businesses, both in the aggregate and relative to large businesses, and cited IRS estimates that “businesses with less than \$1 million in revenue bear almost two-thirds of those costs.”⁷⁴ With respect to the on-demand platform economy, at least one tax expert has observed, “[p]robably most of those providing services through the new service companies have no experience with the tax obligations of businesses...to comply with tax laws, these microentrepreneurs will be spending relatively large amounts on return preparation assistance and devoting large hours to record keeping...the sharing economy will be bearing significantly larger than average tax compliance costs.”⁷⁵

Costs can be quantified in terms of time spent preparing returns and chasing down answers to complex tax questions from the IRS. In her annual report to Congress, the National Taxpayer Advocate noted that during the 2015 tax filing season, only 37% of taxpayer calls routed to customer service representatives overall, and the hold time for taxpayers who got through averaged 23 minutes.⁷⁶ We heard time and again from both taxpayers and tax preparers that small businesses operating in the on-demand economy “generally want to be honest and pay what they owe, but the tools and resources don't exist.”⁷⁷

Indeed, 69% of our survey respondents who earned income operating in the on-demand platform economy indicated that they did not receive any tax guidance or advice from the on-demand platform company with which they contracted.

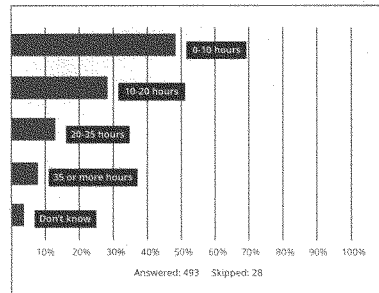
Evidence from our research and survey responses suggests that this lack of information and guidance results in undue burden on a significant portion of the 2.5 million on-demand platform economy operators in terms of compliance costs. Almost half of all our survey respondents indicated that they spent between 10 to 35 hours or more preparing their taxes for 2015.

Q8 Did you receive any tax guidance or advice from the sharing economy platform or app you worked with?



Answer Choices	Responses
Yes	12 (19.67%)
No	42 (68.93%)
Other: Explain (e.g., I looked at chatrooms, online forums, IRS.gov)	7 (11.48%)

Q9 How much time did you spend last year doing your taxes and/or preparing for your tax filing?



Answer Choices	Responses
0-10 Hours	237 (48.07%)
10-20 hours	139 (28.19%)
20-35 Hours	53 (12.78%)
35 or more hours	37 (7.51%)
Don't know	17 (3.45%)

PART III

Treasury is Probably Getting Shortchanged Too

Not only do inefficiencies of the current tax code and administration system result in unnecessary tax compliance challenges for small business operators in the on-demand platform economy, they directly translate to IRS' ability to fairly administer the tax system and Treasury's bottom line. In terms of budget consequences, the most recent data available from the IRS estimates that more than 42% (\$194 billion) of the tax gap, or the amount of tax liability in a given year that is not paid voluntarily and in a timely manner, is attributable to the misreporting of individual business income and related self-employment taxes from Schedule C filers that underreport receipts (e.g., failing to report cash transactions) or over-report expenses, which aren't subject to information reporting.⁷⁸

Overall, compliance is highest where there is third-party reporting and/or withholding.⁷⁹ According to IRS statistics, in cases where employers do withholding, only 1% of wage and salary income is misreported; but in cases where there was no withholding or information reporting, the IRS has documented a 63% net misreporting rate.⁸⁰

One reason small businesses are often considered major contributors to the tax gap is because they often deal in cash.⁸¹ Not so with the on-demand platform economy operators—they deal exclusively in credit card, debit card or mobile payment transactions. Although some evidence suggests that Form 1099-K filings, which are used for reporting some credit and payment card transactions do trigger increases in small business' compliance in reporting gross receipts, the same study found that this increase of receipts was "largely offset" by increased reported expenses, which are not readily verifiable because they are not subject to information reporting.⁸²

Even though sending Form 1099s to the IRS and taxpayers to report income is "widely acknowledged to increase voluntary tax compliance in part because taxpayers know that IRS is aware of their income,"⁸³ in order for this third-party reporting to be effective, *both the IRS and taxpayers have to actually receive a Form 1099.*⁸⁴ However, this outcome is not by any means

guaranteed by the current information reporting regime. As noted earlier, the current instructions to the Form 1099-MISC clearly state that "[p]ayments made with a credit card or payment card and certain other types of payments, including third party network transactions, must be reported on Form 1099-K...and are not subject to reporting on Form 1099-MISC."⁸⁵ At the same time, the Form 1099-K has its own 200 transaction/\$20,000 income threshold for payments made by credit card.⁸⁶

As a result, the existing information reporting regime effectively creates a \$19,399 tax reporting loophole, which is the difference between \$20,000 and \$601—the income thresholds for Forms 1099-K and 1099-MISC.⁸⁷

For example, under the current tax rules, a platform company isn't required to send a Form 1099-K or a Form 1099-MISC to the IRS for a small business operator who makes \$18,000 through 189 different transactions—all of which are payment card transactions and are described as de minimis payments for purposes of Form 1099-K.⁸⁸ Given what the research has documented regarding the monthly income of average on-demand platform economy operators, it's likely that the existing reporting rules are not operating to trigger Form 1099-Ks to be generated for a substantial number of taxpayers.

Remember, the average monthly income of on-demand platform small businesses ranges from \$533 to \$314 (roughly \$6,396 to \$3,700 annually), which means that the Form 1099-K \$20,000 income reporting threshold isn't being tripped by a significant portion of on-demand platform operators.⁸⁹ This income would otherwise be reported on a Form 1099-MISC, but for the fact that the payments were made via credit card and subject to the Form 1099-K 200 transaction/\$20,000 reporting threshold. This likely explains why 61% of our survey respondents who earned income in 2015 from working with an on-demand platform company indicated that they did not receive any Form 1099.

As a consequence of these rules, there is an increased likelihood that taxpayers will be unaware of the full extent of their tax compliance obligations. And less inclined to pay them. We have already started to document, at least anecdotally, the significance of this reporting hole.

“ I got tons of questions this year from [prospective clients] asking, ‘should I report my income?’ - I always advise to do so, otherwise, it would be tax evasion, but I would say more often times than not, people ask if they had to report their income if they aren't receiving a 1099.”

— Email from Small Business Tax Advisor, 2016⁹⁰

The IRS was informed of this tax reporting loophole in 2014, and issued a statement that noted, “[w]e are aware of a potential for 1099-MISC and 1099-K double reporting, and are constantly monitoring our case selection criteria to address this. We do expect to provide more guidance, but we also do not expect this issue to lead to an increase in examinations.”⁹¹

It's two years later, and the on-demand economy has continued to grow to include more than 2.5 million U.S. taxpayers and is projected to include more than 7 million by 2020.⁹² No guidance has been forthcoming, however, IRS Commissioner Koskinen recently reiterated the importance of third-party information reporting in the context of the tax gap noting, “when there is information reporting, such as 1099s, income is only underreported about 7 percent of the time...but that number jumps to 63% for income not subject to any third-party reporting or withholding.”⁹³

Tax gap issues, particularly when they involve small businesses, are persistent and hard to resolve. Congress has attempted in recent years to enact legislation intended to curtail the tax gap using increased information reporting, but the impact of increased reporting requirements on small businesses resulted in almost immediate repeal.⁹⁴ Nevertheless, the Obama Administration has also recognized the tax gap as a pervasive issue and included, among other proposals targeted to addressing misclassification, a proposal to allow “independent contractors receiving payments of \$600 or more from a service recipient to require the service recipient to withhold for Federal tax purposes a flat rate percentage of their gross payments, with the flat rate percentage being selected by the contractor.”⁹⁵

Notably, at least one on-demand platform is taking steps in that general direction. In October 2015, Airbnb announced plans to collect and remit state and local hotel and occupancy taxes in several jurisdictions including Washington state; Rhode Island; Washington, D.C.; Portland, OR; San Francisco, San Diego, Palo Alto and San Jose, CA; Philadelphia, PA; Phoenix, AZ and Paris, France.⁹⁶ In fact, Airbnb estimated that these additional tax collection revenue efforts could generate as much as \$2 billion in potential revenue for America's cities.⁹⁷

While a statutory or policy remedy may be premature for addressing the tax compliance challenges of on-demand platform operators and their impact on the tax administration system, Congressional investigation for purposes of tax reform is certainly warranted given the existing compliance challenges the current information reporting regime presents for the on-demand platform economy's small businesses and the IRS' ability to efficiently administer the tax code.

In the meantime, the IRS can take proactive steps to try and ease the tax compliance burden of on-demand economy participants and facilitate their compliance. Many small business owners we talked to had no idea what quarterly-estimated payments were much less when they were due and very few of the folks we chatted with had any idea that they would be liable for self-employment tax in addition to income taxes. Many of the on-demand platform companies we spoke with were very willing to do more to help their small business operators, but were constrained from doing so over concerns of raising misclassification challenges.

Conclusion

Our assessment of the general confusion state of play when it comes to filing taxes on income earned from on-demand platform work was consistently reinforced by interviews with tax preparers, industry experts and the existing literature. At a minimum, the IRS should explore strategies in which it could leverage third parties (e.g., on-demand platform companies, tax software companies, tax preparers), to address this inefficient state of affairs. Everyone is losing under the current rules. Both taxpayers and the IRS deserve greater efficiency and less hassle. We can do better.

To be sure, the on-demand platform economy “adds an important element to existing labor markets, where finding new or additional work typically involves a lot of effort and high transaction costs...landing a platform job is often easier and quicker.”³⁸ And the on-demand platform economy is going to continue to grow and provide these opportunities.³⁹

1. More than 2.5 million U.S. taxpayers are participating in the on-demand platform economy as small business owners every year, and millions more are set to join their ranks in the next decade.
2. For tax purposes, on-demand economy service providers and sellers are small businesses owners, but their numbers aren't reflected in government data designed to track small business owners. In fact, these taxpayers don't

necessarily realize they are small business owners until tax time or they receive an IRS notice.

3. At best, these small business owners are shortchanged when filing their taxes; at worst, they fail to file altogether. Approximately one-third of our on-demand platform operator survey respondents didn't know whether they were required to pay quarterly-estimated payments and almost half were unaware of any available deductions, expenses or credits they could claim to offset their tax liability. These taxpayers face potential audit and penalty exposure for failure to comply with filing rules that are triggered by relatively low amounts of earned income. Compounding this problem is inconsistent reporting rule adoption.
4. The current tax administration system isn't working for a significant percentage of on-demand platform small business operators or Treasury or IRS. More than 60% of our survey respondents who worked for an on-demand platform company in 2015 reported that they did not receive a Form 1099-K or Form 1099-MISC from their on-demand platform, which likely means the IRS didn't either. The current state of play is one of unnecessary burden, potential audit and penalty exposure for on-demand platform economy players. We can do better.

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- This report takes the position that because the research to date consistently shows that millions of taxpayers are participating in the on-demand platform economy as small businesses, and millions more are set to join their ranks, for purposes of tax reform, review of the existing tax compliance challenges these taxpayers face is warranted, notwithstanding the outcome of a specific misclassification case. See also, Johana Bhuiyan, *Why the Uber Drivers' Lawyer Settled Their Fight to Become Employees*, <http://recode.net/2016/04/30/uber-drivers-employees-contractors-lawyer>.
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²⁴ Carrying on a trade or business has been defined by the courts and IRS administrative guidance as the act of “engag[ing] in the selling of goods or services,” as a “livelihood or in good faith to make a profit,” in a “regular, frequent and continuous” manner. (*Deputy v. DuPont*, 308 U.S. 488 (1940)). Clear profit motive of small businesses has been confirmed by industry surveys that have identified the desire to make more money as the primary reason the majority of people work in the on-demand platform economy. See Emergent Research Survey, *supra* at n. 13. Further, in explaining what a trade or business is for purposes of determining whether a taxpayer is self-employed, the IRS Self-Employed Individuals Tax Center explains that a taxpayer does “not have to carry on regular full-time business activities to be self-employed...[h]aving a part-time business in addition to your regular job or business also may be self-employment.” *Business Activities*, Internal Revenue Services (Apr. 16, 2016), <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Business-Activities>.

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³¹ *Id.*

³² Specifically, GAO began its analysis with identifying what groups of taxpayers were small businesses, using two distinct litmus tests developed by Treasury in 2011 as a more “nuanced approach to identifying small businesses.” Each of these tests had specific income thresholds that a business return would first have to meet. Under the *De Minimis Test*, total income or deductions would need to exceed \$10,000 or their sum exceed \$15,000, and under the *Business Activities Test*, total deductions should exceed \$5,000 in order for a return to be counted as a small businesses. Notably, in 2011, when Treasury first developed these tests, it used them to measure taxpayers with some business income as reported on 2007 Schedule C returns—well-before the advent of the on-demand platform economy—and found that 12.5 million Schedule C filers did not meet the *De Minimis Test* and 2.3 filers failed the *Business Activities Test*. Similarly, the two business tests eliminated 5.0 million Schedule E rental filers as small businesses. On average, the Schedule C filers that failed these income thresholds reported \$7,000 of total income and \$4,600 of net income, whereas the excluded Schedule E filers reported an average of \$8,400 of total income and \$800 of net income. In developing this approach, OTA focused on incorporating income thresholds to ensure that misclassified employees and non-business income, or hobby income, were excluded in the methodology. Office of Tax Analysis, OTA Technical Paper No. 4, *Methodology to Identify Small Businesses and Their Owners* (Aug. 8, 2011), <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/OTA-TP-4.pdf>.

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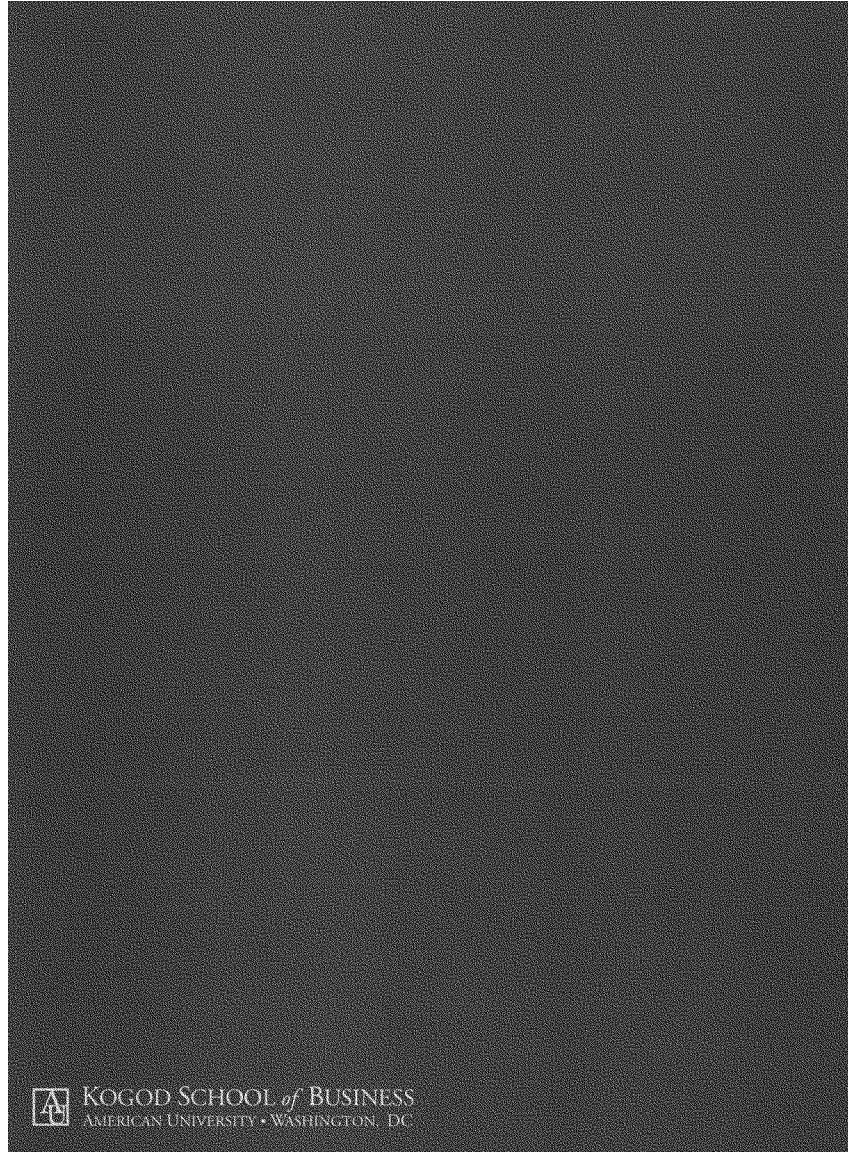
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Prof. Bruckner is on the faculty of American University's Kogod School of Business and is the managing director of the Kogod Tax Policy Center, which researches tax issues specific to small businesses and entrepreneurs. She previously worked for the U.S. Senate Committee on Small Business and Entrepreneurship (SBC) from 2009 through 2014, ultimately as Chief Counsel, where she worked on small business tax legislation and advised the committee and its chair on tax, labor and budget matters. As counsel for the SBC, she worked with U.S. policy makers and small businesses stakeholders across the political spectrum on small business tax legislation and to develop the tax title to the Small Business Jobs Act of 2010 (P.L. 111-240). Prior to public service, Bruckner was a senior associate with the international tax services group of PricewaterhouseCoopers, LLP - Washington National Tax Services (PwC-WNTS), where she advised clients on international tax issues. Before joining PwC-WNTS, she served as an associate in the employee benefits group of PaulHastings. Bruckner has an LL.M. in tax law from Georgetown University Law Center, a JD from George Mason University School of Law, and a BA from Emory University.

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TESTIMONY

of

Rob Willey

Vice President, Marketing

TaskRabbit

before the

Small Business Committee

U.S. House of Representatives

"The Sharing Economy: A Taxing Experience for New Entrepreneurs, Part I"

May 24, 2016

Mr. Chairman, Ranking Member Velázquez, and members of the House Small Business Committee, I am Rob Willey, Vice President of Marketing for TaskRabbit. Thank you for the invitation to testify today, but more important, thank you for holding today's hearing on a topic that captures the legal, regulatory, and public policy challenges that confront platform companies, as well as the millions of individuals that look to platforms like ours to improve their daily lives.

Our Founder and Executive Chairwoman, Leah Busque, launched TaskRabbit in 2008 as a way to help people connect and get more done every day. We are a pioneer in the on-demand service platform industry, operating in 18 major U.S. cities—with New York City being our largest domestic market—and abroad in London, which is our fastest growing market.

We're a two-sided marketplace connecting Taskers with Clients across a variety of categories, such as cleaning, handyman services, delivery, moving, and much more. TaskRabbit's vision is to allow you to be your most productive self, and we're changing the face of work by aligning and meeting a consumer's daily needs across multiple categories, offsetting the demands of their normal lives with consistent and high quality services.

Roughly 60 percent of our Taskers are millennials—young people who see TaskRabbit as a way to earn income while pursuing a college degree, or to supplement the income they are earning from a full-time job. Our community is diverse with a broad set of needs, which is why we have a contractual relationship with our Taskers. By utilizing our platform—largely through a mobile app but also on the web—Taskers can directly engage with their clients. We have more than 50,000 registered Taskers on our platform, and see more than 15,000 applications per month with little direct recruiting or marketing. Interest in our platform is largely driven by flexible scheduling and the ability to earn livable wages. Taskers have the freedom to decide when, where, and how they work, and set their own hourly rates.

Flexibility—the ability to work when and where they want, and at the hourly rate they want—has and continues to be the #1 reason. Taskers are on our platform. They set their prices, their hours, and their location, and are able to make livable wages around a lifestyle that works for them. The importance of our two-sided marketplace is that both the customer that seeks a specific service and the Tasker that can provide it, both choose to opt-in to this on-demand platform.

Today's Tasker earns an average of \$35 per hour—five times the federal minimum wage. The overwhelming majority of our Taskers utilize the platform for part-time work to supplement their incomes, less than 10% “task” full-time. Overall, the average monthly income for Taskers tripled year over year.

It is fitting that today's hearing is in the House Small Business Committee. Whether called “solopreneurs” or “micro-entrepreneurs,” our Taskers are in fact, independent, self-employed, small business owners.

The part-time, flexible nature of the work done by our Taskers is consistent with the larger app-based platform economy, and those characteristics, and the factors that gave rise to the platform economy, are important to note given today's hearing. A February 2016 study by the JP Morgan Chase Institute found that the overwhelming majority of the estimated 2.5 million Americans people who earned income as small business owners using platforms like ours did so to supplement their incomes and better support themselves and their families.

With little to no barriers to entry, the on-demand platform economy has become an important option at a time when income volatility continues to challenge individuals and families. Typically, significant fluctuations in take-home pay, work hours, or availability of optimal job opportunities put pressure on individuals to reduce their household spending or take on more debt. The creation of on-demand platforms like ours has made new income-earning opportunities accessible and feasible to millions of Americans.

Of course, the emergence of the platform economy has sparked an, at times, intense debate on the classification of workers as "employees" or "independent contractors," and the costs and benefits associated with either classification. We know the current legal worker classification structure was designed around a much different economic and technological era. In addition, today's classification structure has been shaped mostly by decades of regulations and court cases at the federal and state levels, which have fueled uncertainty across our sector—uncertainty about what we can or cannot do to support our Taskers while preserving their flexibility and independence in accessing our platform.

The result: we face very limited choices when it comes to the services and level of collaboration we can provide for our Taskers. With the increase in alternative work arrangements in addition to the emergence of the platform economy, we're currently in an era where there's no typical freelancer. There's no "Joe the Plumber,"—rather, we see multiple different work models and work cases.

An example of that inability to collaborate and provide support services for our Taskers is in the tax arena. As Professor Caroline Bruckner ably highlighted in her report released just yesterday, self-employed participants in the platform economy have difficulties with both tax compliance and tax benefits. Professor Bruckner's survey data revealed that significant percentages of respondents did not know what their obligations were with respect to tax filings or taxes owed. They also were not fully aware of the deductions or credits they could claim on income earned on platforms like TaskRabbit.

We at TaskRabbit have no reason to doubt that significant numbers of Taskers are facing or are simply unaware of the tax compliance challenges or the tax benefits that confront them. For many of our Taskers, when they sign up to join our platform, they are making their first forays into the world of small business and self-employment. Some may understand that earning a certain level of income triggers the quarterly estimated payment filing requirement. Many may not.

It's in TaskRabbit's interest to see that our Taskers gain a better understanding of what's required with respect to tax compliance, and what's available with respect to tax benefits. What we want to avoid is a situation in which the burdens of tax compliance become so great that it forces Taskers to scale back on their tasks, if not compel them to leave the network altogether. What we hope to ensure are situations in which tax compliance is not burdensome, and full utilization of tax benefits helps maximize return on Tasker participation in the network.

Tax compliance is just one area of many where our Taskers could benefit from better training. Our Taskers also are looking for direction on how to better market themselves and their services, access health care, and plan for retirement. We at TaskRabbit would like to be a resource, a partner, and a collaborator for that training—it is one of our main areas of focus in determining what types of services we can provide simply because the threat of litigation and the risks tied to worker classification laws and regulations at the federal and state level are real.

I agree with the recommendations of my fellow witnesses that these issues should be considered by Congress and relevant government agencies, such as the U.S. Department of Labor and the Internal Revenue Service. It is certainly worth Congress considering the notion of a legal and regulatory timeout suggested by Dr. Joe Kennedy with the Information Technology Industry Foundation. There is precedent for that kind of action.

In the early years of the Internet, Congress imposed a moratorium on federal and state taxation of Internet transactions. Doing so helped a young, nascent sector of the economy develop and provide real benefits for consumers. A limited period of legal and regulatory relief would enable platform economy companies to pursue innovative ways to develop and provide services and benefits to those small business owners and entrepreneurs who utilize platform services.

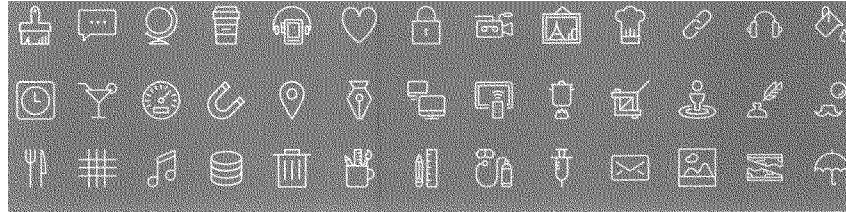
If a broad timeout like the one I just described will take time for Congress to consider, perhaps a narrow timeout tied to a specific set of issues, including tax compliance, preparation, and benefits, could serve as an initial pilot project to demonstrate feasibility and effectiveness, while providing real value to those who provide on-demand services in the platform economy. In addition, we urge both Congress and the Internal Revenue Service to consider ways to bring greater flexibility in tax preparation and compliance for small businesses and the self-employed.

Though TaskRabbit pioneered this industry, this space is still very early and emerging. We absolutely want to continue working with governments to engage with policymakers as our company and industry grows and matures. We consider this engagement rewarding on many levels. Just last month, for example, we announced our intent to follow the diversity principles outlined by the Congressional Black Caucus in its TECH 2020 initiative, and we're proud to have been the first technology company to adopt these principles.

Mr. Chairman and Ranking Member Velazquez, we appreciate today's hearing, and your and the Committee's interest in taking the time to understand our business and how it's changing the face of work, and how public policies can impede or further that advancement. There is already bipartisan interest in the platform economy, as evidenced by last year's formation of the Sharing Economy Caucus, co-chaired by California Congressmen Darrell Issa and Eric Swalwell. We also applaud the House Republican and Democratic leaders, Kevin McCarthy and Nancy Pelosi, for taking a closer look at the public policies impacting the platform economy.

We hope we can channel this bipartisan energy toward constructive policy solutions that will further enable TaskRabbit and the platform economy to continue to innovate and grow, and further empower small business owners and entrepreneurs to efficiently and effectively provide important services across the country.

Thank you.



Testimony

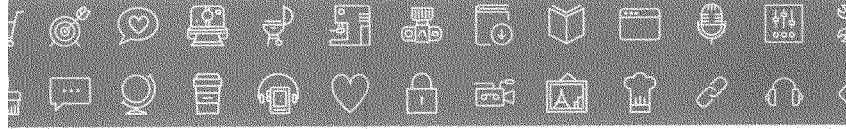
of
Morgan Reed
 Executive Director
 ACT | The App Association

before the
 House Committee on Small Business

on
 The Sharing Economy: A
 Taxing Experience for New
 Entrepreneurs, Part I

May 24, 2016
 2361 Rayburn House Office
 Building



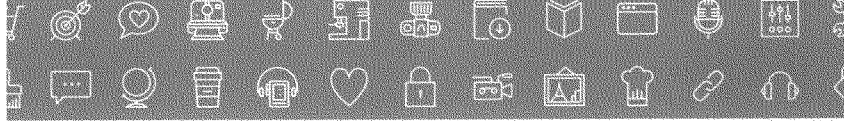


Chairman Chabot, Ranking Member Velázquez, and distinguished members of the Committee: My name is Morgan Reed, and I am the executive director of ACT | The App Association. Thank you for holding this important hearing on the tax challenges faced by participants in the sharing economy.

ACT | The App Association represents more than 5,000 small business app makers and connected device companies across the United States. Our member companies leverage the connectivity of smart devices to create innovative solutions that make our lives better. These technologies have given rise to the sharing economy, which has revolutionized how people work, travel, learn, and consume goods both digital and physical. Our member companies drive the sharing economy, increasing efficiency and reducing wastefulness across American society.

In my testimony today, I want to highlight four key points:

- The dynamic mobile app industry has enabled the rise of the sharing economy, allowing innovative entrepreneurs and small businesses across America to better utilize products and services in meeting market demands. Tens of millions of Americans are earning more for their families with flexibility and autonomy.
- Congress and the Internal Revenue Service (IRS) should take great care to make sure that the federal tax code enables—rather than stifles—the sharing economy. Specifically, the treatment of all sharing economy workers as “employees” under the federal tax code would be detrimental to the sharing economy, especially small businesses.
- Congress should work to advance legislation that would provide taxpayers with certainty and transparency in the tax resolution process and would provide the ability to settle disputes with the IRS in an effective and efficient manner.
- Congress should ensure fairness in the treatment of businesses in the sharing economy by guaranteeing that internet sales taxes are based on the seller’s location. We call on Congress to reject proposals that would force businesses to become tax experts for thousands of state and local jurisdictions across the United States.



I. The Rise of Mobile Fuels Sharing Economy

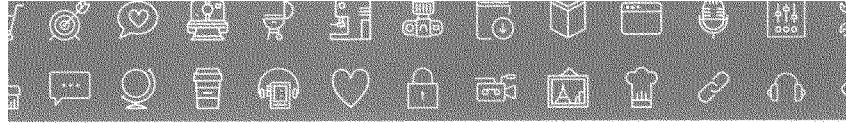
While many Americans are familiar with a few of the most prominent sharing economy companies—Uber, AirBnB, eBay, or PayPal—the concept of “sharing” products and services in order to reduce costs has long existed on a micro level. This “sharing resources” concept has existed in every neighborhood in America, where one might borrow a snow-blower, a set of tools to fix a car, or a pickup truck for a run to the dump; payment was usually a full tank of gas, a plate of cookies, or a six-pack.

Today, your neighborhood has gone national.

The rise of the sharing economy as we know it today has been enabled by the widespread use of mobile devices and the app economy, which have brought the concept of sharing from neighborhood to nationwide. In existence less than a decade, the app industry has experienced explosive growth alongside the rise of smartphones. As the most rapidly adopted technology in human history, smartphones have quickly become the center of our digital lives. Today, the app economy represents a \$120 billion industry that is led by U.S. companies.¹ Apps have provided new opportunities for entrepreneurs to leverage the capacity of a product or service that would otherwise go underutilized or unused.

From ride sharing to child and pet sitting, the sharing economy provides wide societal benefit through on-demand access to goods and services at reduced costs – and we are only scratching the surface. In fact, the global sharing economy is set to reach \$115 billion this year, up from \$3.5 billion in 2012, according to projections from Ernst & Young.² Shifting demographics in the United States have propelled this growth. Millennials have generally demonstrated reluctance to purchase products that can be accessed on-demand without the burdens of ownership. For example, according to a 2013 Goldman Sachs survey, 60 percent of Millennials expressed either opposition or indifference to car ownership.³ Further, between 2008 and 2014, the rate of licensing declined from 82 percent to 76.7 percent among 20 to 25-year-olds.⁴

Eighty-two percent of top grossing apps are made by small businesses from communities across the country, located in areas both urban and rural.⁵ These companies are driving innovation across all sectors of the economy, increasing efficiency and expanding economic opportunity.



The popular media tends to describe the sharing economy in terms of companies that displace or disrupt an existing business model – uberX replacing the taxi, and VRBO replacing hotels. But we believe that is a false, or at least limited, dichotomy. The sharing economy not only replaces, but it also creates new concepts in how people engage and interact. Here are just two examples of sharing economy businesses creating new markets and bringing new outcomes to the world:

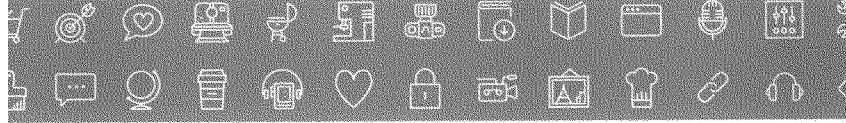
Based in Chicago, Nomful,⁶ an ACT | The App Association member, utilizes a sharing platform to connect nutrition coaches from across the country to consumers seeking a healthier lifestyle. Using Nomful's service, dedicated coaches answer questions, set goals, and help consumers meet their health goals.

Nomful does not merely connect you with a nutrition expert. They fundamentally change the paradigm by getting users to change bad habits through ongoing relationships, not just a once-a-month meeting. Users can take pictures of the food they are eating, share it with their coach, and get real-time feedback and re-enforcement. Coaches get insight about the existing habits of the user so that they can step in before a bad decision is made.

Nomful has found that users who improve their daily nutrition habits are better able to handle chronic illnesses such as diabetes and special dietary situations like post-natal nutrition. This method of easy training for users is only possible through the use of Nomful's contracted nutrition coaches who have the ability to choose the number of clients with whom they work and when they interact with their clients.

Feastly,⁷ a DC-based peer-to-peer startup that connects chefs and diners, has been called the "Airbnb for dinner." Feastly's platform is rather simple: they connect pre-approved chefs with potential diners for a set fee for hosted dinners, brunches, and cooking classes. Since its founding in 2012, Feastly has hosted thousands of meals for tens of thousands of diners across multiple markets, including Washington, DC, San Francisco, New York City, and Chicago.

Feastly offers an unlimited variety, as the number and chefs and disciplines is continually changing. Many chefs using the platform see this as a tremendous opportunity to experiment. In fact, many are forgoing employment other than work secured directly on the Feastly platform.



The benefits of the sharing economy extend beyond end users across consumer and enterprise contexts by creating new opportunities for any entrepreneurial American to earn extra income with flexibility and autonomy that was never possible before the widespread use of mobile devices. Parents looking to make supplementary income, or young professionals hoping to earn secondary income to support themselves, are no longer confined to cubicles or hour sheets.

Instead, Americans have the ability to work when and where they choose – sometimes through multiple sharing economy platforms. American engagement from this side of the sharing economy is already significant and growing.

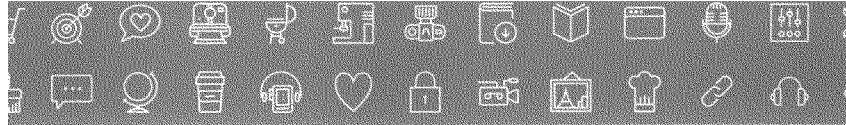
A TIME Magazine poll recently found that 22 percent of American adults—45 million people—have already offered some kind of good or service in the shared economy, the vast majority of whom report positive experiences.⁸ Further, according to recent research from the American Action Forum, from 2002 to 2014 the number of workers in

Today, the app economy represents a \$120 billion industry that is led by U.S. companies.

the gig economy expanded between 8.8 percent and 14.4 percent. And from 2010 to 2014, the gig economy accounted for 28.8 percent of all jobs, putting 2.1 million people to work.⁹ ACT | The App Association believes that these statistics clearly demonstrate how the sharing economy has and can further continue to benefit the lives of entrepreneurial Americans.

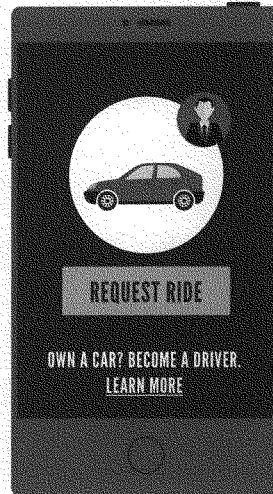
It is a constant struggle for government regulation to keep pace with innovation, from the federal to the local level. Like any new market entrant, sharing economy companies face barriers from legacy competitors and the legal and regulatory systems that have been built around established business practices. Existing legal and regulatory structures often discourage the innovations of the app economy, effectively reducing marketplace competitiveness, and ultimately harming consumers.

Of these legal and regulatory barriers, federal tax policies, which we are here today to discuss, consistently top small businesses' lists of concerns. Instead of worrying about federal taxation issues that may easily present "end of life" financial liabilities, small companies thrive when they are able to channel their energy and resources into more important issues such as growing their teams with talented software developers and protecting the security and privacy of their customers' data.



THE SHARING ECONOMY ➔

- ✓ **Reduces costs** by “sharing” products and services
- ✓ **Gives new opportunities** for any entrepreneurial Americans to earn extra income with flexibility and autonomy that was never possible before the widespread use of mobile devices



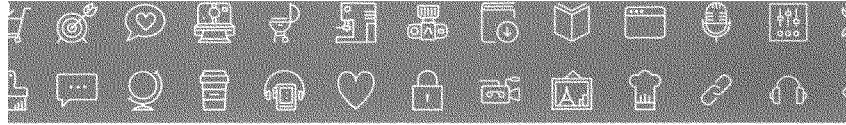
22% OF AMERICAN ADULTS

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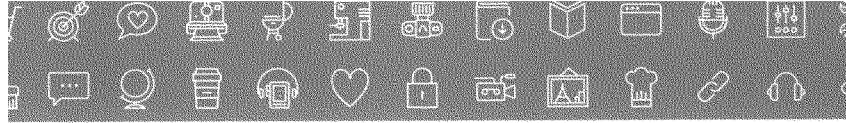


II. Internal Revenue Service Treatment of Sharing Economy Employees

The IRS approach predates the existence of our modern mobile, sharing economy. Traditionally, for tax purposes, a worker is regarded by the IRS either as an employee or a contractor. The employer makes this assessment, and the consequences of erroneously categorizing an employee are serious.¹⁰ Clarity in guidance from the IRS would be beneficial, particularly for small businesses that rely on their good faith determinations of worker status.

Heavy-handed application of outdated tax regulations threatens both the innovation driving the sharing economy as well as the incentives workers have to offer their skills to it. At a fundamental level, sharing economy businesses do not tell the contractors when to work, where to work, or how many hours to work. Further, as discussed below, while an American can find a job as a contractor or as a full-time employee, workers' basic needs are addressed through existing laws and marketplace availabilities. ACT | The App Association, therefore, is concerned with proposals for the blanket treatment of sharing economy workers as "employees" under the existing tax code and urges Congress to carefully examine the tax treatment of the growing sharing economy before making policy changes that could have widespread impact. Instead, we believe that by focusing on removing the barriers workers face to obtaining governmental and market-based services, sharing economy small businesses can be encouraged to develop and grow.

Under the IRS' "Common Law Rules," the degree of control, and independence of, a worker must be considered when determining whether they are an employee or independent contractor based on facts that fall into three categories: behavioral, financial, and the type of relationship.¹¹ Each of these categories and the factors within them are explored in an appended analysis from NetChoice,¹² from the traditional "employee," "independent contractor," and—representing the sharing economy use case—a "transportation network company" driver. Their analysis demonstrates that the typical sharing economy worker clearly does not fit within the definition of the traditional employee. Further, practical application issues would arise should the IRS use the traditional employee approach for shared economy workers, such as for unemployment insurance. Carrying these burdens through to the sharing economy would severely harm small businesses unable to carry such liabilities for part-time workers and would diminish the growth opportunity and societal benefits of the sharing economy.

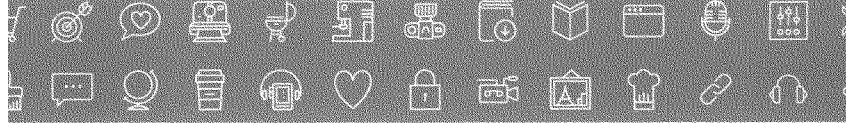


To sustain this growth and its widespread benefits, the IRS should offer guidance to the sharing economy that clearly allows for the kinds of resource and property sharing we see making up this sector. For example, as small sharing economy companies strive to attract the best workers, many offer training and other educational instruction, yet face uncertainty in the Common Law Rules determination due to a lack of guidance from the IRS. For example, if Nomful provides training for its contractors on how to best handle their taxes or how to better engage with new users, does that trigger a change in status from contractor to employee? Such guidance does not require Congressional action and could be provided today.

ACT | The App Association urges this Committee and the IRS to recognize that, whether an American works as a contractor or as a full-time employee, their basic needs are addressed through existing laws (either at the federal or state level – or both) and market place availabilities. For example:

- **Health Insurance:** since the passage of the Affordable Care Act, individuals are required to have health insurance.¹³
- **Social Security and Medicare:** whether working as an employee or working as an independent contractor, contributions towards Social Security and Medicare are collected.¹⁴
- **Workman's Compensation:** insurers today provide tools for contractors to protect themselves. For example, the marketplace today offers customizable “contractors insurance” which can provide general liability insurance, workers’ compensation insurance, and commercial auto insurance.¹⁵

There are a variety of proposals before Congress today to address IRS treatment of sharing economy workers. We are committed to an inclusive public discourse to inform any policy changes related to the sharing economy and believe that Congress should carefully consider any changes to the tax code made to address the rise of the sharing economy before moving forward. The livelihoods of tens of millions of Americans who offer their services through sharing economy platforms today and the countless Americans who save money and time through sharing economy consumption depend upon the careful consideration of these policies.



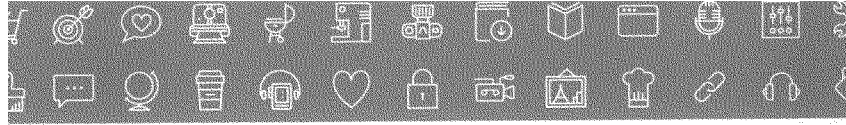
III. Troubling Trends in IRS Auditing Practices

In addition to the tax-related challenges discussed for the sharing economy, IRS audits have become increasingly inefficient and pose an additional threat to the growth of the small business app economy at large and the sharing economy specifically. In recent years, the IRS has taken steps to create new precedents within its auditing process that should be of particular concern to this Committee. Such practices include denying taxpayers the ability to seek review with the IRS Appeals office, the use of intimidation tactics to coerce taxpayers into extending the statute of limitations, the hiring of third party litigation law firms to engage in tax audits; and repeated failure to provide statutorily-mandated reports on its auditing practices to Congress, among others.



As a founding member of the Coalition for Effective & Efficient Tax Administration (CEETA),¹⁶ we have worked with the broad interests of this coalition to identify several areas of concern with how audits are currently conducted, including those noted above. These areas of concern fall into three broad categories:

- Need for transparency along with centralized management and accountability in IRS management of audits;
- Implementation of the new Information Document Request (IDR) process; and
- Impact of litigation strategies on IRS audits.



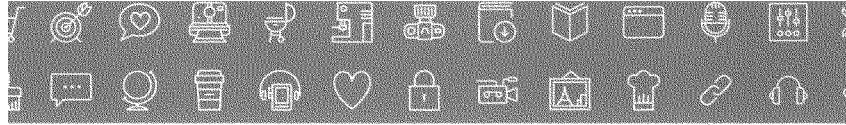
CEETA has publicly provided detailed analyses on these specific concerns and has further put forward workable legislative changes to improve the situation.¹⁷ More recently, we were pleased to support legislation introduced by Senator Rob Portman of Ohio to amend the Internal Revenue Code of 1986 to preserve taxpayers' rights to administrative appeal of deficiency determinations (S.2809). Senator Portman's proposal would:

- **Provide taxpayers with the opportunity to resolve issues in the IRS Appeals office before being forced to litigate in Tax Court.** Allowing Appeals review of a case by seasoned Appeals officers is more efficient and cost effective for the courts, the government, and taxpayers than going directly to expensive and time consuming litigation in Tax Court. If the IRS position is strong, the issue will likely be resolved in Appeals. If the IRS position is not strong, it may obtain a better result in Appeals rather than risk a loss in Tax Court.
- **Restrict the ability of the IRS to designate cases for litigation to "listed transactions" (tax shelter issues).** This would allow the IRS to designate cases for litigation for "listed transactions" to obtain precedent but would allow other issues to be resolved (or not) by IRS Appeals before engaging in Tax Court litigation.
- **Shifting the burden of demonstrating taxpayer uncooperativeness to the IRS in a more transparent process.** S.2809 would introduce needed accountability into this process by clarifying the ability of the IRS to unilaterally suspend the statute of limitations in a tax controversy through a designated summons by requiring documented review and written approval of that summons, and to require the IRS to demonstrate the taxpayer was uncooperative. Importantly, this does not prevent the IRS from issuing a designated summons against an uncooperative taxpayer – it merely provides safeguards for the use of this extraordinary tool to unilateral extend the statute of limitations.
- **Bar the IRS from hiring outside law firms to participate in a tax audit.** Small businesses, including those in the sharing economy, are concerned that if the IRS continues to expand its practice of hiring litigation law firms to engage in tax audits, small businesses will be targeted due to motivation on the part of these law firms to earn fees.

ACT | The App Association strongly urges the Committee to work to advance proposals consistent with S.2809 to foster the ability of taxpayers—including small businesses—to resolve disputes with the IRS in an effective and efficient manner. We commit ourselves to working with you and other stakeholders to address these issues.

The MFA would subject the entirety of U.S. online and catalog merchants, including sharing economy small businesses, to submit to 10,000 local jurisdictions' sales tax laws, creating an impossible situation for interstate commerce through an avalanche of compliance and cost burdens American small businesses have never seen before. Further, the MFA would enable any U.S. business to be audited by any of 46 states. In practice, this is a storm that only a select few large incumbent companies could weather. The small businesses across the country that this Committee is committed to assisting, however, will be unable to track and comply with the regulations of 46 different jurisdictions.

Proposed to remedy some of the issues posed by the MFA yet compounding the damage, the RTPA would require these same small businesses to utilize “free software” in order to comply with the thousands of U.S. tax jurisdictions. However, in providing this “free” software, the RTPA would unleash a slew of directly related expenses associated with software installation and maintenance. Further, the RTPA would again expose these small businesses to the possibility of audits from 46 states that utilize a sales tax. An exemption in the RTPA for small businesses would sunset in only three years. Finally, perhaps as troubling is the fact that the RTPA, unlike the MFA, eliminates federal preemption and federal court jurisdiction, preventing impacted businesses from seeking federal judicial review of state activity under the RTPA. The effects of these policies would be particularly harmful to sharing economy platforms, such as eBay, which enable thousands of small businesses to conduct interstate sales over the internet.



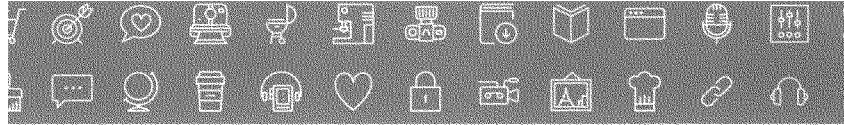
As an alternative to the MFA and RTPA, we support House Judiciary Committee Chairman Bob Goodlatte's proposal, which would instead base internet and catalog sales taxes on the seller's location, rather than the that of the customer. We believe this approach, which is consistent with how brick-and-mortar retailers collect sales taxes today, will permit businesses to avoid exposing thousands of American small businesses to regulatory and tax liability in double-digit jurisdictions.

We urge members of Congress, and this Committee in particular, to seriously examine the MFA and RTPA and their impacts. We believe that this Committee should work to oppose its flawed policies and oppose both bills.

Conclusion

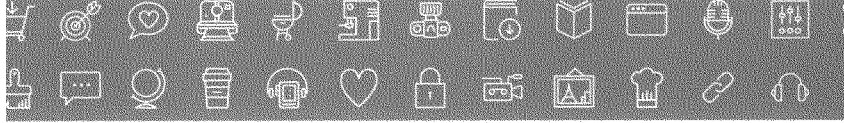
The app ecosystem that powers the sharing economy offers incredible benefits to each and every American. This Committee has taken an important step towards addressing a threshold tax issue for a growing number of innovative small businesses across the United States.

I thank you again for the opportunity to present testimony about the extraordinary app ecosystem and the sharing economy. I look forward to our continued work together and pledge our support to help advance measures that empower innovation.



End Notes

- 1 ACT | The App Association, State of the App Economy (4th Edition) (Jan. 2016) at 4, <http://actonline.org/state-of-the-app-economy-2016/> (App Economy 2016 Report).
- 2 Ernst & Young, The rise of the sharing economy: The Indian landscape (Oct. 2015), [http://www.ey.com/Publication/vwLUAssets/ey-the-rise-of-the-sharing-economy/\\$FILE/ey-the-rise-of-the-sharing-economy.pdf](http://www.ey.com/Publication/vwLUAssets/ey-the-rise-of-the-sharing-economy/$FILE/ey-the-rise-of-the-sharing-economy.pdf).
- 3 Goldman Sachs, Millennials: Coming of Age, <http://www.goldmansachs.com/our-thinking/pages/millennials/> (last visited May 23, 2016).
- 4 Joe Cortright, StreetsBlog USA, Are Millennials Racing to Buy Cars? Nope, <http://usa.streetsblog.org/2016/04/25/are-millennials-racing-to-buy-cars-again-nope/> (last visited May 23, 2016).
- 5 App Economy 2016 Report at 4.
- 6 See Nomful, be nomful about food, <http://www.nomful.com/> (last visited May 23, 2016).
- 7 See Feastly, Feastly, <https://eatfeastly.com/> (last visited May 23, 2016).
- 8 Katy Steinmetz, TIME, "Exclusive: See How Big the Gig Economy Really Is" (Jan. 6, 2016), available at <http://time.com/4169532/sharing-economy-poll/> (last visited May 23, 2016).
- 9 Will Rinehart and Ben Gitis, American Action Forum, Research: Independent Contractors and the Emerging Gig Economy (Jul. 29, 2015), available at <http://www.americanactionforum.org/research/independent-contractors-and-the-emerging-gig-economy/> (last visited May 23, 2016).
- 10 See Internal Revenue Code section 3509. See also Robert W. Wood, Forbes, IRS Inspector Urges Crackdown on Mislabeling 'Independent Contractors' (Jul. 30, 2013), available at <http://www.forbes.com/sites/robertwood/2013/07/30/irs-inspector-urges-crackdown-on-mislabeling-independent-contractors/#741fec3e2450> (last visited May 23, 2016) (describing the tax consequences of misidentifying workers as contractors).
- 11 IRS, "Publication 15-A: Employers' Supplemental Tax Guide," Department of the Treasury, 2016: 7–10, <https://www.irs.gov/pub/irs-pdf/p15a.pdf>.
- 12 NetChoice is a trade association of eCommerce businesses and online consumers all of whom share the goal of promoting convenience, choice, and commerce on the net. See <https://netchoice.org/>.
- 13 26 U.S.C. § 5000A.



14 The IRS states that “[s]elf-employed individuals generally must pay self-employment tax (SE tax) as well as income tax. SE tax is a Social Security and Medicare tax primarily for individuals who work for themselves. It is similar to the Social Security and Medicare taxes withheld from the pay of most wage earners. In general, anytime the wording ‘self-employment tax’ is used, it only refers to Social Security and Medicare taxes and not any other tax (like income tax).” See <https://www.irs.gov/individuals/self-employed>.

15 See, e.g., Progressive, Contractors Insurance, <https://www.progressivecommercial.com/insurance/contractors-insurance/> (last visited May 23, 2016); see also Pacific United Insurance, Contractor Workers Compensation Insurance Protects Both Your Employees and Your Company, <http://pacificunitedins.com/services/workers-comp/> (last visited May 23, 2016).

16 CEETA, Home, <http://www.eetax.org/> (last visited May 23, 2016).

17 CEETA, Coalition for Effective & Efficient Tax Administration Position Paper, available at http://www.eetax.org/images/EETAX/CEETA_PositionPapers11132015.pdf (last visited May 23, 2016).

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**Testimony of
Joseph V. Kennedy
Senior Fellow
Information Technology and Innovation Foundation**

**Before the
House Committee on Small Business**

**Hearing on
“The Sharing Economy:
A Taxing Experience for New Entrepreneurs Part I”**

May 24, 2016
2360 Rayburn House Office Building
Washington, DC

INTRODUCTION

Thank you Chairman Chabot, Ranking member Velázquez, and members of the Committee. I am grateful for the opportunity to testify before you on the subject of taxes and the sharing economy.

The Information Technology and Innovation Foundation (ITIF) is a non-partisan think tank whose mission is to formulate and promote public policies to advance technological innovation and productivity internationally, in Washington, and in the states. Recognizing the vital role of technology in ensuring prosperity, ITIF focuses on innovation, productivity, and digital economy issues.

ITIF's approach to this subject is driven by three considerations. The first is that, while the sharing economy is growing rapidly, it still represents only a small fraction of an increasingly diverse labor market. In their report for the Hamilton Project at the Brookings Institution, Seth Harris and Alan Krueger estimated that 600,000 U.S. workers used an Internet platform to identify consumers interested in purchasing personal services. Of these, roughly 400,000 were Uber drivers.¹ These estimates are roughly consistent with others that have been published. The total should not be appreciably higher if we add workers who make a living selling goods on Internet platforms such as Etsy and Artful Home. My testimony is mainly focused on those platforms that deal in personal services since they suffer the most from the current confusion in our labor laws.

However, these individuals are part of a much larger number of workers in "alternative arrangements". A 2015 report commissioned by Freelancers United and Upwork estimates that 54 million Americans, over one-third of the workforce, fall into one of the following five categories: independent contractors, moonlighters, diversified workers, temporary workers, or small business owners.² A study by Lawrence Katz and Alan Krueger estimated that the percentage of workers engaged in "alternative work arrangements," rose from 10.1 percent of the workforce in 2005 to 15.8 percent last year.³ Contract companies accounted for the largest share of this increase, although independent contractors make up the largest group, at 8.4 percent of the workforce. Workers who provide services through online intermediaries accounted for only 0.5 percent of workers.

Public debate over this segment of the workforce is hampered by three factors. The first is that the Department of Labor has not conducted its Contingent Work Survey since 2005. I am glad that the Department has announced its intention to renew data collection this year. Hopefully, its findings will shed more light on the size and composition of this large fraction of the labor market.

¹ Seth D. Harris and Alan B. Krueger, "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker'" (discussion paper 2015-10, The Hamilton Project, The Brookings Institution, December 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf

² Sara Horowitz, "Freelancing in America 2015 Report," Freelancers Union, October 1, 2015, <https://www.freelancersunion.org/blog/dispatches/2015/10/01/freelancing-america-2015/>.

³ Lawrence F. Katz and Alan B. Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015, March 29, 2016, https://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-_march_29_20165.pdf.

Our insight into the labor market and other parts of the economy is also hampered by a lack of sharing among the three main data agencies; the Census Bureau, the Bureau of Labor Statistics, and the Bureau of Economic Analysis. Unlike Canada, the U.S. statistical system is highly fragmented. This makes it difficult to gather consistent statistics across agencies. Tax law currently bars the agencies, mainly the Census Bureau, from sharing microdata with each other. The result is inaccurate and imprecise data. This in turn limits the ability of lawmakers and businesspeople to understand what is really happening in the economy. Sensible data sharing legislation could reduce costs and improve accuracy while still protecting taxpayer confidentiality.⁴

Finally, much of the debate around the sharing or gig economy has focused on Uber and Lyft. This is understandable since these two companies have introduced a new business model into the economy that employs a large majority of all "gig" platform workers. They have also been the focus of high-profile legislation and litigation. Yet the focus is also unfortunate because it diverts attention from the large number of other matching platforms that are pursuing different business models to connect buyers and sellers of various services and goods. A few platforms, such as Hello Alfred, hire their workers as employer. Most, however, classify their workers as independent contractors. Some platforms seek to offer a new service that consumers could not previously get. Others try to do a better job of connecting consumers and providers for traditional services like plumbing and legal advice. The platform may or may not become involved in specific activities such as setting prices, handling payments, maintaining a ratings system, or training workers. Platforms also differ in the amount of flexibility that they give workers to determine when they will work and which jobs to take.

The second consideration that shapes our approach to this issue is that task matching Internet platforms are delivering tremendous value to both consumers and workers. A survey of Uber drivers showed that the vast majority are happy working for the company.⁵ They greatly value the flexibility in terms of when and how much to work. This is reflected in significant variability in the number of hours worked per week. They also seem happy with the pay. One indication of this is that only seven percent of Uber drivers work more than 50 hours a week compared to 35 percent of taxi drivers. A second survey of over 4,600 workers from 11 platform companies found that 54 percent were highly satisfied with their on-demand job.⁶ Only 7 percent said they were dissatisfied. Sixty-three percent reported that they were happier because they were with an on-demand platform, in fact 33 percent work for more than one platform. Eighty-one percent said they would probably or definitely continue working with the platform for at least the next year. Half of the workers agreed that they would not go back to relying solely on a traditional job. Workers earned an average of \$7,900 over the last 12 months, accounting for 22 percent of their total household income. The average hourly earnings was \$28. For the large portion of workers who would be on their own anyway, platforms can offer an efficient way to advertise their services, build a reputation, and find work between projects.

⁴ Luke Stewart, "We Have a Sharing Problem," Information Technology and Innovation Foundation Innovation Files blog, June 13, 2012, <http://www.innovationfiles.org/we-have-a-sharing-problem/>.

⁵ Jonathan Hall and Alan Krueger, "An Analysis of the Labor Market for Uber's Driver-Partners in the United States."

⁶ "Dispatches from the New Economy: The On-Demand Workforce and the Future of Work," Intuit and Emergent Research, January 28, 2016, <http://www.slideshare.net/IntuitInc/dispatches-from-the-new-economy-the-ondemand-workforce-57613212>.

Gig platforms also deliver tremendous benefits for consumers. Buyers are able to find reliable workers at a competitive price. Rating systems give them some assurance of both the quality and safety of the work that will be done. A recent survey of five cities showed that Uber drivers were 30 to 50 percent more efficient than taxi cabs in terms of either time spent working or miles driven.⁷ This allows them to earn more per hour even while charging the rider less. Platforms are also much more likely to help underserved areas of the market. Because of these benefits, the spread of platforms should be encouraged not resisted.

The third consideration is that the traditional employee-independent contractor distinction no longer serves much purpose for a growing share of today's labor market. It is a relic of common law torts used to determine whether a person should be held responsible for the negligence of someone who works for another.⁸ Because this question hinges on the details of control in the relationship, courts have developed a highly subjective, multi-factor test that offers very little guidance to future companies and their workers, especially in an economy that is increasingly fluid and diversified.

Largely by default, the common law test has become the basis for determining whether all of the major federal and state labor laws apply. The result is a large amount of uncertainty and litigation, much of it serving no purpose other than to confuse and delay hiring decisions. Worse, the possibility that any discretionary support given to workers will be used to classify the work as an "employee," thereby invoking the full panoply of labor laws, whether or not they make sense in a given work relationship, discourages companies from supporting gig economy workers and consumers in a large variety of ways.

Absent the threat of labor litigation we would expect employers to support their workers whenever the cost of doing so is less than its value to workers. Some of the ways that companies have said that they would like to support the workers who use their platforms include training, business advice, recordkeeping, financial advice, and tax assistance. Such efforts could be enormously valuable to workers, who after all are now for all intents and purposes running their own businesses. In addition, these companies could add value to both workers and consumers by setting prices, handling transactions, letting parties rate each other, and conducting background checks. Yet such activities are often used as evidence that companies have created an employer-employee relationship.

Within the tax field, help with tax advice, recordkeeping, and withholding could be especially important. The tax laws are enormously complex. Workers need to make a number of important decisions including what form of business to create, whether to set up a new savings plan such as a SEP-IRA, how much to withhold, what salary to pay themselves, and how much to save. They need to determine what expenses are deductible and begin keeping the necessary records. And they need to complete their tax filings in a timely manner. In

⁷ Judd Cramer and Alan B. Krueger, "Disruptive Change in the Taxi Business: The Case of Uber, NBER Working Paper No. 22083, National Bureau of Economic Research, March 2016, www.nber.org/papers/w22083.

⁸ Richard R. Carlson, "Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying," *Berkeley Journal of Employment & Labor Law* 22, no. 2, September 2001, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1301&context=bjell>.

the Intuit survey referenced above, 20 percent of on-line workers listed understanding tax and legal obligations as one of their top challenges.⁹ There are many ways that platform companies could help. I suspect that in many cases, it will be fairly simple for the platform to alter its payroll system to withhold taxes from workers who do more than a threshold amount of business with them. This would substantially reduce the administrative burden on workers and could result in a larger percentage of taxes owed being paid.

Existing law is less than optimal. With respect to tax laws, companies have a legal obligation to report the income of their employees to the Internal Revenue Service (IRS) and to withhold income taxes and the employee's share of payroll taxes. They must also pay the employer's share of the payroll tax, although it is widely recognized that this cost is passed on to employees in the form of lower take-home wages. Finally, employers must pay unemployment taxes for their employees, even if the worker is a household worker who works for 10 or more households a month. No similar obligation exists with respect to independent contractors.

This distinction raises several issues. The first is the desirability of drawing a clear line between employees and independent contractors. The guidelines of distinguishing between a worker and an employee are set out in IRS Publication 15-A.¹⁰ Today's labor market is distinguished by a broad spectrum of arrangements between these two poles with individual work arrangements characterized by literally dozens of factors that can vary not only from worker to worker but also can change with respect to individual workers over time. For instance, experienced workers might be given much more flexibility and discretion than beginners. They might also qualify for more benefits. Tax law tries to reflect this complexity by looking at the details of the work relationship. IRS Publication 15-A lists eleven criteria divided into three categories, essentially incorporating the common law liability test. None of these look at the intention of the two parties.

Because of its fact-based nature and the subjectivity of many of the criteria, the guidelines give little guidance to either companies or workers. Despite the fact that reasonable people can easily disagree on how the law applies to specific cases, the penalties for misclassification are significant. Besides resulting in significant uncertainty, litigation, and administrative costs, the guidelines actually give companies perverse incentives. For example, a company's decision to give its workers vacation pay or insurance or to take efforts to reduce turnover would make it more likely that the IRS would classify the worker as an employee. As such, gig platforms are provided an incentive to do little other than pay the gig worker. Clearer thresholds could eliminate this confusion while improving tax collection.

Second, it is not clear why so many of the obligations are bundled in an all or nothing form. For example, why, if we want a company to withhold and pay taxes on behalf of its workers, should we also automatically decide that the workers are now entitled to form a union, receive family leave or be entitled to a minimum wage? Conversely, if we decide that a person should not have these tax burdens, why does that automatically mean that discrimination laws do not protect the worker? With respect to tax laws, it would seem to make

⁹ "Dispatches from the New Economy: The On-Demand Workforce and the Future of Work."

¹⁰ Internal Revenue Service (IRS), "Publication 15-A: Employers' Supplemental Tax Guide," Department of the Treasury, 2016: 7–10, <https://www.irs.gov/pub/irs-pdf/p15a.pdf>.

more sense to draw bright lines that everyone could understand. We may not want to burden individuals with the need to calculate and withhold taxes for their baby sitters, figuring that in most cases the consumer is no better positioned to perform this administrative work than the worker and that relieving the consumer of this burden also relieves the worker of the danger that the individual will misappropriate the taxes. Similarly, if a company only pays someone \$500 over the course of a year, withholding may introduce more complexity than we need. On the other hand, if a company is paying a worker more than \$5,000 over the course of a year and is also paying at least four other people that much money, the company is probably in a better position to do the withholding than are any of its workers, irrespective of the details of the particular work arrangement. But once we have decided on these thresholds, why would we also adopt them for the purpose of other federal and state labor laws?

Public policy should encourage companies to support their workers' careers, irrespective of their work relationship. If a company offers withholding to all workers, or pays for access to tax or business advice, why would we want to discourage that by insisting that it must also be subject to minimum wage, collective bargaining, and unemployment insurance legislation if those workers are not clearly employees rather than contractors?

In a recent ITIF report, I argue that there are three approaches that Congress can take to begin modernizing the nation's labor laws.¹¹ The best option would be for Congress to amend each federal labor law by throwing away the common law test and replacing it with a clearer one specific to that particular piece of legislation. The exact scope of coverage should probably depend on the purpose of the statute, the size of the two contracting parties, the intention of the parties, which side is best equipped to fulfill the underlying social goal, and the desirability of a clear line. I have suggested some ways that these criteria might be satisfied in tax law. Even though the amendment of each law could proceed separately, I recognize that updating major legislation is a tall order for Congress.

The second approach is to define a third category of workers somewhere between employee and independent contractor. This is the approach Seth Harris and Alan Krueger take in their report for the Hamilton Project. The downside of this approach is that courts now have to distinguish between three classes rather than two. It also requires Congress to amend the existing labor laws in order to make it clear which laws would apply to the third category. In this case, however, it would be much more difficult to amend each law separately.

Finally, Congress could give platforms devoted to personal services a temporary exemption from most labor laws. The workers of many of these platforms are clearly independent contractors anyway. The small size of the gig economy and the temporary nature of the exemption reduce any risk to the broader labor markets. The platforms should have to serve a broad section of the public and give workers significant freedom to choose when and for whom to work. In return Congress would see whether companies stepped up to offer their workers more support. If most did not, the legislation could be allowed to expire on its own. If they did, then hopefully the gig economy could serve as a model for the larger variety of alternative work arrangements.

¹¹ Joseph V. Kennedy, *Three Paths to Update Labor Law for the Gig Economy*, Information Technology and Innovation Foundation, April 2016, <https://itif.org/publications/2016/04/18/three-paths-update-labor-law-gig-economy>.

The world around us is rapidly changing. We see this in the technology we use, our expectations of the private sector and government, and in our economy, including the labor market. Work arrangements will continue to diversify as companies respond, changing competition and new technology and as new generations of workers replace the Baby Boomers. Congress cannot dictate the shape of future work arrangements. It can, however, play a large role in helping workers get the kind of support they need to have rewarding careers that fit into their lives and allow them to accumulate the resources needed for a good life.

Thank you again for this opportunity to appear before you today.



April 13, 2016

The Honorable Orrin Hatch
Chairman
Committee on Finance
United States Senate
Washington, D.C. 20510

The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate
Washington, D.C. 20510

Re: Mark-Up of Legislation Affecting IRS Administration

Dear Chairman Hatch and Ranking Member Wyden:

The Coalition for Effective & Efficient Tax Administration (CEETA) asks that you include in any mark-up of legislation affecting IRS operations a "Taxpayer Bill of Rights" title addressing certain IRS examination practices discussed below. CEETA's mission is to promote constructive administrative changes and legislative solutions to inefficiencies in the IRS audit process. CEETA comprises 14 trade associations and taxpayer groups, representing a broad cross section of industries and publicly and privately owned companies. A detailed description of CEETA's membership and policy positions can be found at <http://eetax.org>.

CEETA is concerned about the IRS's increasing use of confrontational litigation tactics during an audit. CEETA has identified several key IRS examination practices that are viewed as inappropriate by the taxpayer community and that would benefit from Congressional intervention and oversight:

1. Denying taxpayers access to an impartial review of their case by the IRS Appeals Office. The IRS Restructuring and Reform Act of 1998 requires that the Commissioner of Internal Revenue ensure the availability of an impartial Appeals Office function. However, the IRS has afforded to itself the sole discretion to permit or deny taxpayers access to the Appeals Office by "designating a case for litigation," preventing a review by the Appeals Office prior to litigation. We request that a "Taxpayer Bill of Rights" title include a provision affording taxpayers the right to an independent review of the examination division's proposed adjustments by the IRS Appeals Office in most cases.
2. The IRS's use of a designated summons against a fully cooperative taxpayer to unilaterally extend the statute of limitations. By issuing or threatening to issue a designated summons, the IRS sidesteps the time allowed by law for completing an audit or coerces a taxpayer into agreeing to a statute extension. We ask that a "Taxpayer Bill of Rights" title include a provision limiting the use of designated summonses to cases where a taxpayer has been uncooperative.

3. The IRS's retention of private sector lawyers to conduct IRS examinations. Retaining outside lawyers to conduct audits of private taxpayers is unprecedented in the history of the IRS. At least one court has stated that it is "troubled" by the practice, noting, "The idea that the IRS can 'farm out' legal assistance to a private law firm is by no means established by prior practice, and this case may lead to further scrutiny by Congress." We ask that a "Taxpayer Bill of Rights" title include a provision limiting the use by the IRS of outside lawyers in the conduct of taxpayer audits.

CEETA urges that the Finance Committee address these IRS examination practices in a fair and bipartisan manner via a "Taxpayer Bill of Rights" title in any future legislation affecting IRS operations, balancing the IRS's need to conduct thorough examinations with a taxpayer's right to have examinations completed on a timely basis and impartially reviewed by the IRS Appeals Office prior to incurring the damaging economic and reputational costs of litigation.

Sincerely,

ACT | The App Association
 Council for Citizens Against Government Waste
 Entertainment Software Association
 Financial Executives International
 Information Technology Industry Council
 National Association of Manufacturers
 National Foreign Trade Council
 National Taxpayers Union
 Retail Industry Leaders Association
 Small Business & Entrepreneurship Council
 Software Finance and Tax Executives Council
 TechNet
 U.S. Chamber of Commerce

Statement for the Record

by

Coalition to Promote Independent Entrepreneurs



The Sharing Economy: A Taxing Experience for New Entrepreneurs, Part I

before the

Small Business Committee
U.S. House of Representatives

May 24, 2016

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The Coalition to Promote Independent Entrepreneurs (the “Coalition”) respectfully submits this Statement for the Record concerning a May 24, 2016, hearing before the House Committee on Small Business that addressed “The Sharing Economy: A Taxing Experience for New Entrepreneurs.” The Coalition consists of organizations, companies and individuals supportive of an individual’s right to work as an independent entrepreneur.

We appreciate the opportunity to submit this statement setting forth our views on the critically important issue as to whether the technological advances giving rise to what is commonly referred to as the “sharing economy” would justify the creation of a new third status of worker. For the reasons set forth below, we believe the creation of such a new third status of worker would create more problems than it would solve, and that a higher priority at this time should be a harmonization of the definition of covered “employee” for purposes of all federal statutes.

The Deceptive Allure of a New Third Status of Worker

Technological advances have been disrupting business for as long as technology has been advancing. A recent example is the disruption caused by a technological advancement giving rise to the ride-sharing industry, as exemplified by Uber and Lyft. The technological advancement that enabled the creation of these businesses consists generally of a technology platform through which buyers and sellers of a specific type of service can connect with each other, and do business with each other, on a nearly instantaneous basis.¹

This new business model, commonly known as a “sharing economy” or “gig economy” business model, is not limited to transportation; it is now operated in many different industries.² It has caused some to question whether the current laws for determining whether an individual is an employee or independent contractor are too antiquated to appropriately determine the status of an individual who chooses to utilize this business model to obtain access to client opportunities.

Ironically, this business model has existed for many decades.³ What is new is the use of advanced technology to make the business model operate more efficiently. The fundamental relationship between an “intermediary” and an individual who uses the intermediary to gain access to client opportunities remains largely the same – regardless of the extent to which the intermediary is technologically enhanced.

The arguably most profound market disruption caused by the ride-sharing innovation has little to do with the independent-contractor status of drivers. Many taxicab and limousine companies have for years operated with independent-contractor drivers.⁴ The most disruptive aspect of the ride-sharing businesses is its entry into the highly regulated local-transportation market, resulting in the regulated sector of this market now having to compete against a new type of business that is completely unregulated.

It follows that any proposals concerning worker status intended to mitigate the disruption to the local-transportation market caused by Uber and Lyft would be misdirected. Moreover, the collateral damage that would result from an effort to address the Uber and Lyft market disruptions by changing the rules governing

¹ As will be discussed below, the basic business model that facilitates the matching of buyers and sellers of a specific type of service has existed for many decades. What makes this new iteration different is its ability, through the use of new technology, to accelerate the matching process so that it occurs nearly instantaneously.

² See, e.g., *Thanks for Sharing: A Sourcebook for the Gig Economy*, Joint Economic Committee, (Mar. 21, 2016), available at http://www.jec.senate.gov/public/_cache/files/26c9a98a-6a13-4fa8-8e6e-f4a5d9a19430/sharing-economy-sourcebook.pdf.

³ In home care, for example, a nurse registry, which functions as an intermediary for matching caregivers with families, has been licensed in the State of Florida since 1947.

⁴ See, e.g., Rev. Rul. 71-572, 1971-2 C.B. 347, 1971 IRB LEXIS 253 (1971); Priv. Ltr. Rul. 8905040 (Nov. 7, 1988).

worker classification would be dramatic, widespread and harmful to the affected individuals and affected intermediaries.

It is submitted that the creation of a new third category of worker status – regardless of the reason – is fundamentally inadvisable. A new third status would create more problems than it would solve, and its principal effect would be to deny legitimate self-employed individuals access to a technologically supercharged intermediary through which they can efficiently gain access to client opportunities. It would force individuals who do business with such an intermediary into a type of work relationship that they affirmatively chose to avoid,⁵ and would convert intermediaries into a very different type of business, which their owners did not choose to operate.

A policy proposal for the creation of a new third status that has attracted significant attention is a thoughtful proposal, titled *A Proposal for Modernizing Labor Laws for Twenty-First Century Work: The "Independent Worker"* (Dec. 2015)⁶ by Seth D. Harris and Alan B. Krueger on behalf of The Hamilton Project.⁷ This proposal will be the focus of the discussion that follows.

I. The Proposed New Third Category of Worker Status

The proposal recommends the enactment of federal and state legislation to define and establish a new third category of workers called *independent workers*. These workers would be accorded certain protections and benefits that would approximate the social compact⁸ guaranteed to employees. The proposal is clear that independent workers would be treated for purposes of specified statutes as employees.

The authors define this proposed new category of *independent workers* broadly: as individuals who operate in a triangular relationship under which they provide services to customers identified with the help of *intermediaries*.⁹ For these purposes, an *intermediary* would be defined generally as an entity, interposed between an independent worker and the ultimate customer, which helps facilitate a matching of the independent worker with the customer.

⁵ See, e.g., A survey conducted by Crowded.com – a marketplace for on-demand workers – found that 80.2% of respondents want the 1099 (independent contractor) designation, while only 11.72% prefer W-2 (employee) status. SURVEY: ON-DEMAND WORKERS WANT 1099 STATUS, NOT W-2 CLASSIFICATION (Jan. 15, 2016), <https://www.crowded.com/survey-on-demand-workers-want-1099-status-not-w2-classification/>; Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 11 (2015), https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Krueger_2015.pdf (Uber drivers were asked, "If both were available to you, at this point in your life, would you rather have a steady 9-to-5 job with some benefits and a set salary or a job where you choose your own schedule and be your own boss?" 73% chose the latter – self-employment).

⁶ Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing labor Laws for Twenty-First Century Work: The "Independent Worker,"* (hereinafter the "Proposal") available at http://www.hamiltonproject.org/papers/modernizing_labor_laws_for_twenty_first_century_work_independent_worker.

⁷ THE HAMILTON PROJECT, <http://www.hamiltonproject.org/about/>.

⁸ The term "social compact" is a term the authors of the Proposal use to describe what they characterize as a "synthesis" to which the United States labor and employment laws have evolved "between the desire to enhance the efficiency of the operations of the labor market ... and to ensure that the employment relationship treats workers fairly in light of the unequal bargaining power that typifies most employee-employer relationships." Proposal, at p. 6.

⁹ *Id.* at 9.

II. Authors' Rationale for Change

A. Current Law Creates Uncertainty Over Worker Status

One of the problems with current law that the proposal identifies, and seeks to address, is that current labor and employment laws are not harmonized or applied consistently for purposes of determining worker status.¹⁰ The authors note that different statutes tend to define the term “employee” differently, depending upon the purpose a particular statute is intended to achieve. As a consequence, an individual could qualify as an independent contractor for purposes of one statute, e.g., the Internal Revenue Code, but not another, e.g., the Fair Labor Standards Act, because each of these statutes defines the term “employee” differently. The proposal recognizes that the existence of these different tests, that apply for different purposes, create economic inefficiencies for all parties concerned.¹¹

Another problem the proposal seeks to address is the uncertainty associated with determining the status of an individual under the current tests, themselves, which can lead to long and costly litigation. The authors believe this problem is exacerbated by the tribunals responsible for making these decisions being influenced by factors other than the operative test, noting that “[a]s a practical matter, in too many cases conclusions are driven by a predetermined desired outcome rather than by objective analysis.”¹²

B. Ability to Pool Benefits for Contractors and Expand the Social Compact

One social objective the proposal seeks to accomplish is an expansion to independent workers of what the authors refer to as the “social compact.”¹³ This expansion would allow independent workers to gain the advantages associated with obtaining benefits on a pooled basis, rather than on an individualized basis. In addition, the proposal would expand coverage under specified state and federal laws – that currently cover only employees – to also cover independent workers.

C. Risk that Companies Convert Traditional Employees into Independent Workers – Regulatory Arbitrage

A final objective the proposal would seek to accomplish is to establish a bulwark against employers converting traditional employees into sharing-economy workers and thereby avoid their “social compact” obligations. The authors refer to this risk as *regulatory arbitrage*.¹⁴

III. Firms that would be Affected by the Proposal

The proposal defines an *intermediary* as an entity through which independent workers gain access to end-user customers. The proposal identifies numerous characteristics of an intermediary that uses technology to match customers with independent workers.¹⁵ By application of a “neutrality” principle and a principle of

¹⁰ *Id.* at 6.

¹¹ *Id.* at 5-6.

¹² *Id.* at 6.

¹³ *Id.* at 6-7.

¹⁴ *Id.* at 5.

¹⁵ The characteristics of an intermediary are:

- An intermediary creates a communications channel, commonly called an “app” that customers use to identify themselves as needing a service.
- The intermediary’s app directs the customer’s request to independent workers and allows the independent workers to select which customers they choose to serve.
- The intermediary does not assign customers to independent workers; rather, independent workers choose or decline to serve customers.
- An intermediary may set certain threshold requirements for independent workers who are eligible to use its app, such as

treating like cases alike,¹⁶ which the authors adopt, the proposal would treat as an intermediary any entity that performs the generic function of matching service providers with service recipients, regardless of whether the entity uses any technology.¹⁷ This means that the term *intermediary* would include not only the new technologically enhanced market intermediaries, but also those that have operated for decades with varying degrees of technology.

An *intermediary* would be responsible under the proposal for ensuring that the *independent workers* who obtain customers through it receive the new social-compact benefits that the proposal would grant them.

IV. Proposed Treatment of Independent Workers

The proposal discusses the treatment of an *independent worker* for purposes of the following employment-based rights and duties:¹⁸

- (a) Collective bargaining;
- (b) Employee benefits;
- (c) Civil rights protections;
- (d) Tax withholding and FICA contributions;
- (e) Workers' compensation;
- (f) Wage and hour protections;
- (g) Unemployment insurance; and

criminal background checks.

- The intermediary may set the price for services provided by the independent worker.
- The intermediary exercises no further control over how and whether a particular independent worker will serve a specific customer.
- The intermediary typically is paid for its services with a predetermined percentage of the fee the customer pays to the independent worker.
- The relationship can be fleeting, occasional or constant, at the discretion of the independent worker.
- An independent worker may offer his or her services through multiple intermediaries.
- Independent workers are integral to the business of the intermediary; the intermediary business lives or dies by the provision of services by independent workers.
- Independent workers do not make themselves economically dependent on any single employer.
- Independent workers do not have an indefinite relationship with any employer.
- Independent workers do not relinquish control over their work hours or the opportunity for profit or loss.
- Some aspects of the methods and means of work – including price of their services – are controlled by the intermediary.

¹⁶. *Id.* at 14 (“Neutrality also requires that workers in ‘old economy’ jobs who meet the definition of independent worker, as opposed to independent contractor or employee, should be classified as ‘independent workers.’ For example, as argued in the analysis below, many taxi drivers who are currently classified as independent contractors could be deemed to be independent workers, depending on their terms and conditions of work. In this way, taxi drivers would be treated just like independent workers who provide rides through the Uber and Lyft platforms.”); *Id.* at 22 (“Our view is that the application of our proposed independent worker category should not be limited to the online gig economy. In fact, the very nature of law—treating like cases alike—requires that this new category include any group of workers who satisfy the definition of independent workers we offered above. Accordingly, if there are workers in triangular relationships with intermediaries and customers, then they should be considered for independent worker status.”); *Id.* at 23 (“Furthermore, assigning a similar legal status to workers in the same relationship with an intermediary, regardless of the nature of the technology employed, will support the neutrality principle.”).

¹⁷. *Id.*

¹⁸. *Id.* at 15.

(h) Affordable care act and health insurance.

In essence, the proposal would treat an *independent worker* substantially the same as an employee for purposes of each of the foregoing, except (e), (f) and (g).¹⁹ The proposed treatment of an independent worker for each of these purposes is described below.

A. Collective Bargaining

The proposal recommends that antitrust laws, or the National Labor Relations Act, be amended “to allow independent workers to organize for the purpose of aggregating their bargaining power so they may bargain successfully with their intermediaries over the terms and conditions of their work,”²⁰ and thereby influence their compensation and benefits.²¹

B. Employee Benefits

The proposal recommends that intermediaries be covered by a safe-harbor provision that would permit (but not require) them to pool independent workers for purposes of purchasing, providing or administering for them specified types of benefits and services²² without such action being treated as an indication of an employment relationship. The proposal asserts that this would permit independent workers to gain access to a range of benefits at a lower price.²³

C. Civil Rights Protections

The proposal recommends expanding the coverage of workplace antidiscrimination protections to cover independent workers.²⁴

D. Tax Withholding and FICA

The proposal recommends requiring intermediaries to withhold and remit to the appropriate tax authorities the income and social-insurance taxes owed by independent workers with respect to the remuneration they receive.

In addition, the proposal would require that an intermediary pay the “employer share” of Federal Insurance Contributions Act (“FICA”) taxes with respect to their remuneration.²⁵ This would replace an

¹⁹ The proposal, if adopted, would create a new “slippery slope” risk that the employment-related statutes from which independent workers initially would be exempt under the proposal would over time gradually be expanded to cover them. In this regard, a recent precedent supporting this concern is the fate of home care workers. When the Congress amended the FLSA in 1974 to cover domestic workers, it exempted providers of companionship services. During the years that followed, a campaign was undertaken to extend FLSA coverage to companionship services providers. Although the Congress refused to amend the FLSA to repeal the exemption, the DOL in November 2013 accomplished a de facto repeal of the exemption through regulations. See, *Application of the Fair Labor Standards Act to Domestic Service*, 78 FR 60454 (Oct. 1, 2013). In this regard, the advocacy already has begun for the proposition that this proposal does not go far enough, and that coverage under the Fair Labor Standards Act should be expanded to include independent workers. See, Ross Eisenbrey and Lawrence Mishel, *Uber business model does not justify a new ‘independent worker’ category*, ECONOMIC POLICY INSTITUTE (Mar. 2016).

²⁰ Proposal, at p. 15.

²¹ *Id.* at 6.

²² Cited examples of the services that could be offered include insurance services, tax preparation services and financial services. *Id.* at 17.

²³ *Id.*

²⁴ *Id.* at 17-18.

²⁵ *Id.* at 18.

independent worker's duty to pay Self Employment Contribution Act ("SECA") taxes with respect to such remuneration.

The proposal asserts that tax withholding by intermediaries would reduce the administrative burden imposed on independent workers associated with paying their income and social insurance taxes;²⁶ and that, given the economies of scale, the intermediaries could provide these services with more economic efficiency and at a higher compliance rate than the independent workers could if left to comply with these duties on their own.²⁷

E. Workers' Compensation Insurance

While the proposal would not mandate that an intermediary provide independent workers with workers' compensation coverage, it would permit an intermediary to provide such coverage, on an elective basis, without transforming the relationship into employment. In exchange for providing such coverage, an intermediary (but not the end-user client) would receive the limited liability protection from tort lawsuits that is currently offered to employers that provide the coverage.²⁸

F. Wage and Hour Protections

The proposal does not recommend that independent workers be covered by the overtime or minimum-wage requirements that the Fair Labor Standards Act imposes on an employer with respect to its employees.²⁹ This decision was based in part on the difficulty of measuring hours worked by an independent worker. The proposal recommends that these matters be the subject of collective bargaining with an intermediary.³⁰

G. Unemployment

Acknowledging that independent workers control when and whether they will work, the proposal does not recommend extending coverage to independent workers under federal or state unemployment insurance programs.³¹

The proposal would encourage and permit intermediaries to pool resources and create a private unemployment insurance system in which individual accounts could be created for independent workers who stop working. Such a system, the proposal notes, could be a subject of collective bargaining between independent workers and intermediaries.³²

H. Affordable Care Act

The authors conclude that determining eligibility for the employer mandate under the Affordable Care Act ("ACA") and for coverage under its mandate would be problematic, due to the difficulty of measuring the number of hours that independent workers work. Nonetheless, the proposal recommends that intermediaries be required to pay a contribution equal to five percent (5%) of an independent worker's earnings (net of commissions).³³ This payment would be intended to address the *free rider dilemma* that the proposal suggests

²⁶. *Id.*

²⁷. *Id.*

²⁸. *Id.* at 19-20.

²⁹. *Id.* at 20.

³⁰. *Id.*

³¹. *Id.*

³². *Id.*

³³. *Id.* at 20-21.

arises when companies contract with nonemployees and are not subject to the same ACA compliance burden as employers.³⁴

V. Comments and Concerns

A. Lack of Harmonized Definition of Employee

The authors bring much-deserved attention to a fundamental problem of current law, namely, the lack of a harmonized definition of “employee” for purposes of federal and state laws.³⁵ But the authors’ proposed new third category of worker status would only exacerbate the level of disharmony and confusion by treating self-employed individuals who obtain clients through an intermediary as employees for some purposes, but not others.

To achieve a harmonized definition of “employee,” it would seem that a better approach would be to amend the relevant laws so that they all follow the same definition for the term. In this regard, the most appealing definition of “employee” for achieving harmonization is the common-law, right-of-control, test. As its name implies, this is the test that applies in the absence of a statute. It also is the test that applies for purposes of many statutes at this time.³⁶

A related concern that the proposal seeks to address is the possibility that companies working with intermediaries could organize work in such a way as to convert jobs that were traditionally performed by employees into sharing-economy jobs.³⁷ The authors suggest that companies would have an incentive to do this in order to avoid their social-compact responsibilities.³⁸ The authors call this *regulatory arbitrage*. This concern does not appear to take into account the fact that the intermediary business model has existed for many decades. If the authors’ fears were real, the *regulatory arbitrage* about which they are concerned already would have occurred, as the intermediaries that preexisted the technologically enhanced versions were fully capable of accomplishing this.

It is submitted that the best defense against the threat of *regulatory arbitrage* is for all relevant statutes to adopt the common-law, right-of-control test for determining worker status. One of the strongest attributes of the common-law test is that it requires a company to make a fundamental business decision that will determine the status of an individual as an employee or independent contractor. If a company retains the right to control the means and methods of an individual’s performance, the individual will be an employee; and only if the company is willing to define the objective, and permit an individual to determine the manner and means for accomplishing the objective, can the individual qualify as an independent contractor. Facing this common-law choice, a company would be disinclined to outsource to a sharing-economy worker any function over which it is not prepared to abdicate control.

The common-law, right-of-control test is agnostic as to whether the requisite right of control is retained through technology or some other means. If a firm retains the requisite right of control over the means and methods of an individual’s performance, the firm is deemed the employer of the individual – regardless of whether the right of control is achieved through the use of technology.

³⁴ *Id.* at 21.

³⁵ See, Exhibit 1 for a table illustrating the different definitions of the term employee for different purposes.

³⁶ The common-law right-of-control test applies for purposes of, among others, federal employment taxes, the Affordable Care Act, the Employee Retirement Income Security Act of 1974, the National Labor Relations Act, the Federal Tort Claims Act, and state tort law. A more complete list is provided in Exhibit 1.

³⁷ Proposal, at p. 5, 7.

³⁸ *Id.* at 14.

It follows that instead of creating a new test that exacerbates the current disharmony as to the definition of the term “employee,” consideration should be given to harmonizing the general test for “employee” for purposes of the relevant statutes, so that they all define the term “employee” the same. A harmonized general test would achieve greater certainty for all parties. The common-law, right-of-control test would be a prudent choice in this regard, as it provides a clear substantive trade-off that differentiates the two classes of individuals based on a business’s right of control over the means and methods of an individual’s performance, and it is the test that applies in the absence of any statute.

B. Dramatic Expansion of the “Employee” Classification

While the authors claim to “propose a new legal category of workers, which [they] call ‘independent workers,’ who occupy a middle ground between traditional employees and independent workers,”³⁹ the proposed new category is anything but a “middle ground.” It would represent an unprecedented expansion of the definition of “employee” for purposes of affected statutes.

The proposal would expand the “employee” category for purposes of certain statutes to also include anyone who obtains clients through an intermediary. Coverage under affected statutes would remain binary; an individual still would either be covered (if an employee) or not (if an independent contractor). The proposal would simply convert a large swath of independent contractors into employees for purposes of specified statutes.

Under the proposal, an individual could no longer qualify as self-employed for the specified purposes if the individual engages an intermediary for assistance in identifying client opportunities. While this approach would eliminate any uncertainty under the current tests, the uncertainty would be eliminated by obviating the need for any test at all. It would simply treat all these individuals as statutory employees for purposes of the affected statutes. The uncertainty could just as easily be eliminated by making the individuals statutory independent contractors. While the authors apparently believe the individuals would be better off as employees, the affected individuals do not appear to share that belief.⁴⁰

It is submitted that individuals should not be denied the right to choose whether to offer their services as employees or as independent contractors. Those who freely choose self-employment should not forfeit their right to be self-employed simply because they engage a third-party firm to assist them in finding client opportunities.

C. Accomplishing That which the Proposal Concedes would be Destructive

The authors acknowledge that:

Forcing these new forms of work into a traditional employment relationship could be an existential threat to the emergence of online-intermediated work, with adverse consequences for workers, consumers, businesses, and the economy.⁴¹

Yet this is precisely what the proposal would accomplish; it would treat self-employed individuals who also satisfy the *independent worker* definition as employees for purposes of specified statutes. Moreover, because this proposal would not be confined to technology-based intermediaries, the “existential threat” the authors caution against would extend to all intermediaries, regardless of whether they utilize any technology.

³⁹. *Id.* at 5.

⁴⁰. *See*, above, note 5.

⁴¹. *Id.* at 8.

Many of the intermediaries that currently exist in various industries have existed for many decades. These entities provide a function that can be of immense value to the service recipients and service providers that use them. For example, an intermediary can:

- add efficiency to a disaggregated marketplace in which providers of a specific service cannot easily find potential buyers of that service, by offering access to a centralized marketplace that enables service providers to quickly and easily find potential customers who seek to buy their services;
- assist customers who seek providers of a specialized type of service to perform very short-term engagements within a short time period in different geographic areas, by enabling a customer to simultaneously offer its opportunities in every geographic location where it needs the engagement completed, to independent contractors who are already at those locations and possess the skills needed to perform the project;
 - o in some cases, the intermediary will accept from the customer a lump sum payment for all independent contractors who complete a customer engagement during a specified time period and disburse that payment to the appropriate independent contractors on the customer's behalf;
- offer customers on-demand access to previously background-screened and credential-verified providers of a certain type of service, which can be critically important to customers who will be engaging an individual to perform services for, and be left alone with, a vulnerable individual, and to customers who need access to highly credentialed individuals on short notice to provide services on a sensitive project;⁴² and
- offer individuals who choose to work on an ad hoc basis, at their own discretion, and only at a time, location and for a fee they deem acceptable, with access to a wide variety of different client opportunities.

In all of these examples, the providers of the service are self-employed; they use an intermediary as a means to help market their services and, in some cases, to supplement their own client base. These intermediaries are not designed to function as an employer; they are designed to facilitate a more efficient marketplace for freelance workers. The imposition of employer duties on these intermediaries would fundamentally change the nature of their business and, in the words of the authors, expose them to an “existential threat.”

D. Distorting the Decision by Independent Contractors Whether to Outsource Marketing

The proposal would be patently unfair to those individuals who prefer to be self-employed and have determined that they can maximize their profits by engaging a third-party firm, namely, an intermediary, to help them find clients. The use of intermediaries enables these individuals to devote all of their work time to providing billable client services. The alternative is for them to devote a portion of their work time to marketing, which, of course, is non-billable.

While there is a cost associated with outsourcing one's marketing function, an individual will balance that cost against the billable time that is forgone when the individual conducts his or her own marketing. It is an entrepreneurial decision whether to conduct one's own marketing or outsource all or a portion of it to a

⁴². An intermediary that only accepts to its registry those service providers who have passed a rigorous vetting protocol provides an invaluable service to those service providers and their clients by adding efficiency to the marketplace – especially when the clients are individual consumers. Instead of each consumer having to separately vet each service provider, the vetting need only be conducted once by the intermediary for the benefit of all consumers. If these firms were eliminated from the marketplace, this valuable source of consumer protection would be lost, leaving consumers more vulnerable to charlatans and to contractors with a disqualifying criminal past.

services referral agency/broker/intermediary. Under current law, this decision is driven entirely by an individual's entrepreneurial judgment; it is not affected by any external government interference. The proposal would dramatically change that.

Under the proposal, an individual who elects to outsource marketing to an intermediary would forfeit his or her independent-contractor status for purposes of specified statutes. The individual would become a de facto employee of the third-party firm for those purposes. The individual could retain his or her independent-contractor status only by conducting his or her own marketing.

An overarching justification the authors offer for this proposed governmental interference is to ensure that self-employed individuals who gain access to clients through an intermediary are given the social compact benefits that the government has promised to employees. An implicit premise of the proposal is that self-employed individuals who work in the "sharing economy" and obtain clients through an intermediary do not actually want to be self-employed.⁴³ While some individuals arguably fit that description, the authors do not appear to consider the interests of the other cohort of self-employed individuals, which is larger, who affirmatively want to be self-employed and are content with their current status.

Numerous studies indicate that many self-employed individuals are very pleased with their status. The GAO found that in 2010, 56.8 percent of independent contractors reported that they were "very satisfied" with their jobs, while only 8.1 percent reported they were "not at all/not too satisfied."⁴⁴ By contrast, only 45.3 percent of full-time employees reported that they were "very satisfied" with their jobs, and 9.5 percent reported that they were "not at all/not too satisfied."⁴⁵

In addition to their high level of job satisfaction, 85.2 percent of independent contractors reported in 2005 that they did not want a different type of work arrangement, compared to only 9.4 percent who reported that they would prefer an alternative arrangement.⁴⁶ Furthermore, an Elance-oDesk/Freelance Union study found that 77 percent of freelancers reported that they believe the "best days of the freelance job market are still ahead."⁴⁷ The foregoing studies, which are consistent with past studies,⁴⁸ suggest that self-employed individuals are very satisfied with their choice of status. It is submitted that the interests of this cohort also needs to be considered, as it represents the millions of individuals who have affirmatively chosen to be self-

⁴³ The authors do not appear to acknowledge that the "sharing economy" now offers employment opportunities – for those who do not wish to be self-employed. See, e.g., MEET THE GIG ECONOMY COMPANIES THAT SEE INVESTING IN WORKERS AS A SMART BUSINESS STRATEGY (March 15, 2016), <http://www.ihetimes.com/meet-gig-economy-companies-see-investing-in-workers-smart-business-strategy-2336721> (discussing sharing economy companies that operate on an employee-based business model).

⁴⁴ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS, GAO-15-168R 24 (2015) available at <http://gao.gov/products/GAO-15-168R>. Accord, Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 3 (2015), https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Krueger_2015.pdf (A comprehensive analysis of Uber drivers found that "[h]istorically, independent contractors have preferred their working arrangements to traditional employment relationships, and this tendency appears to be continuing in the sharing economy.").

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ FREELANCING IN AMERICA: A NATIONAL SURVEY OF THE NEW WORKFORCE 7 (Elance-oDesk and Freelancers Union, 2014) available at http://fu-web-storage-prod.s3.amazonaws.com/content/filer_public/c2/06/c2065a8a-7f00-46db-915a-2122965df7d9/fu_freelancinginamericareport_v3-feb.pdf.

⁴⁸ See, e.g., Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy*, at 33 - 35 (Dec. 2010) ("Eisenach Study"), available at <http://www.igcoalition.org/wp-content/uploads/2014/07/Role-of-Independent-Contractors-December-2010-Final.pdf>.

employed and fully comprehend what self-employment entails. Many of these individuals have made the business decision to at least partially outsource their marketing function in order to enhance their profitability.

From a purely economic perspective, the proposal would materially distort the marketplace for self-employed individuals by making the option of outsourcing one's marketing function less attractive. Those who believe they can maximize their profits by outsourcing their marketing function might determine that the cost associated with forfeiting their independent-contractor status is too high. If these individuals were to begin conducting their own marketing, which would require them to allocate more time toward non-billable activities, their business could suffer and become less profitable.

Requiring a self-employed individual to forfeit self-employed status as a consequence of using a lawful marketing channel would be patently unfair to the individual.

E. Fundamentally Changing the Business Model for Service Referral Agencies / Brokers

The proposal likewise would be unfair to those third-party firms that operate marketing firms/brokers/services referral agencies/intermediaries, and have no interest in being the employer of the independent contractors with whom they do business. There are plenty of firms in the marketplace that hire individuals as the firm's employees and assign them to work opportunities that their clients offer.⁴⁹ These firms are designed to be the employer of the service providers. By contrast, the intermediaries that would be swept up by the proposal are a different type of business; and many are simply a marketing channel.

The proposal does not appear to take into account the financial and administrative burden that the proposal would impose on intermediaries. The business model for these entities does not contemplate the entity being an employer of the independent contractors whom they match with client opportunities. While it is not suggested that there are no intermediaries that misclassify workers, it is submitted that the mere fact that misclassification might exist is no justification for deeming all individuals who do business with an intermediary to be treated as statutory employees of the intermediary.

Many intermediaries have a very fleeting relationship with the individuals who use them to gain access to client opportunities.⁵⁰ For example, there are some industries in which an intermediary will offer self-employed individuals access to client opportunities of a very short duration, e.g., projects that can be completed in several hours, and the individuals who accept these opportunities might perform only a few opportunities in an entire year. These individuals commonly register with multiple intermediaries, to obtain access to a broad array of different types of opportunities. They retain complete and unfettered discretion to select which, if any, of the available opportunities to perform. When an individual initially registers with an intermediary, the operator of the intermediary commonly has no idea whether the individual intends to perform many opportunities or just a few – and has no business reason to inquire. Moreover, once an individual completes a client opportunity obtained through an intermediary and is paid, the individual has no obligation to ever utilize that intermediary again.

The additional administrative costs and heightened regulatory risks⁵¹ associated with an intermediary being treated as the employer for the specified purposes of each individual who utilizes the intermediary to

⁴⁹ E.g., Adecco, Kelly Services, S.A., Manpower, Inc., Randstad Holding N.V., Spherion Corporation, Allegis Group and Robert Half International, Inc.

⁵⁰ The proposal even acknowledges, at pages 7-8, that independent workers typically have only fleeting relationships with their final customers as well.

⁵¹ Once an entity is deemed to be the employer of an individual for purposes of a specific statute, the entity becomes responsible for properly and timely discharging its duties under the statute with respect to the individual, which in some cases can require compliance with highly prescriptive rules contained in voluminous regulations and related guidance. The entity also becomes

gain access to a client opportunity would be excessive. Such a mandate would fundamentally change the nature of these businesses. An important issue to consider in this regard is how many firms/brokers/services referral agencies/intermediaries that currently function as pure marketing channels would continue to operate if they are subjected to these proposed new duties.

F. Significantly Increasing the Complexity of Federal Tax Compliance

The proposal would create significant tax-compliance complexities for an independent worker. While the authors recommend imposing tax withholding on independent workers, they do not explicitly address how an independent worker would be treated for federal tax purposes in other respects.

A threshold issue, which the authors do not address, is whether an independent worker's earnings and corresponding tax withholdings would need to be reported by an intermediary on an Internal Revenue Service ("IRS") Form W-2, which is currently used to report wages earned by employees, together with taxes withheld, or a Form 1099-MISC, which is currently used to report self-employment income earned by independent contractors. In this regard, if the remuneration is to be reported on a Form W-2, this likely would dictate the independent worker's status for all other purposes as well, because, as a practical matter, it is extremely difficult for a taxpayer to defend its treatment of an individual as an independent contractor for any purpose when the taxpayer reports the individual's remuneration on a Form W-2.

Another uncertainty under the proposal is whether an independent worker would be allowed to report the individual's income and expenses attributable to clients obtained through intermediaries on a schedule C to the Form 1040 individual tax return. If yes, then the proposed withholding of state and federal income and payroll taxes by an intermediary would in many cases result in over-withholding, due to the withholding being based on an individual's gross revenues, as opposed to the individual's net income, which takes into account tax-deductible business expenses.⁵²

If an independent worker were not permitted to report on a Schedule C to the Form 1040 the earnings and related expenses incurred with respect to clients obtained through an intermediary, the individual's business-related expenses could be claimed only as miscellaneous itemized deductions, which are deductible only to the extent they exceed 2% of the individual's adjusted gross income.⁵³ If an independent worker were

subject to audit by the government agency with jurisdiction to enforce compliance with the statute. In the case of federal employment taxes, the entity becomes responsible for accurately calculating the taxes due with respect to the individual, and for timely filing periodic reports and timely paying the amounts due. Any failures to meet these duties can expose the entity to financial penalties and interest.

⁵² For example, when the State of California was considering imposing tax withholding on payments made to independent contractors, a report prepared by the California Franchise Tax Board Staff, titled *Independent Contractor Withholding*, (January 2005), observed at page 1:

An undesirable feature of a withholding system is the potential for unwanted overwithholding. This is a potentially severe complication for independent contractors because gross receipts are a poor predictor of tax liability. This problem could be addressed by allowing for different withholding rates. Adding such flexibility would, however, substantially increase administrative costs, invite noncompliance through improper claims for reduced withholding rates, and reduce revenue gains from acceleration.

⁵³ As the U.S. Tax Court explained in *Quintanilla v. Comm'r*, T.C. Memo 2016-5 (2016):

The big issue is whether Quintanilla correctly reported his business expenses on Schedule C (the schedule that people who are in business for themselves use to report their expenses) and not on Schedule A (the schedule that people who work for somebody else use to report business expenses). The distinction matters because the Code limits Schedule A deductions more than it limits Schedule C deductions. The most important of these limits is the 2% rule: An employee who incurs unreimbursed business expenses may deduct them only as miscellaneous itemized deductions and only to the extent that they exceed 2% of his adjusted gross income. Secs. 62(a)(2), 63(a), (d), 67(a) and (b), 162(a).

...

to incur an expense that pertains to two separate clients (e.g., the purchase of a laptop computer used in performing services for both clients), where one client is obtained through an intermediary and the other is obtained independently, the independent worker would need to allocate the expense item as between the two clients – adding yet another dimension of tax-compliance complexity for the independent worker. Such an individual also would be treated less favorably for purposes of the alternative minimum tax (“AMT”) with respect to clients obtained through an intermediary.⁵⁴

With respect to an independent worker who obtains client opportunities through multiple intermediaries, which is common, each intermediary would withhold and pay FICA taxes with respect to the individual’s earnings up to the FICA wage base.⁵⁵ This could result in the individual paying more in FICA taxes than the individual would have owed in SECA taxes, due to a separate FICA wage base being applied with respect to each intermediary through which the individual obtains clients – or with respect to each client obtained through an intermediary.⁵⁶

The proposal would further complicate tax compliance for independent workers who obtain some, but not all, clients through an intermediary – which is not uncommon. These independent workers would be treated as employees of an intermediary with respect to the clients obtained through the intermediary, but as independent contractors with respect to the clients they obtain on their own. While such an individual’s income tax liability for the year would be based on the individual’s entire earnings during the year, some of the income would be subject to tax withholdings, while the other income would not. Moreover, as noted above, it is not clear how the business-related expenses would be treated with respect to clients obtained through an intermediary. The individual would need to calculate estimated tax payments relative to the individual’s total earnings by factoring in (i) the tax withholding by the intermediaries that would be made with respect to a portion of the earnings, and (ii) the potentially disparate treatment of the business-related expenses incurred with respect to the two sets of clients.

The foregoing examples represent only a subset of the many unaddressed potential federal tax implications of the proposal.⁵⁷

Finally, the proposed tax withholding on payments made to independent workers would represent a tectonic shift in the tax law’s fundamental distinction between employees and independent contractors, under which tax withholding has been limited principally to wages paid to employees.⁵⁸ The proposal’s impact on federal employment taxes would not represent a “middle ground” between employees and independent

Independent contractors and self-employed persons report business deductions on Schedule C. See *Chapman v. Apfel*, 236 F.3d 480, 486 (9th Cir. 2000); *Weber v. Commissioner*, 103 T.C. 378, 386 (1994), *aff’d*, 60 F.3d 1104 (4th Cir. 1995).

⁵⁴ “Schedule A itemized deductions are subject to various limitations. For example, employee business expenses can be deducted only to the extent those expenses exceed 2% of the taxpayer’s adjusted gross income, sec. 67(a) and (b); may be subject to income limitations, sec. 68; and may have alternative minimum tax implications, sec. 56(b)(1)(A)(i).” *Richards v. Comm’r*, T.C. Memo 2014-88 (2014) (non-Code citations omitted).

⁵⁵ The FICA wage base is the maximum amount of wages an employee earns during a calendar year that is subject to the FICA tax. See, Code section 3121(a)(1).

⁵⁶ See, e.g., *Cencast Servs., L.P. v. United States*, 2009 U.S. Claims LEXIS 403 (Fed. Cl. 2009) (illustrating the application of separate wage base limitations with respect to different common-law employers).

⁵⁷ Examples of other tax implications of the proposal that would need to be considered include the treatment of an independent worker for purposes of health benefit plans, qualified retirement plans, self-employed retirement plans, and eligibility for certain tax credits that are available with respect to employees.

⁵⁸ As the author Anuj C. Desai observed in *SYMPOSIUM: WHAT A HISTORY OF TAX WITHHOLDING TELLS US ABOUT THE RELATIONSHIP BETWEEN STATUTES AND CONSTITUTIONAL LAW*, 108 Nw. U.L. Rev. 859 (Spring 2014):

The Current Tax Payment Act of 1943 established tax withholding from wage income in such a way that it is now embedded deeply into the fabric of American society.

contractors; it would represent a massive reclassification of millions of independent contractors to employee status.

As the foregoing reveals, the proposal would create new uncertainties and substantial federal-tax complexities for independent workers and eliminate a bedrock distinction in the tax law that differentiates employees from independent contractors.

G. Pursuing the Perhaps Unwanted Pooling of Benefits

One of the rationales for the proposal is to enable independent workers to gain the advantages of pooling of benefits that are available to employees but generally not to self-employed individuals.

A negative consequence of this approach to a self-employed individual is the risk that the individual would accrue benefits with multiple intermediaries. These benefits might not be portable and could be difficult to aggregate. This is a common complaint today about the “job lock” associated with employment, which restricts an employee’s mobility because the benefits accrued at a current employer (other than vested retirement benefits) generally will not follow the individual. The proposal would extend this detriment of employment to the self-employed.

An alternative means for extending the pooling of benefits to self-employed individuals, without the concomitant job-lock detriment, would be to facilitate the ability of entities – other than intermediaries – to offer benefits to the self-employed. Under this option, the self-employed individuals, rather than an intermediary, could choose which benefits to purchase, and the entities offering the benefits would compete for their business. This would enable an individual to select which benefits to purchase, and the pooling-of-benefits advantages would be even greater under plans that are open to all self-employed individuals, as opposed to only those individuals who obtain clients through a specific intermediary.⁵⁹ This option for health benefits is ostensibly available today through the Affordable Care Act.

H. Questionable Assumptions

The proposal is premised on assertions and assumptions concerning the uncertain status of individuals who obtain clients through an intermediary, and the intermediary business model itself – that are open to question.

i. Proposal Glosses over Integration Concept

The authors assert that one aspect of an independent worker’s relationship with an intermediary that suggests an employment relationship is that the independent worker is “integral to the business of an intermediary.”⁶⁰ But this is not always true. While an individual’s services can be an integral part of a firm, when the firm is in the business of providing the same type of services as the individual, there are many examples of brokers/services referral agencies being held not to be in the business of providing the same type of services as the individual, and of the individual’s work being held not integral to business of the firm.

For example, in *State of Nevada Department of Employment v. Reliable Health Care Services of Southern Nevada, Inc.*, 983 P.2d. 414 (Nev. 1999), the Supreme Court of Nevada analyzed the “integration” factor in the context of an agency/broker that refers respiratory technicians to clients. The Court concluded that (1)

⁵⁹ One option in this regard would be an expansion of association health plans. See, e.g., *Employer Association Health Plans*, GAO/HERS-96059R (Dec. 6, 1995); Roger Stark, *Association Health Plans and Small Business Health Insurance Exchanges in the Affordable Care Act* (Aug. 2015), available at <http://www.washingtonpolicy.org/library/docLib/Stark-Association-Health-Plans-and-Small-Business-Health-Insurance-Exchanges-in-the-Affordable-Care-Act.pdf>.

⁶⁰ Proposal, at p. 10.

the course of business engaged in by the referral agency consisted solely of brokering workers, and (2) the course of business engaged in by the referred workers was limited to providing patient care.

The Nevada Supreme Court recognized that the two types of businesses engaged in by a referral agency and by a care provider are entirely separate from each other, and that despite the fact that the agency profited solely from referring workers to clients, the Court could not ignore “the simple fact that providing patient care and brokering workers are two distinct businesses.” Moreover, the Court further noted that “We are convinced that the business of brokering health care workers does not translate into the business of treating patients for these purposes, and thus a temporary health care worker does not work in the usual course of an employment-broker’s business...”⁶¹

It follows that individuals who obtain client opportunities through an intermediary are not necessarily integral to business of the intermediary.

ii. Intermediaries Do Not Always Set Contractors’ Prices

Another assertion by the authors in support of their claim that independent workers possess certain employee characteristics relative to an intermediary is that an intermediary sets the price for their services.⁶² This is not always true, and is generally not true in the case of intermediaries that predate the sharing-economy business model.

In practice, while some intermediaries might set the price of an individual’s services, it is more common for a client to set a price, and for an intermediary to communicate that price (net of its referral fee) as part of a description of the client opportunity. This practice is especially common for industries in which a client will offer a large number of opportunities throughout the country. In these cases, it would not be feasible for the client to separately negotiate fees for each project. In other industries, the individual and client separately negotiate the fee for the individual’s services. An intermediary that does not set prices generally is agnostic as to how an individual’s price is set, inasmuch as the intermediary’s principal function is to create an efficient marketplace through which those parties can find each other and do business together.

Moreover, in virtually all cases in which an individual engages an intermediary – or multiple intermediaries – to gain access to client opportunities, the individual retains the right to review the opportunities an intermediary offers, and to determine – based on the location, price (whether negotiated or not) and services required – which, if any, of the opportunities to accept. Such an individual is not required to work at a price set by the intermediary, or the client; rather, the individual will almost always determine

⁶¹. *Accord, Trauma Nurses, Inc. v. Board of Review*, 576 A.2d 285 (N.J. Super. 1990); *Daw’s Critical Care Registry, Inc. v. Department of Labor*, 422 Conn. 457, 622 A.2d 622 (1993), *aff’d* 225 Conn. 99 (1993).

Different determinations have been made on this issue even in the context of the Uber business model. The California Labor Commissioner in *Berwick v. Uber Technologies, Inc.*, Case No. 11-46739 (June 3, 2015), determined that the services provided by a driver under contract with Uber Technologies, Inc. (“Uber”) are an *integral* part of Uber’s business, namely, its transportation business, and that without drivers Uber’s business would not exist. By contrast, the Florida Department of Economic Opportunity (the “Department”) in *Rasier LLC v. State of Florida Department of Economic Opportunity*, Case No. 0026 2834 68-02, Final Order (Dec 3, 2015), determined that Uber is in business of providing lead generation for transportation services. The Final Order characterizes Uber as a middleman or broker, as opposed to a business of providing transportation services. The Executive Director explained that while such a business model is related to and is dependent on the provision of transportation services, it is not in that business. He reasoned that without sellers and buyers, a broker has no business; but that economic reality does not transform a broker into the seller’s employer, any more than it transforms the broker into the buyer’s employer.

⁶². Proposal, at p. 10.

the price at which he or she will work, either by negotiating the price or by exercising his or her right to select which, if any, opportunity to accept.⁶³

The fact that different intermediaries follow different practices on how an individual's fee is determined suggests that imposing a sweeping new category of worker status on all intermediaries, based on an assumption that intermediaries set such prices, would be ill-advised.

iii. Proposal Fails to Consider Different Intermediary Business Models

Many intermediaries, by virtue of how their business is structured, would not be able to comply with the proposed new mandates. It is not uncommon for an intermediary to be structured such that the end-user client pays the individual service provider directly or through a third-party billing service or escrow account. In these cases, the client pays the intermediary its referral fee and separately pays the service provider his or her fee. These intermediaries have no ability to withhold any taxes with respect to an independent worker, because they do not make any payments to the independent worker. If the proposal were enacted, this particular type of intermediary business model might become more prevalent.

If more intermediaries were to structure their business so that customers pay the independent workers directly, a customer not engaged in a trade or business (unlike an intermediary) would have no Form 1099 reporting duty.⁶⁴ This would lead to less information reporting on payments received by individuals who obtain clients through an intermediary, which could have a negative impact on tax compliance.⁶⁵

VI. Conclusion – A Solution in Search of a Problem

The proposal states that labor and employment law has evolved over time to reflect a social compact between employees and employers, but expresses concern that workers participating in the growing online “gig economy” are at risk of being excluded from this social compact.⁶⁶ This concern is premised on the unstated assumption that an independent worker participating in the “gig economy” does not choose to be self-employed – but that the choice is made by someone else i.e., the intermediary or the end-user client. The proposal does not appear to acknowledge the reality that many individuals actually choose self-employment, and – rather than being deprived of the benefits that are available to traditional employees – do not want them, or, at most, attach a lesser value to those benefits than to the right to be self-employed.

As noted, independent contractors report higher job satisfaction than full-time employees.⁶⁷ The individuals who are self-employed appear to have chosen this option because they find it more attractive for them. It is unfair to require these individuals to forfeit their self-employed status simply because they choose to utilize an intermediary to gain access to client opportunities.

If there is any need for change in the laws at this time, it is not to force individuals into a worker status

⁶³ The Connecticut Supreme Court, in *Standard Oil of Conn., Inc. v. Adm'r, Unemployment Comp. Act*, 320 Conn. 611, 637 (Conn. 2016), explained that an individual who has right to “accept or reject assignments simply on the basis of convenience” has “full control over how much work they did and when they did it.”

⁶⁴ See, e.g., AM I REQUIRED TO FILE A FORM 1099 OR OTHER INFORMATION RETURN?, <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Am-I-Required-to-File-a-Form-1099-or-Other-Information-Return>.

⁶⁵ In 2006, then IRS Commissioner Mark W. Everson explained that “[tax] compliance is highest where there is third-party reporting.” IRS Updates Tax Gap Estimates, IR-2006-28 (Feb. 14, 2006) available at <https://www.irs.gov/uac/IRS-Updates-Tax-Gap-Estimates>.

⁶⁶ Proposal, at p. 6.

⁶⁷ See, above, text accompanying notes 44-48.

that they did not choose, and do not want.⁶⁸ Rather, a more pressing need is for a harmonization of the general tests governing the determination of worker status, to enable individuals and companies to enter into mutually advantageous relationships – whether an individual be an employee or an independent contractor – with greater certainty that those relationships will be respected for purposes of all applicable laws. We would appreciate the opportunity to work with the Committee in pursuing such a harmonization.

⁶⁸. Moreover, denying individuals the right to work as independent contractors can result in higher unemployment, slower economic growth and reduced economic welfare. *See*, Eisenach Study, at ii, 35-39.

Exhibit 1

The following chart identifies the different tests used under federal and state statutes to determine whether an individual is an employee or independent contractor. References to a state are references to the state's unemployment statute.

The summaries of the tests identified in the following chart are stated generally; the specific test followed by each statute may contain slight variations.

Statute and/or State	Test to Determine a Worker's Status
• American with Disabilities Act of 1990 (majority of courts) • Title VII of the Civil Rights Act of 1964 • Age Discrimination in Employment Act of 1967 (Supreme Court, EEOC and majority of circuit courts) • Equal Pay Act of 1963 • Employee Retirement Income Security Act of 1974 • Copyright Act of 1976; • National Labor Relations Act • Federal Tort Claims Act • Fair Credit Reporting Act • Energy Reorganization Act • Federal Obscenity Statute • Affordable Care Act • Federal Income and Employment Taxes • Alabama • Arizona • California • District of Columbia • Florida • Iowa • Kansas • Kentucky	The Restatement (Second) of Agency and the IRS 20-Factor Test are examples of the primary common law tests. The test applied by a specific statute may contain variations. <u>Common Law Test (Restatement (Second) of Agency):</u> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business. Restat. 2d of Agency, § 220(2). <u>Internal Revenue Service 20-Factor Test</u> 1. No instructions. An independent contractor does not receive instructions from the engaging entity as to how to accomplish a job. 2. No training. An independent contractor does not receive training from the engaging entity.

• Michigan¹ • Minnesota • Mississippi • Missouri • New York • North Dakota • North Carolina² • Ohio • Rhode Island³ • South Carolina • Texas • Virginia⁴	3. No integration. The engaging entity's operations or ability to be successful does not depend on the service of independent contractors. By contrast, the factor weighs in favor of employee status if the workers constitute a critical and essential part of the taxpayer's business. <i>Bartels v. Birmingham</i>, 332 U.S. 126 (1947). 4. Services do not have to be rendered personally. Because independent contractors are in business for themselves and are contracted with to provide a certain result, they have the right to hire others to assist them. 5. Control their own assistants. Independent contractors retain the right to control the work activities of their assistants. 6. Not a continuing relationship. Unlike employees, independent contractors generally do not have a continuing working relationship with the engaging company, although the relationship may be frequent, by means of multiple engagements. 7. Work hours are set by the independent contractor. An independent contractor has control over the hours worked for accomplishing the result. 8. Time to pursue other work. An independent contractor is free to work when and for whom the individual chooses. A requirement to work full-time indicates control by the engaging entity. 9. Job location. Unless the services cannot be performed elsewhere, an independent contractor has the right to choose where the work will be done. 10. No requirements on the order or sequence of work. Independent contractors have control over how a result is accomplished and, therefore, determine the order and sequence in which their work will be performed. 11. No required reports. Independent contractors are accountable for accomplishing the objective only; interim or progress reports are not required. 12. Payment for the result. Independent contractors are paid by the job and are not compensated based on the time spent performing the work. 13. Business expenses. Independent contractors are responsible for their incidental expenses. 14. Own tools. As business owners, independent contractors provide their own equipment and tools to do the job. 15. Significant investment. An independent contractor's investment in his or her trade is bona fide, essential, and adequate. 16. Possible profit or loss. Independent contractors bear the risk of realizing a profit or incurring a loss.
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¹. Michigan follows the IRS 20-factor common law test.

². North Carolina follows the IRS 20-factor common law test.

³. Rhode Island follows the IRS 20-factor common law test.

⁴. Virginia follows the IRS 20-factor common law test.

	17. Working for multiple firms. Independent contractors are free to work for more than one firm at a time. 18. Services available to the general public. Independent contractors make their services available to the general public. 19. Limited right to discharge. An independent contractor is not terminable at will, but may be terminated only for failure to comply with the terms of the contract. 20. Liability for noncompletion. Independent contractors are responsible for the satisfactory completion of a job and are liable for failing to complete the job in accordance with the contract. Internal Revenue Manual, 4600 Employment Tax Procedures, Exhibit 4640-1.
• Fair Labor Standards Act of 1938⁵⁶ • Social Security Act; • Family and Medical Leave Act of 1993⁶⁷ • Migrant and Seasonal Agricultural Worker Protection Act⁷⁸ • Occupational Safety and Health Act of 1970	Economic Realities (DOL): 1) The extent to which the work performed is an integral part of the employer's business. 2) Whether the worker's managerial skills affect his or her opportunity for profit and loss. 3) The relative investments in facilities and equipment by the worker and the employer. 4) The worker's skill and initiative. 5) The permanency of the worker's relationship with the employer. 6) The nature and degree of control by the employer.
• Age Discrimination in Employment Act of 1967 (minority of circuit courts) • American with Disabilities Act of 1990 (minority of courts)	Hybrid Test: [H]ybrid economic realities/common law control test that focuses on whether the alleged employer had the right to hire and fire, the right to supervise, the right to set the work schedule, paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment. <i>Hathcock v. Acme Truck Lines, Inc.</i>, 262 F.3d 522, 526 (5th Cir. Tex. 2001).
• Alaska • Connecticut • Delaware • Hawaii • Illinois • Indiana⁸⁹ • Louisiana • Maryland⁹¹⁰	ABC Test #1: [U]nless the context otherwise requires, "employment" means service performed by an individual whether or not the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the department that (A) the individual has been and will continue to be free from control and direction in connection with the performance of the service,

⁵ Each Federal Circuit applies a slightly different version of the economic realities test.

⁶ The FMLA adopts the FLSA's definition of "employee."

⁷ The MSAWPA adopts the FLSA's definition of "employee."

⁸ Element C may be satisfied by establishing that the individual is customarily engaged in an independently established trade, occupation, profession or business; or is a sales agent who receives remuneration solely upon a commission basis and who is the master of the individual's own time and effort. Burns Ind. Code Ann. § 22-4-8-1(b).

⁹ Element B may be satisfied by either establishing that the individual's work is:

(i) outside of the usual course of business of the person for whom the work is performed; or

(ii) performed outside of any place of business of the person for whom the work is performed. Md. LABOR AND EMPLOYMENT Code Ann. § 8-205(a)(3).

• Massachusetts • Nebraska • Nevada • New Hampshire • New Jersey • New Mexico • Tennessee • Vermont • Washington • West Virginia • Wyoming	both under the individual's contract for the performance of service and in fact; (B) the service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.
• Arkansas • Oklahoma	<u>ABC Test #2:</u> Service performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the director that: (1) The individual has been and will continue to be free from control and direction in connection with the performance of the service, both under his or her contract for the performance of service and in fact; and (2) (A) The service is performed either outside the usual course of the business for which the service is performed or is performed outside all the places of business of the enterprise for which the service is performed; or (B) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.
• Colorado • Idaho • Montana¹⁰ • Oregon¹¹ • Pennsylvania • South Dakota • Utah	<u>AB Test#1:</u> [S]ervice performed by an individual for another shall be deemed to be employment, irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the division that (A) such individual is free from control and direction in the performance of the service, both under his contract for the performance of service and in fact; and (B) such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.

¹⁰. An individual must obtain an Independent Contractor Exemption Certificate which is issued to individuals who qualify as an independent contractor under the "AB" test.

¹¹. Oregon exempts an individual from being required to satisfy the (B) prong if the individual files a schedule F as part of his or her income tax return and the individual provides farm labor or farm services. Additionally, Oregon's test requires individuals to be licensed, only if their profession requires a license.

Georgia	<u>AB Test #2:</u> Services performed by an individual for wages shall be deemed to be employment subject to this chapter unless and until it is shown that: (1) (A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of service and in fact; and (B) Such individual is customarily engaged in an independently established trade, occupation, profession, or business; or (2) Such individual and the services performed for wages are the subject of an SS-8 determination by the Internal Revenue Service, which decided against employee status.
Maine	<u>Statutory Test #1:</u> 1) The following criteria must be met: a) The individual has the essential right to control the means and progress of the work except as to final results; b) The individual is customarily engaged in an independently established trade, occupation, profession or business; c) The individual has the opportunity for profit and loss as a result of the services being performed for the other individual or entity; d) The individual hires and pays the individual's assistants, if any, and, to the extent such assistants are employees, supervises the details of the assistants' work; and e) The individual makes the individual's services available to some client or customer community even if the individual's right to do so is voluntarily not exercised or is temporarily restricted; and 2) At least 3 of the following criteria must be met: a) The individual has a substantive investment in the facilities, tools, instruments, materials and knowledge used by the individual to complete the work; b) The individual is not required to work exclusively for the other individual or entity; c) The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work; d) The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual or entity prior to completion of the work; e) Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual; f) The work is outside the usual course of business for which the service is performed; or

	g) The individual has been determined to be an independent contractor by the federal Internal Revenue Service. 26 M.R.S. § 1043(11)(E).
• Wisconsin	<u>Statutory Test #2:</u> (bm) [An individual is an independent contractor] if the employing unit satisfies the department that the individual meets the conditions specified in subds. 1. and 2., by contract and in fact: 1. The services of the individual are performed free from control or direction by the employing unit over the performance of his or her services. In determining whether services of an individual are performed free from control or direction, the department may consider the following nonexclusive factors: a. Whether the individual is required to comply with instructions concerning how to perform the services. b. Whether the individual receives training from the employing unit with respect to the services performed. c. Whether the individual is required to personally perform the services. d. Whether the services of the individual are required to be performed at times or in a particular order or sequence established by the employing unit. e. Whether the individual is required to make oral or written reports to the employing unit on a regular basis. 2. The individual meets 6 or more of the following conditions: a. The individual advertises or otherwise affirmatively holds himself or herself out as being in business. b. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services. c. The individual operates under multiple contracts with one or more employing units to perform specific services. d. The individual incurs the main expenses related to the services that he or she performs under contract. e. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work. f. The services performed by the individual do not directly relate to the employing unit retaining the services. g. The individual may realize a profit or suffer a loss under contracts to perform such services. h. The individual has recurring business liabilities or obligations. i. The individual is not economically dependent upon a particular employing unit with respect to the services being performed. Wis. Stat. § 108.02(12)(bm).