

# Caldwell Leslie

Caldwell Leslie & Proctor, PC

725 South Figueroa Street, 31st Floor Los Angeles, CA 90017-5524 Tel 213.629.9040 Fax 213.629.9022 www.caldwell-leslie.com

## VIA MESSENGER

**ALBERT GIANG**  
giang@caldwell-leslie.com

August 24, 2015

Councilmember Mike Bonin  
200 N. Spring Street, Room 475  
Los Angeles, CA 90012

Sean Burton, President  
Board of Airport Commissioners  
Los Angeles World Airports  
1 World Way  
Los Angeles, CA 90045

Councilmember Bob Blumenfield  
200 N. Spring Street, Room 415  
Los Angeles, CA 90012

Deborah Ale Flint, Executive Director  
Los Angeles World Airports  
1 World Way  
Los Angeles, CA 90045

Holly L. Wolcott, City Clerk  
200 N. Spring Street, Room 360  
Los Angeles, CA 90012

Re: *July 16, 2015 BOAC Action Re Approving NELA Covering TNCs Servicing LAX*  
*(Item No. 15-0899)*

Dear Honorable Councilmembers, City Clerk, President Burton, and Executive Director Flint:

On behalf of Lyft, Inc. ("Lyft"), I write to submit this letter and the attached materials into the administrative record in this matter. On August 18, 2015, the Trade, Commerce and Technology Committee ("the Committee") voted to recommend approval of the Board of Airport Commissioners' ("BOAC") decision to approve Non-Exclusive License Agreements ("NELAs") to Transportation Network Companies ("TNCs") to service Los Angeles International Airport ("LAX"). Lyft applauds this action and welcomes the opportunity to serve the needs of LAX and its passengers.

During this process, certain parties have raised unfounded arguments and claims in an attempt to delay approval of the NELA. In particular, the Alliance for a Regional Solution to Airport Congestion submitted a letter dated August 7, 2015 claiming that

BOAC's issuance of a simple permit required extensive environment review under the California Environmental Quality Act ("CEQA"). This argument has already been rejected by BOAC, other California airports, and the California Public Utilities Commission ("CPUC"). In addition, the letter alluded to vague "safety" concerns, without providing any support or explaining why they are relevant to a CEQA analysis.

Accordingly, Lyft submits the attached materials into the administrative record in order to address these issues and support BOAC's decision to approve TNC services at LAX:

- **BOAC's license is not a "project" that requires environmental review.** To Lyft's knowledge, no other California agency or airport has required CEQA review before permitting TNC operations at existing airports. In fact, the few agencies and airports that have addressed the issue have concluded (like BOAC) that environmental review is *not* necessary:
  - **California Public Utilities Commission:** After the CPUC created a new regulatory framework for TNCs in September 2013, it rejected a challenge claiming that the CPUC had violated CEQA. In an April 10, 2014 decision (Exh. 1), the CPUC specifically found its new regulations "are not a CEQA project." When the challengers appealed the CPUC's decision, the California Supreme Court summarily rejected the CEQA challenge.
  - **No physical impact where activity is already underway:** The CPUC explained that its decision simply imposed "paper" requirements, and had no direct or indirect physical impact or change. "Significantly, when we issued the Decision, TNC operations were already well-established." (Exh. 1 at 3.) The same is true at LAX: TNCs offered both pickups and drop-offs for many months, and only halted pickups temporarily in recent months. BOAC's decision does not affect drop-offs (which will continue), and any "new" pickups are passengers who would have used other transportation anyway.
  - **Establishing regulatory framework will not create impact:** The CPUC rejected the need for CEQA review, despite acknowledging that the new authorization of TNCs "may assist TNCs because they provide some regulatory framework, and the ability to operate legally." (Exh. 1 at 3.) If the CPUC's far-reaching decision authorizing TNCs statewide did not warrant CEQA review, BOAC's smaller-scale decision does not warrant it either.
  - **Regulations may actually *reduce* environmental impact:** As the CPUC explained, "the Decision [only] imposes regulatory

requirements on already existing operations. But even if the Decision expanded the TNC industry, it is not at all foreseeable that adverse environmental impacts would worsen. Car share programs may effectively remove other cars from the road, and actually decrease emissions." (Exh. 1 at 4.)

- **Oakland Airport:** A July 30, 2015 Oakland Airport Resolution recommended that TNCs be allowed to operate on a pilot basis. It specifically found that TNC operation did not have to undergo CEQA review because there was no "potential for causing a significant effect on the environment." It also stated that TNC operations "will not result in a physical change in the environment, and therefore is not subject to CEQA and no further environmental review is required." (Exh. 2 at 5.)
- **San Diego Airport:** A February 19, 2015 San Diego Airport Staff Report recommended a pilot program for TNCs. "This Board action is not a 'project' subject to CEQA." And like Oakland Airport, San Diego Airport determined that its pilot program would not "have a significant effect on the environment as defined by [CEQA]." (Exh. 3 at 19.)
- **BOAC:** In concluding that it was not required to conduct an environmental review, BOAC similarly determined that its license was subject to several CEQA exemptions, including exemptions for the mere "issuance of permits ... granting use of existing airport facilities." (Exh. 4 at 1, 4.) TNCs have been operating at LAX for a long time, and still offer drop-offs to this day. And many users simply walk to nearby streets or hotels to request TNC pickups. The only "new" TNC operations from BOAC's proposal would be pickups of users who would not request an airport-adjacent pickup anyway. But as BOAC explained, the reality is that most airport passengers would use their private vehicles if they didn't use TNCs: "LAWA patrons, in large number, continue to use private vehicles for pick up and drop off, which contributes to greater traffic and congestion." (Exh. 4 at 2.) Because "new" TNC users would have used alternate transportation options, any impact from these "new" TNC pickups would be offset by reductions in other types of pickups. Therefore, BOAC found that TNC operations may have a positive effect: "Permitting TNCs will allow our guests an additional transportation choice that may provide a viable and effective alternative for some private vehicle users, which would increase use of commercial vehicle alternatives and improve the efficient use of LAX and LA/ONT facilities." (Exh. 4 at 2.) Furthermore, any potential impact would be mitigated by BOAC's

regulations, including designating a specific staging area for TNCs and banning TNCs from circling.

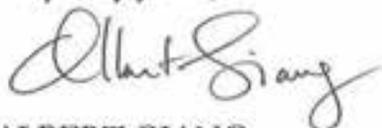
- **The CPUC, and not local agencies, has responsibility for setting uniform statewide safety standards for TNCs.** For its September 2013 decision, the CPUC conducted extensive factfinding before creating a regulatory framework that adopted “strict safety regulations and guidelines that are similar in nature and in some cases more stringent than current and past practice in the transportation industry as a whole.” (Exh. 5 at 40.) These include specific requirements for criminal background checks, DMV checks, and vehicle checks. Since then, TNCs have reasonably relied on and complied with these statewide regulations. Indeed, the CPUC specifically applauded Lyft’s commitment to safety: “Lyft has been the only TNC that has acknowledged that safety is not only a priority, but there should also be some overarching rules and regulations. We applaud Lyft for its leadership in this area and we certainly agree with Lyft in this area.” (Exh. 5 at 23.)
- **TNCs should not be subject to a patchwork of conflicting safety regulations:** Where the CPUC has taken a leadership role in creating statewide safety regulations, local attempts to add varying safety requirements would interfere with the CPUC’s uniform standards. *See Willingham Bus Lines*, 66 Cal.2d 893, 896 (1967) (municipal licensing scheme may not “prescribe qualifications ... different from or additional to those prescribed by the state”); *Leslie v. Superior Court*, 73 Cal. App. 4th 1042, 1046 (1999) (“Counties may not make and enforce laws conflicting with general state laws. The powers granted the PUC, including its rules and regulations, constitute general state laws. Accordingly, counties may not enforce local regulations that conflict with rules and regulations of the PUC.”) (citations omitted).
- **BOAC properly deferred to statewide safety standards:** BOAC solicited extensive public comments on safety issues, including background checks. (*See, e.g.*, Exh. 6.) After considering the public comments, BOAC recommended approval of the NELA for TNCs that have “Authority from the California Public Utilities Commission (CPUC).” (Exh. 4 at 2 (deferring to safety, insurance, and permitting requirements of the CPUC).)

August 24, 2015

Page 5

These materials demonstrate that CEQA review is unnecessary and confirm what other California airports, the CPUC, BOAC, and now the Committee have concluded—there are sound and important policy reasons for permitting TNCs to service airports like LAX and meet growing consumer demand for transportation alternatives. Accordingly, Lyft respectfully submits these materials and requests that the City Council approve BOAC's decision.

Very truly yours,

A handwritten signature in black ink that reads "Albert Giang". The signature is written in a cursive, flowing style.

ALBERT GIANG

Enclosures

cc: Joseph Okpaku (via email)  
Veronica Juarez (via email)

**TABLE OF CONTENTS**

**Exhibit 1:** California Public Utilities Commission's Order (dated April 10, 2014) Granting Limited Rehearing of Decision 13-09-045, Modifying Certain Holdings, and Denying Rehearing of the Remaining Portion of the Decision, As Modified

**Exhibit 2:** Oakland Airport Resolution (dated July 30, 2015) to Authorize the Executive Director to Enter into Agreements with Rasier-CA, LLC, Lyft, Inc. and Sidecar Technologies to Permit Transportation Network Company Services at Oakland International Airport Under a Pilot Program Basis

**Exhibit 3:** San Diego County Regional Airport Authority Staff Report (dated February 19, 2015) on Transportation Network Company (TNC) Pilot Program Parameters

**Exhibit 4:** Los Angeles World Airports' Report to the Board of Airport Commissioners (dated July 16, 2015) to Adopt a Blanket Resolution for a Non-Exclusive License Agreement for Transportation Network Companies

**Exhibit 5:** California Public Utilities Commission's Decision (dated September 23, 2013) Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry

**Exhibit 6:** CATO Institute Report (dated January 27, 2015) entitled *Is Ridesharing Safe?* and related documents

EXHIBIT 1

Decision 14-04-022

April 10, 2014

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services.

Rulemaking 12-12-011  
(Filed December 20, 2012)

**ORDER GRANTING LIMITED REHEARING OF DECISION 13-09-045,  
MODIFYING CERTAIN HOLDINGS, AND DENYING REHEARING OF THE  
REMAINING PORTION OF THE DECISION, AS MODIFIED**

**I. INTRODUCTION**

On October 23, 2013, the Taxicab Paratransit Association of California (“TPAC”) and Uber Technologies, Inc. (“Uber”) filed timely applications for rehearing of Decision (D.) 13-09-045 (“Decision”). In the Decision, the Commission adopted regulations applicable to new entrants in the transportation industry labelled Transportation Network Companies (“TNCs”). TNCs are defined as organizations, “operating in California that provide [] prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles.” (Decision, at p. 2.)

In its application for rehearing TPAC alleges: (1) the Decision violates the California Environmental Quality Act (“CEQA”); (2) the TNCs are operating as taxis, which are exempt from Commission regulation, and the Commission failed to undertake the appropriate analysis; (3) the Decision violates the Equal Protection Clause of the United States and California Constitution; and (4) the Decision conflicts with the Public Utilities Code by exempting TNCs from certain charter party carrier (“TCP”) requirements. Uber’s application for rehearing alleges that Uber does not provide

transportation services, and therefore the Commission cannot exercise jurisdiction over its operations.

We have carefully considered all the arguments presented by rehearing applicants, and are of the opinion that limited rehearing of certain issues in the Decision is warranted, as explained below. We are also convinced that some modifications of the remaining holdings are appropriate, in order to explain our holdings and rationale more clearly. After the granting of limited rehearing, and after making certain modifications to the remainder of the Decision, rehearing on the Decision is otherwise denied. We emphasize that, despite the limited rehearing we are granting today, our fundamental holdings regarding our jurisdiction over TNCs, and the appropriate regulatory oversight, remain intact.

## **II. DISCUSSION**

### **A. TPAC REHEARING**

#### **1. CEQA**

TPAC argues that the Decision violates CEQA, Public Resources Code section 21000 et seq. According to TPAC, the Decision is subject to CEQA, “which requires the Commission to follow a specific review process if its actions may have an environmental impact.” (TPAC App. Rehg., at p. 3.) TPAC particularly takes issue with our statement that we will convene a workshop in one year to hear stakeholders on issues related to TNC regulation, specifically including CEQA. (Decision, at p. 34) TPAC argues that we cannot defer CEQA compliance to a later date. In addition, TPAC asserts that we cannot rely on any CEQA “exemption,” because there is no evidence or analysis to support such an exemption. TPAC’s arguments fail because the Decision and the adopted regulations are not a CEQA project, and therefore, the Commission was not required to fulfill any CEQA requirements. TPAC’s point, however, that we failed to adequately explain our CEQA holdings is well-taken, and we will modify these holdings in order to more accurately reflect our rationale.

The California Legislature enacted CEQA in 1970 with the intent of requiring public agencies to consider the environmental implications of their actions

when they carry out projects or approve private projects. (Pub. Resources Code, §§ 21000, 21001.1.) The application of CEQA is triggered by an agency's discretionary action or approval, and the CEQA review requirements do not apply when an agency does not make any discretionary decision. (Pub. Resources Code, § 21080.) Moreover, a discretionary decision is only a CEQA project if it "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect change...." (Pub. Resources Code, § 21065) If an activity is not a CEQA project, CEQA does not require any environmental review. (Pub. Resources Code, § 21080.)

In this case, no CEQA review was required because the regulations the Commission adopted do not constitute a CEQA project. Although a Rulemaking and the act of adopting regulations can be considered an agency action and a project (see *Dunn-Edwards v. Bay Area Air Quality Management District* (1995) 9 Cal.App.4th 644), those regulations would only be a CEQA project if there were a direct physical impact or a reasonably foreseeable indirect change. (Pub. Resources Code, § 21065.)

Here, we adopted a limited number of safety regulations applicable to existing and future TNC operations. These regulations include insurance regulations, driver safety regulations, and other provisions regarding fee payment, discrimination, and identification. (Decision, at pp. 26-33) Our requirements are largely "paper" requirements, and they do not have any direct physical impact on the environment. Notably, TPAC does not identify any particular adopted regulation and specifically identify how that regulation would impact the environment.

In addition to the fact that there is no direct physical impact, there also is no "reasonably foreseeable indirect change" caused by the Decision. Significantly, when we issued the Decision, TNC operations were already well-established. The Decision neither encourages nor discourages these operations, and that is not our intent. All the Decision does is impose certain regulatory and safety requirements on TNCs that are already operating, or may be in the future. There is no indication that these new requirements will either increase or decrease TNC operations. While the regulations may assist TNCs because they provide some regulatory framework, and the ability to operate legally, they

also may interfere and limit TNC operations, since they impose new requirements. Since the Decision does not change the physical status quo, directly or indirectly, there is no reasonably foreseeable indirect change that will occur.

TPAC argues that we did not consider the greenhouse gas impacts of the transportation sector. TPAC wrongly assumes the Decision creates or encourages the TNC industry, which it does not. Again, the Decision imposes regulatory requirements on already existing operations. But even if the Decision expanded the TNC industry, it is not at all foreseeable that adverse environmental impacts would worsen. Car share programs may effectively remove other cars from the road, and actually decrease emissions. In any event, since TNCs were already in operation before the Decision, the Decision would not be causing those impacts, either directly or indirectly.

TPAC's suggestion that we were required to conduct an initial study before determining the extent to which CEQA applies, is similarly misplaced. Pursuant to CEQA, if an agency action is not a CEQA project, it is not subject to the requirements of CEQA at all. (See Pub. Resources Code, § 21065.) Therefore, because the Decision has no direct physical impact or reasonably foreseeable indirect impact, none of the requirements of CEQA apply. TPAC cites authority regarding projects that are "exempt" from CEQA, arguing that we did not go through the required CEQA processes for determining an exemption. That authority is not applicable here, because, as we clarify in today's order, we hold that the Decision and adopted regulations are not a CEQA project, not that they are exempt from CEQA.

TPAC also takes issue with the Decision's statement that it will consider CEQA issues a year from the Decision. (Decision, at p. 74.) TPAC correctly notes that we failed to clearly explain that, in fact, the Decision is not a CEQA project. More accurately stated, we will reconsider the application of CEQA if we undertake further actions in connection with TNC operations, in order to determine whether those future actions may trigger the application of CEQA. To be clear, no actions the Commission has taken to date concerning TNC participants or operations, constitute a CEQA project. We will modify the Decision to more clearly reflect our rationale.

## 2. TCPs and Commission Jurisdiction

TPAC next argues that we erred in finding that TNCs are TCPs subject to our jurisdiction. According to TPAC, the Decision undertook an incorrect analysis in determining that TNCs are TCPs, and neglected to consider whether TNCs are taxis, exempt from Commission regulation pursuant to section 5353. TPAC further contends that we erred in relying on the concept of “prearrangement” as determinative of our jurisdiction.

### a) Section 5351 et seq. and the Decision’s Analysis

TPAC alleges that Decision mistakenly focuses its jurisdiction analysis on whether TNCs are engaging in transportation for compensation, and whether the services are prearranged. (TNC App. Rehg., at p 6.) Instead, according to TPAC, the correct analysis pursuant to section 5351 et seq., is first to look at whether TNCs are TCPS, and then whether a relevant exemption applies. Contrary to TPAC’s argument, we correctly analyzed the necessary elements to determine that TNCs are TCPs subject our jurisdiction.

Section 5351 et seq. lays out guidelines for our jurisdiction over TCPs. Charter party carriers, or TCPs, are defined as, “every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this state.” (§ 5360.) Section 5360.5 further holds that:

- (a) Charter party carriers of passengers shall operate on a prearranged basis within this state.
- (b) For the purposes of this section, “prearranged basis” means that the transportation of the prospective passenger was arranged with the carrier by the passenger, or a representative of the passenger, either by written contract or by telephone.

Section 5360 charter-party carriers are subject to Commission, as opposed to local, jurisdiction (see § 5371 et seq.) unless the entity falls within one of the numerous exemptions specified in section 5353. As relevant to TPAC’s application for rehearing,

section 5353 provides that, “This chapter does not apply to ... (g) Taxicab transportation service licensed and regulated by a city or county by ordinance or resolution, rendered in vehicles designed for carrying not more than eight persons excluding the driver.”

(§ 5353 (g).)

The Commission’s analysis addresses the essential elements of these statutory standards. The Decision first concludes that TNCs are not exempted from state regulation (Decision, at pp. 12-18). It next addresses whether the TNCs transport passengers for compensation (Decision, at p. 18), and whether TNCs operate on a prearranged basis. (Decision, at p. 20.) While TPAC asserts that the Commission incorrectly focused on compensation and prearrangement rather than TCP or taxicab status, TPAC fails to recognize that these are overlapping concepts. Because compensation is a required factor for TCP status pursuant to section 5360, and compensation is a disputed element in the section 5360 definition, the discussion of compensation is essentially a discussion of whether the section 5360 definition is met.

Similarly, TPAC’s suggestion that we failed to conduct an analysis of whether any section 5353 exemption applies to TNCs (TPAC App. Rehg., at p. 6) is incorrect. The Decision addresses the section 5353 (h) ridesharing exemption (Decision, at pp. 44-52), as well as discussing whether the TNCs should be considered taxis. The Decision states, “Unlike taxi cabs, which may pick up passengers via street hails, PU Code § 5360.5 requires that charter party carriers operate on a prearranged basis.” (Decision, at p. 20.) In this sentence, we explained that prearrangement distinguishes TNCs from taxis. The section goes on to discuss how TNCs meet the prearrangement criteria.

We acknowledge, however, that our discussion of TNCs’ regulatory status and whether TNCs are taxis can be improved. We discuss TPAC’s allegations in further detail below, and will modify the Decision to reflect this explanation. In addition, in today’s order, we add appropriate findings and conclusions to the Decision.

**b) Taxis v. Charter-Party Carriers**

TPAC takes issue with the Decision's definition of prearrangement, and the idea that prearrangement determines whether transportation provider is a TCP or a taxi. TPAC further argues that it is up to local governments, as opposed to the Commission, to determine what constitutes taxi service. Contrary to TPAC's assertions, we correctly relied on prearrangement in determining whether TNCs are charter party carriers. Moreover, it is within our jurisdiction to determine whether TNCs are TCPs subject to our jurisdiction.

**(1) Prearrangement and Taxi Service**

The Decision identifies "prearrangement" as the main defining characteristic of TCPs, explaining that charter party carrier service must be prearranged, "[u]nlike taxicabs...." (Decision, at p. 20.) The Decision concludes:

We find that TNCs operate on a prearranged basis. PU Code § 5360.5 does not define "prearranged," and we are reluctant to impose a minimum time requirement as some other jurisdictions have done. Instead, we are guided by the plain meaning of "prearranged" as something arranged in advance, which has been our custom and practice in interpreting "prearranged" at the Commission. For example, our information packet for prospective TCP applicants says that all transportation performed by TCPs must be arranged beforehand, and the driver must have a completed waybill in his or her possession at all times during the trip.

(Decision, at p. 20.)

TPAC relies solely on *Babaiean Transp. Co. v. Southern California Transit Co.* (1992) 45 Cal.P.U.C.2d 85 in support of its position that the Decision relies on a new and incorrect interpretation of prearrangement. In *Babaeian*, we considered whether defendant Southern California Transit Corporation was operating illegally as a taxi service, in violation of its TCP authority. Based on our findings that the defendant, "paints his vehicles like a taxi, advertises to taxi customers, operates almost entirely on short notice for short distances, carries 1 or 2 passengers per trip, and leases vehicles to

drivers,” the Commission concluded that defendant provided taxi service. (*Babaeian*, at p. 88.)

TPAC particularly relies on our holding in *Babaeian* that, “interpreting the rule to allow the majority of transportation service to be short notice or immediate response, gives the effect of allowing a charter-party carrier to operate a taxi service.” (*Babaeian*, at p. 88.) While TPAC notes that *Babaeian*, decided over twenty years ago, used a different standard for prearrangement and TCP service than that discussed in the TNC Decision, this does not show that the Decision’s standard is in error. As Lyft, Inc. notes in its response, since *Babaeian* was decided in 1992, both the Commission and the Legislature have repeatedly declined to adopt any time dependent standard for prearrangement. In addition to the fact that *Babaeian* can be distinguished on its facts (the defendant also represented itself as a taxi), it also has been effectively superseded or overruled. Moreover, it is clearly settled that the Commission is not bound by its precedent, unlike a court. (*In re Pacific Gas & Electric Co.* (1988) 30 Cal.P.U.C.2d 189, 223-225; see also *Postal Telegraph-Cable Company v. Railroad Commission* (1925) 197 Cal. 426, 436; § 1708.) Therefore, even if the Decision were inconsistent with decades-old holdings in *Babaeian*, that would not demonstrate legal error in the Decision.

Moreover, both the Legislature and the Commission have rejected using any time period as a standard for prearrangement. The Legislature defines and explains “prearrangement” twice in the Public Utilities Code. Section 5360.5 unambiguously provides that prearrangement means the passenger and carrier arranged the transportation “either by contract or telephone.” (§ 5360.5 (b).) By its plain language, this section only requires a contract or telephone contact, and contains no type of time restrictions. Similarly, section 5381.5, enacted in 2004, provides that the Commission must ensure TCP transportation is occurring on a prearranged basis by requiring a waybill that includes information on how the service was procured, as well as the name of a passenger. In the Legislature’s efforts to ensure the prearrangement requirement is being followed, and crack down on bandit taxis, at no time did it adopt any particular time period, or whether there was short notice, as a requirement. The Legislature revisited

prearrangement again in 2012, when it specifically allowed electronic waybills. (§ 5381.5) Again, there is no suggestion in the amendments that the length of the wait time should be any type of requirement for prearrangement.

We also convincingly rejected any time requirement for carrier prearrangement in our implementation of the TCP statutes. All of our definitions of prearrangement are consistent with the legislative directives. Accordingly, General Order (GO) 157-D provides that a traditional TCP driver must have a waybill with the details of the arrangement, including name of a passenger and how the trip was arranged.

In 2002, we opened *Rulemaking to Examine Whether the Regulations Regarding Prearrangement of Charter-Party Transportation Contained in GO 157-C should be Revised* [Rulemaking (R.) 02-08-002]. As the title indicates, the Rulemaking examined the requirements “regarding prearrangement of transportation by charter-party carriers...” (*Opinion Issuing GO 157-D* [D.05-02-033], at p. 1.) Ultimately, we decided to stay with an amended version of the previous definition of prearrangement – only requiring a waybill. (*Id.*, at p. 2.) We cited the 2004 legislative action adopting section 5381.5, which contains a similar waybill requirement and does not contain any sort of time prerequisite. (*Ibid.*)

Applying these principles to TNCs, they meet the requirement for prearranged travel as long as they have waybills which describe the arrangements. There is no requirement that prearrangement be for any particular amount of time. Section 5381.5 concerning prearrangement also explicitly allows for electronic waybills, as of January 2014.

## (2) Other Factors

TPAC also contends that the Decision erred in relying solely on prearrangement to determine that TNCs were not providing taxi service. (TPAC App. Rehg., at p. 6.) According to TPAC, there are other factors that determine whether a transportation service is a taxicab, and therefore exempt from Commission regulation pursuant to section 5353 (g).

Although prearranged travel is not the sole factor that distinguishes TCPs from taxis, it is correctly considered to be the primary factor. TPAC argues that because the section 5353 (g) taxi exemption leaves taxi service undefined, it is left to the local jurisdictions to decide taxi characteristics. Although TPAC cites section 5353 (g)'s taxi exemption, it neglects to consider the entire scheme of the Passenger Charter-Party Carriers Act ("Act"). (§ 5351 et seq.) Other sections of the Act demonstrate the Legislature's view that prearrangement is the primary defining characteristic of TCP service. The Legislature highlighted this requirement in section 5360.5, where prearrangement is the only TCP requirement specifically laid out in the preliminary article. The Legislature again emphasized prearrangement as determinative of TCP status in 2004, when it amended the Code to address the issue of illegal taxi operations by carriers. It addressed that issue by requiring waybills as evidence that the prearrangement requirement was being met. (See § 5381.5.)

Certainly, there are factors besides street hails that could indicate a carrier is operating as a taxicab. In a number of cases, the Commission has identified factors, which, in addition to hailing, could indicate illegal taxi operations. (See *Babaeian, supra*, at p. 88 ["defendant paints his vehicle like a taxi"]; *San Gabriel Transit, Inc. v. Titan Capital Corp.* [D.03-02-008] (2003) 2003 Cal. PUC LEXIS 113 [accepting taxi requests/vouchers, advertising as taxicab]; *Transportation Investments, Inc. v. Valley Cab* [D.83-03-012] (1983) Cal. PUC LEXIS 489 [identification and advertisement as taxicabs, taximeters, cars that resemble cabs].) The most common characteristics of taxis that TCPs must avoid, other than offering spontaneous service, or hails, are identifying the vehicle as a taxi, by paint, taxi lights, the use of taximeters (see G0 157-D, § 3.03), and representing the service as taxi service in advertisements or otherwise. TNCs do not have these taxi characteristics.

TPAC cites four characteristics of taxi service under the Los Angeles Municipal Code that it contends TNCs meet. These are: (1) use of self-propelled vehicles designed to carry under eight persons; (2) equipped with taximeters; (3) for-hire transportation on the streets of Los Angeles, and (4) under the direction of passengers as

opposed to a defined route. (TPAC App. Rehg., at pp. 9-10.) As Lyft notes, 1, 3, and 4 are characteristics which are shared by many legitimate TCPs, and have never been judged to be indicative of illegal taxi operations. The Decision acknowledges that TNCs share many characteristics with taxis. (Decision, at p. 12.) The fact that they have these things in common does not demonstrate error.

TPAC is also incorrect in its assertion that TNCs use taximeters. TPAC exclusively relies on the City of Los Angeles Municipal Code definition, which defines taximeter as “a device that automatically calculates at predetermined rate or rates, and indicates the charge for hire of the vehicle.” (City of Los Angeles Muni. Code § 71.00, TPAC App. Rehg., at p. 9, fn 43.) However, that same ordinance states that taxicabs must be *equipped* with such devices, which clearly does not apply to transportation apps. Moreover, despite the City of Los Angeles Definition, other local jurisdictions have definitions of taximeter that clearly exclude smartphone apps. For instance, San Francisco defines a taximeter as “a device *attached* to a Motor Vehicle for Hire...” (SF Muni. Code, § 1102.) Los Angeles County provides, “Every taximeter should be placed so that the reading dial showing the amount to be charged shall be well-lighted and readily discernible at all times by passengers.” (LA County Muni. Code, § 7.80.320.) All of these definitions indicate that taximeters are meters that are part of the vehicle. Therefore, under the relevant definitions, TNC apps do not qualify as taximeters.

**e) Local Determination of Taxi Service**

TPAC contends that because the State granted local jurisdictions with authority to regulate taxi services pursuant to Government Code section 53075.5, State agencies are without power to override this regulation. (TPAC App. Rehg., at p. 9.) Accordingly, TPAC suggests the Commission’s TNC analysis is flawed since it fails to defer to local jurisdictions. TPAC’s assertion lacks merit.

Government Code section 53075.5 provides that:

Notwithstanding [Public Utilities Code § 5351 et seq.], every city or county shall protect the public health, safety and welfare by adopting an ordinance or resolution in regard to taxicab transportation service rendered in vehicles designed

for carrying not more than eight persons, excluding the driver, which is operated with the jurisdiction of the city or county.

TPAC argues that when this is read in conjunction with section 5353 (g) (exempting “Taxicab transportation service licensed and regulated by a city or county”), “it becomes clear that the Legislature effectively directed local governments to establish the scope of the taxicab exemption to the Commission’s general jurisdiction.” (TPAC App. Rehg., at p. 9.)

To the extent TPAC suggests that the Commission is powerless to make determinations about the limits of our TCP jurisdiction, its claim is not credible. Regardless of the status of local authority over taxicabs, we clearly have state jurisdiction over TCPs. (See § 5351 et seq.) Therefore, even if an argument for concurrent jurisdiction could be made, there is no legitimate argument that we lack jurisdiction to determine the limit of our TCP jurisdiction. As is clear from the many TCP v. taxi Commission cases TPAC cites (i.e. *Babaeian*), we have been making these determinations for decades.

TPAC essentially proposes how conflicts between our TCP regulation and local taxi regulation should be resolved. TPAC’s contention, however, is entirely hypothetical, because there is no indication in this proceeding that local jurisdictions consider TNCs to be taxicabs. As discussed above, contrary to TPAC’s arguments, the definitions TPAC cites from local ordinances do not indicate that TNCs are taxis. (See § 2(B)(2).) Most significantly, in the Rulemaking, no local jurisdiction claimed TNCs were taxis or objected to the Commission’s assertion of TCP jurisdiction over the TNCs. Although TPAC cites San Francisco’s concerns early in the proceeding that “electronic hails” are similar to street hails (see TPAC App. Rehg., at p. 8, fn 38; SFMTA Feb. 11, 2013 Reply), ultimately neither San Francisco nor any other local jurisdiction objected to the Commission’s assertion of TCP jurisdiction over TNCs, or contended TNCs were taxis. (See, e.g., August 19, 2013 SFMTA Comments.) Finally, TPAC has not shown any instance where the any local jurisdictions have attempted to license or

regulate TNCs, such as by any enforcement action undertaken. Although TPAC's position is that TNCs are unlawful taxis, no local authority has officially taken that position.

Even if there were some type of conflict with local jurisdictions, general legal principles concerning State and Commission preemption indicate that our determinations about our jurisdiction are paramount to local regulation. "In any conflict between action by a municipality and a lawful order of the Commission the latter prevails." (*Harbor Carriers v. City of Sausalito*, *supra*, 46 Cal.App.3d 773, 775.) As a practical matter, local pronouncements are not uniform, as is clear with the taximeter definitions. Because uniformity is required, only the Commission can make definitive determinations about the limits to its TCP jurisdiction.

### **3. Equal Protection**

TPAC next contends that the Decision violates the Equal Protection Clauses of the United States and California Constitutions because the Decision treats TNCs differently from taxis even though they provide the same services.

The Equal Protection Clause in the United States Constitution is contained in the 14<sup>th</sup> amendment, which provides, "No State shall... deny to any person within its jurisdiction the equal protection of the laws." In evaluating a claim under the equal protection clause, the courts first look to whether the two groups are similarly situated for the purposes of the law being challenged. (*Cooley v. Superior Ct.* (2002) 29 Cal.4<sup>th</sup> 228, 253.) "If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold. [Citations]" (*Walgreen Co. v. San Francisco* (2010) 185 Cal.App.4<sup>th</sup> 424, 434.) Where the persons are similarly situated and the challenged classification does not involve a suspect class or fundamental right, the next inquiry is whether there is a rational basis for the disparate treatment. (*Id.*, at p. 435.)

Here, TPAC claims that TNCs are similarly situated to taxis for the public safety purposes of the Decision. In support of its contention, TPAC again cites a number of shared characteristics including primarily short trips, and use of city streets. (TPAC App. Rehg. at pp. 15-16.) Much of this argument reiterates TPAC's earlier argument that

TNCs are, in fact, taxicabs. But the Commission has rejected that contention, and found as a legal and factual matter that TNCs are TCPs, and not taxis.

Because TNCs are not taxicabs, they are not similarly situated for the safety purposes of the Decision, and TPAC's equal protection argument fails. Unlike taxis, TNCs are not subject to the safety jurisdiction of local agencies. TPAC argues that the Commission, "attempts to give TNCs special dispensation" (TPAC App. Rehg., at p. 18), and "[t]here is no rational basis for treating TNCs differently from taxicabs in order to protect the public interest...." (TPAC App. Rehg., at p. 18.) These arguments ignore the largest difference between TNCs and taxis for the safety purposes of the Decision -- that we have jurisdiction over TNCs and we do not have jurisdiction over taxis. (See § II.) As discussed, this jurisdiction difference, which is established by statute, is largely based on the prearrangement requirement. (§ 5360.5.)

The Decision can only adopt safety regulations for TNCs, and we can only apply our regulations to TNCs, because the Commission cannot regulate taxis. Again, unlike taxis, TNCs are not regulated by the local authorities. There was little dispute that new safety regulations applicable to TNCs were needed. There would be no need for additional safety regulations to apply to taxis, since as TPAC notes, taxi safety is extensively regulated by local jurisdictions. Moreover, no local jurisdiction has imposed safety regulations on TNC operations. Given this difference, there can be no serious argument that taxis and TNCs are similarly situated for the safety purposes of the Decision.

TPAC also contends that the Decision violates Article IV, section 16 of the California Constitution, which provides that "[a] local or special statute is invalid in any case if a general statute can be made applicable." (Cal. Const. Art. IV, §16 (b).) TPAC argues that the Decision is an invalid special law because the regulations, "remove TNCs from the taxicab regulatory scheme without justification." (TPAC App. Rehg., at p. 21.)

The California special statute clause has been interpreted as an equal protection provision, and therefore, the test is substantially the same as that for equal protection claims. (*County of Los Angeles v. Southern California Tel. Co.* (1948) 32

Cal.2d 378, 389.) Thus, the special statute provision, “does not preclude legislative classification but only requires that the classification be reasonable. [Citations.]” (*People v. Western Fruit Growers* (1943) 22 Cal.2d 494, 506.)

Contrary to TPAC’s argument, the Decision would not constitute an invalid special law for the reasons discussed above regarding equal protection. There are significant and rational reasons that TNCs are treated differently than taxis, the most important being that the Commission is charged with regulating the safety of TCPs, including TNCs, while it has no jurisdiction over taxis. TPAC’s assertion that the Commission removed TNCs from taxi regulation is inaccurate. It is the Public Utilities Code and not the Decision that provides for entirely different regulatory schemes for TCPs, such as TNCs, versus taxis.

For these reasons, TPAC’s argument that the Decision violates equal protection lacks merit.

#### **4. Public Utilities Code**

TPAC’s final arguments concern whether the Decision violates the Public Utilities Code provisions setting forth requirements for all TCPs. TPAC emphasizes that the Commission can only regulate TCPs, “to the extent that such is not inconsistent with the provisions of this chapter [Charter-party Carrier Act]....” (§ 5381.)

In summary, TPAC asserts that the Decision is inconsistent with the following provisions of the Public Utilities Code: (1) sections 5360, 5371, 5384 – charter-party carrier is defined as every person providing transportation, but the Commission is exempting the drivers from the permit requirement; (2) section 5391 requires adequate insurance, but the insurance provisions are not adequate; (3) sections 5374 and 1032(a)- Commission cannot issue a CPCN or permit unless mandatory substance abuse testing and certification requirements are followed; (4) section 5385.6 requires limousines to have special license plates, and TNCs operate limousines that do not meet that requirement; and (5) section 5401 requires that charges be based solely on mileage or time of use, and the Decision does not require this.

**a) Section 5391 Insurance Requirement**

TPAC argues that the Decision fails to meet the section 5391 requirement that the Commission shall “require the charter-party carrier ... to procure...adequate protection against liability...” Although the section 5391 concept of “adequate” insurance is somewhat inexact, we recognize the need to revisit the insurance issues. Accordingly, the Assigned Commissioner has already issued an Assigned Commissioner Ruling directing further proceedings on the issue of adequate TNC insurance. For these reasons, we are granting rehearing on the insurance provisions in the Decision. Proceedings will occur as directed in the ACR. Through that process the insurance provisions will be reassessed.

**b) Sections 5374 and 5385.6**

TPAC highlights two statutory requirements for TCPs, mandatory drug testing and commercial license plate requirements that are not easily applied to the newly emerging TNC industry. TPAC argues that Decision fails to adhere to the requirements of sections 5374 and 1032.1 because it does not require the TNCs to provide for a mandatory controlled substance and alcohol testing certification program. In addition, TPAC alleges that the Commission fails to require TNCs to adhere to section 5385.6, which requires limousines to be equipped with special license plates issued and distributed by the Department of Motor Vehicles.

We acknowledge that the Decision does not fully address the application of these Public Utilities Code sections. Therefore, we will grant limited rehearing of the Decision on the issues of drug testing and commercial license plates.

**c) Section 5384 Permit Requirement**

As TPAC points out, section 5384 requires all charter-party carriers to obtain permits, and section 5360 defines charter-party carriers as “every person engaged in the transportation of persons by motor vehicles for compensation...” Therefore, according to TPAC, because drivers are persons engaged in transportation for compensation, they are carriers who must also obtain permits from the Commission. Although TPAC acknowledges that we have never required all employee-drivers to have

individual permits if they are under the supervision and control of the permit holder (GO 157-D § 5.03), TPAC argues that TNC drivers are not employees.

TPAC correctly notes that TNC drivers are not employees, as this is one of the characteristics that sets TNCs apart from the majority of TCPs. But the GO does not apply to TNCs, so the GO 157-D, section 5.03 requirement TPAC cites is inapposite. Section 5.03 illustrates, however, that the section 5384 TCP permit requirements are often applied to companies, and not individual drivers. Section 5357 defines person as “an individual, a firm, or a corporation.” As we have consistently interpreted the permit requirement, drivers do not need to have individual permits, but rather the firm or corporation must have a permit. Although in the context of TNCs the drivers are not employees, they are clearly still agents connected with the firm. Thus, the Commission’s current interpretation of the permit requirement for TNCs, as applying to the firm or corporation and not the individual drivers, is consistent with how the Commission has interpreted this provision for other types of TCPs, and is in accord with the statute.

**d) Section 5401 Mileage and Time of Use**

TPAC’s final argument is that section 5401 requires that TCPs compute charges based on “vehicle mileage or time of use...” (§ 5401.) TPAC contends that TNCs have used other factors to determine charges. (TPAC App. Rehg., at p. 26.)

As Lyft notes, this is not an issue the Decision addresses, and therefore there is no provision in the Decision that conflicts with section 5401. Accordingly, TPAC does not demonstrate any legal error in the Decision. Section 5401 does not require any action from the Commission, but rather is directed at the TCPs. TPAC’s allegation that TNCs have violated this provision is not appropriately raised in an application for rehearing on a Rulemaking that does not address the issue.

**B. UBER REHEARING**

Although the Decision does not actually rule on whether “Uber” is a TCP, in its application for rehearing, Uber asserts that it does not provide transportation services, and as such the Commission has no jurisdiction over it. According to Uber, it is just a “technology compan[y] that develop[s] software that allow a user to simply procure

transportation service from a licensed TCP holder or future TNC holder....” (Uber App. Rehg., at p. 2.) Uber alleges that we lack jurisdiction over Uber since it is not a transportation provider, and that we have unlawfully expanded our jurisdiction to include those who “facilitate transportation of passengers....” (Uber App. Rehg., at p. 2.)

The Commission held that TNCs are TCPs subject to the Commission’s jurisdiction largely based on the fact that the TNCs receive compensation for transportation and that the transportation is prearranged. (Decision, at pp. 18-21.) The Decision defines TNCs as an entity:

...that provides transportation services for compensation using an online-enabled app or platform to connect passengers with drivers using their personal vehicles. The primary distinction between a TNC and other TCPs is that a TNC connects riders to drivers who drive their personal vehicles, not a vehicle such as a limousine purchased primarily for a commercial purpose. To that end, a TNC is not permitted to itself own vehicles used in its operation or own fleets of vehicles.

(Decision, at p. 24.)

Based on this definition, the Decision concludes that Uber is not a TNC, because Uber drivers typically operate commercially licensed vehicles that are used for other TCP operations. (*Ibid.*) The Decision goes on to hold that uberX, in contrast, is a TNC because it involves the use of personal vehicles. (*Ibid.*) We left the issue of whether Uber is a TCP, despite the fact that it is not a TNC, to be determined in Phase II of this proceeding.

Uber suggests that our holdings about uberX are mistaken. According to Uber, uberX does not designate any type of transportation service, but rather is “one of several classes of car that users of the Uber App can request.” (Uber App. Rehg., at p. 4, fn 11.) Uber asserts that its subsidiary, Rasier, LLC, contracts with drivers of personal vehicles who use the Uber App. and that the Commission should regulate Rasier, not

uberX as a TNC, but “only if and when Rasier applies to the Commission to become a TNC.” (*Ibid.*)

We concede that we have scant information in this proceeding regarding the structure of Uber, any subsidiaries and their roles, and Uber has provided few citations on this subject in its application for rehearing. For this reason, rehearing on the issue of which portion or subsidiary of Uber is a TNC is warranted.

Because we are granting rehearing on the issue of uberX’s status as a TNC there is no longer any ripe issue that Uber is challenging. This is particularly true because we have not yet ruled on Uber’s TCP status. Notwithstanding the fact that Uber has no live controversy with the Decision, we are persuaded that our Finding of Fact 17 should be modified to more accurately track the statutory language. Moreover, we emphasize that our grant of rehearing on the limited issue of the TNC component of Uber’s operations is in no way an endorsement of Uber’s legal arguments.

### III. CONCLUSION

For the above reasons, we will grant limited rehearing on certain issues as described below. We will also modify some of the remaining language in the Decision to better explain and clarify our reasoning. With these modifications, rehearing of the remaining portions of the Decision, as modified is denied.

#### **THEREFORE, IT IS ORDERED that:**

1. Limited rehearing is granted on the following issues: (1) the application of section 5391 (adequate insurance); (2) the application of section 5374 (mandatory drug testing); (3) the application of section 5385.6 (license plate requirement); and (4) whether uberX, or some other component or subsidiary of Uber, is a TNC.

2. The last sentence on page 34 continuing on to page 35 of the Decision is modified to read:

Workshops topics will include, but not necessarily be limited to, a consideration of safety, competition, innovation, accessibility, congestion, the California Environmental Quality Act (in the event any new actions are proposed at that time), and other pollution related issues.

3. The heading of section 2.2.3. is modified to read:

**2.2.3. TNCs Operate on a Prearranged Basis and are not Taxicabs**

4. The following discussion is added on page 20 of the Decision before section 2.2.4.

Pursuant to section 5353 the Commission's TCP jurisdiction does not apply to "Taxicab transportation service licensed and regulated by a city or county by ordinance or resolution, rendered in vehicles designed for carrying not more than eight persons excluding the driver." (§ 5353 (g).) Although prearranged travel is not the sole factor that distinguishes TCPs from taxis, it is correctly considered to be the primary factor.

In a number of cases, the Commission has identified factors, which, in addition to hailing, could indicate illegal taxi operations. (See *Babaeian, supra*, at p. 88 ["defendant paints his vehicle like a taxi"]; *San Gabriel Transit, Inc. v. Titan Capital Corp.* [D.03-02-008] (2003) 2003 Cal. PUC LEXIS 113 [accepting taxi requests/vouchers, advertising as taxicab]; *Transportation Investments, Inc. v. Valley Cab* [D.83-03-012] (1983) Cal PUC LEXIS 489 [identification and advertisement as taxicabs, taximeters, cars that resemble cabs].) The most common characteristics of taxis that TCPs must avoid, other than offering spontaneous service, or hails, are identifying vehicles as taxis, by paint, taxi lights, the use of taximeters (see GO 157-D, § 3.03), and representing the service as taxi service in advertisements or otherwise. TNCs do not have these characteristics.

Notably, TNCs do not use taximeters. The City of Los Angeles requires that taxicabs must be *equipped* with such taximeter devices, which clearly does not apply to transportation apps. (City of Los Angeles Muni. Code § 71.00.) Other local jurisdictions also have definitions of taximeter that clearly exclude smartphone apps. For instance, San Francisco defines a taximeter as "a device *attached* to a Motor Vehicle for Hire...." (SF Muni. Code, § 1102.) These definitions indicate that taximeters are meters that are part of the vehicle. Therefore, under the relevant definitions, TNC apps do not qualify as taximeters.

Therefore, in addition to prearrangement, because TNCs do not share other defining characteristics of taxicabs, they cannot be considered taxicabs.

5. The following paragraph is added after the end of the first paragraph on page 21 of the Decision:

Both the Legislature and the Commission have conclusively rejected using any time period as a standard for prearrangement. The Legislature defines and explains "prearrangement" twice in the Public Utilities Code. Section 5360.5 unambiguously provides that prearrangement means the passenger and carrier arranged the transportation "either by contract or telephone." (§ 5360.5 (b).) By its plain language, this section only requires a contract or telephone contact, and contains no type of time restrictions. Similarly, section 5381.5, enacted in 2004 provides that the Commission must ensure TCP transportation is occurring on a prearranged basis by requiring a waybill that includes information on how the service was procured, as well as the name of a passenger. Consistent with the legislative directives, the Commission also rejected any time requirement for carrier prearrangement in our implementation of the TCP statutes. Accordingly, General Order (GO) 157-D only provides that a traditional TCP driver must have a waybill with the details of the arrangement, including name of a passenger and how the trip was arranged.

6. Section 2.2.5. is added on page 35 of the Decision, as follows:

**2.2.5. Application of the California Environmental Quality Act**

TPAC argues that we our proposed TNC regulation are subject to CEQA, which requires the Commission to follow a specific environmental review prior taking an action that may have an environmental impact. No CEQA review is required prior to the adoption of today's TNC regulations because they do not constitute a CEQA project. Although a Rulemaking and the act of adopting regulations can be considered an agency action and a project (see *Dunn-Edwards v. Bay Area Air Quality Management District* (1995) 9 Cal.App.4th 644), those regulations would only be a CEQA project if there were a direct physical impact or a reasonably foreseeable indirect change. (Pub. Resources Code, § 21065.)

Here, we adopt a limited number of safety regulations applicable to existing and future TNC operations. These regulations include insurance regulations, driver safety regulations, and other provisions regarding fee payment, discrimination, and identification. Our requirements are largely “paper” requirements, and they do not have any direct physical impact on the environment. In addition to the fact that there is no direct physical impact, there also is no “reasonably foreseeable indirect change” caused by the Decision. Significantly, TNC operations are already well-established. We neither encourage nor discourage these operations. We simply impose certain regulatory and safety requirements on TNCs that are already operating, or may be in the future. There is no indication that these new requirements will either increase or decrease TNC operations. While the regulations may assist TNCs because they provide some regulatory framework, and the ability to operate legally, they also may interfere and limit TNC operations, since they impose new requirements. We are not changing the physical status quo, directly or indirectly, and there is no reasonably foreseeable indirect change that will occur.

7. Finding of Fact 17 is modified to read:

It is reasonable to exercise this Commission’s broad grant of authority pursuant to PU Codes §§ 5381 and 701 to create the category of TNC as a subcategory of the existing category of TCP. A company or individual wishing to engage in transportation of passengers, including the facilitation of such transportation through online enabled apps, can choose either to get a traditional TCP license or a TNC permit.
8. Finding of Fact 38 is added to the Decision to read as follows:

Today’s order and the adopted TNC regulations do not have any direct physical impact on the environment and will not result in any reasonably foreseeable indirect change.
9. Finding of Fact 39 is added to the Decision to read as follows:

TNC travel uses electronic waybills prior to service.
10. Finding of Fact 40 is added to the Decision to read as follows:

TNCs do not share defining characteristics of taxicabs, such as top lights and taximeters.
11. Finding of Fact 41 is added to the Decision to read as follows:

TNC online enabled apps are not taximeters.

12. Conclusion of Law 12 is added to the Decision to read as follows:  
Because today's order and the adopted TNC regulations do not have any direct physical impact on the environment and will not result in any reasonably foreseeable indirect change the decision and regulations do not constitute a CEQA project.
13. Conclusion of Law 13 is added to the Decision to read as follows:  
The Commission has no obligation pursuant to CEQA to review the environmental impact of today's order and the adopted TNC regulations, because they do not constitute a CEQA project.
14. Conclusion of Law 14 is added to the Decision to read as follows:  
The prearrangement requirement in section 5360.5 is satisfied by arrangement by contract or telephone, and is verified through use of a waybill.
15. Conclusion of Law 15 is added to the Decision to read as follows:  
Pursuant to Legislative and Commission directives, the concept of "prearrangement" does not require any particular length of time.
16. Conclusion of Law 16 is added to the Decision to read as follows:  
TNCs engage in providing prearranged travel.
17. Conclusion of Law 17 is added to the Decision to read as follows:  
Because TNCs engage in providing prearranged travel and do not share the defining characteristics of taxicabs, they are not taxicabs. TNCs are charter party carriers pursuant to section 5351 et seq., and are not exempt from Commission jurisdiction pursuant to section 5353 (g) (the taxicab exemption).
18. Limited rehearing on insurance related issues will be conducted through the proceeding described in the March 25, 2014 Assigned Commissioner Ruling in this proceeding.

19. Limited rehearing on the other issues listed in ordering paragraph 1, and the coordination of that rehearing with Phase II of this proceeding will be described in a future Assigned Commissioner Ruling to be issued within 30 days of today's order.

20. To the extent any holdings in today's order are inconsistent with any statements in D.13-09-045, those earlier statements are superseded.

21. Rehearing of the remaining portion of D.13-09-045, as modified herein, is denied.

This order is effective today.

Dated April 10, 2014, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
MICHEL PETER FLORIO  
CATHERINE J.K. SANDOVAL  
CARLA J. PETERMAN  
MICHAEL PICKER  
Commissioners

## EXHIBIT 2

## AGENDA REPORT

**Resolution:** Authorize The Executive Director To Enter Into Agreements With Rasier-Ca, Llc, Lyft, Inc And Sidecar Technologies To Permit Transportation Network Company Services At Oakland International Airport Under A Pilot Program Basis (**Aviation**)

**MEETING DATE:** 7/30/2015

**AMOUNT:** Estimated Revenue of \$85,500 in Permit Fees and \$1,000,000 in trip fees for FY '15-16

**PARTIES INVOLVED:** Lyft, Inc., San Francisco, CA, Sidecar Technologies, Inc., San Francisco, CA, Rasier-CA, LLC, San Francisco, CA

**SUBMITTED BY:** Kristi McKenney, Acting Director of Aviation

**APPROVED BY:** J. Christopher Lytle, Executive Director

**ACTION TYPE:** Resolution

### **EXECUTIVE SUMMARY**

Port staff is requesting authority for the Executive Director to enter into separate agreements with three transportation network companies ("TNCs")– Sidecar Technologies, Inc ("Sidecar"), Lyft, Inc ("Lyft"), and Rasier-CA, LLC ("Uber") – using either one of two approaches with each TNC, to authorize ground transportation TNC services at Oakland International Airport ("OAK" or the "Airport") on a pilot program basis. Authorizing TNC ground transportation services will provide a legal avenue for TNC services at OAK, will create a new revenue stream associated with these services, and will address the requests of existing customers to have TNC services available at OAK. The pilot program would expire within eight months of its inception at which time Port staff may recommend incorporating TNC ground transportation services into the Airport Rules and Regulations as one of the ground transportation services authorized at OAK.

### **BACKGROUND**

TNCs have revolutionized commercial ground transportation over the past few years by providing riders the unique ability to connect with drivers through a mobile application platform usable on any smart phone or mobile device. An increasing number of San Francisco Bay Area residents have come to rely on this TNC mobile application technology as a primary method for obtaining ground transportation.

On September 23, 2013, the California Public Utilities Commission ("CPUC") issued a *"Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry,"* (the "2013 CPUC Decision"), which clarified, among other things, that: 1) all TNCs must be regulated by the CPUC as a ground transportation service in California and 2) it is illegal for TNCs to operate at any California airport unless expressly authorized by the applicable airport.

On September 17, 2014, the California Legislature passed AB 2293, effective July 2015, which established certain insurance requirements for TNCs and TNC Drivers. The CPUC issued further guidance on November 20, 2014 regarding the specific definition of a TNC and applicable safety requirements, including commercial liability insurance requirements, for TNCs.

Since September 23, 2013, TNCs have been operating illegally at OAK to varying degrees because the Port does not currently have a mechanism to authorize TNC ground transportation services. TNC services are not currently recognized or included in the Airport Rules and Regulations. At various points over the past year, Lyft, Sidecar, and Uber (the "Permittees") have taken proactive steps to limit operations at OAK in anticipation of completing a formal approval process with the Port. The Permittees would like the ability to operate legally at the Airport to provide desired ground transportation services to their customers.

Port staff have developed agreements with the Permittees, as reflected in the TNC Agreements, which would authorize ground transportation services under a pilot program basis for these three companies. Undertaking a pilot program would highlight the benefits and any difficulties associated with providing TNC ground transportation services at OAK and would provide practical guidance on the best way to incorporate TNC ground transportation services into the Airport Rules and Regulations.

At its July 23, 2015 Meeting the Board of Port Commissioners authorized the Executive Director to enter into agreements with Lyft and Sidecar. Staff has continued to meet with Uber and have since developed a second approach to the proposed permit agreement for the pilot program. This approach also achieves the goals of the pilot program and is described and compared to the previously authorized agreement in the Analysis section below. This Agenda Report seeks authorization for the Executive Director to enter into agreements using either approach with each of the Permittees during the pilot program.

## **ANALYSIS**

Since December 2014, Aviation staff and the Port Attorney's office have been working with Lyft, Sidecar, and Uber to negotiate the terms of TNC Agreements to authorize legal operations at OAK. After productive negotiations with Lyft and Sidecar, at the July 23, 2015 Board of Port Commissioners Meeting, staff recommended TNC Agreements for providing TNC services at OAK on a pilot basis. The agreements established a fee of \$3.85 for each pick up and drop off at OAK for both Lyft and Sidecar with no minimum annual guarantee.

The fee established considered the current trip, permitting and other fees that current OAK ground transportation operators must pay to create equitable total fees relative to access provided. The TNC agreements also establish a one-time permit activation fee as compensation for past operations at OAK. In addition, the agreements include clear safety requirements, including background checks, insurance requirements, etc. to ensure that the TNCs provide safe rides to OAK passengers. Agreement had not been reached with Uber at the time of the July 23, 2015 Meeting and the Lyft and Sidecar agreements were moved forward to not cause delay with parties who had reached agreement.

Since that time Staff and Uber have continued to meet and have developed a second proposed agreement approach for the pilot permit program. The new proposed agreement differs from the previously approved agreements in that it includes a lower trip fee of \$3.15 for each pick up and drop off at OAK with a substantial minimum annual revenue guarantee of \$1,500,000 (if all three TNCs participate) to be prorated to the actual length of the pilot program. The agreement also retains the one-time permit activation fee as compensation for past operations at OAK, as well as clear safety requirements, including background checks, insurance requirements, etc. to ensure that the TNCs provide safe rides to OAK passengers.

While using different approaches, the two types of agreements both considered the current trip, permitting and other fees that current OAK ground transportation operators must pay to create equitable total fees relative to access provided and achieve the goals of the pilot program. The minimum annual revenue guarantee makes a lower trip fee appropriate giving the Port a guaranteed revenue source to ensure flexibility to ensure equitable total fees relative to access provided over the course of the pilot program.

Given that both approaches provide critical information and meet the goals of the pilot program, Staff recommends the Board authorize the Executive Director to enter into agreements with Lyft, Sidecar, and Uber employing either pilot program approach. By approving the agreements, the Board would create a legal avenue for these TNC operations at OAK and a revenue stream for the Port from trip fees associated with TNC operations.

If approved by the Board, each TNC will be authorized to operate legally for eight months (with the option to extend the pilot program an additional 4 months) once they meet all of the conditions established in the agreements, which include meeting insurance requirements, safety requirements, paying permit activation fees, etc.

By creating a pilot program, Aviation staff will be able to closely monitor TNC operations at OAK over the next eight to twelve months to determine if and how TNC services should be incorporated into Article 8 of the Airport Rules and Regulations, which currently covers all ground transportation services at the Airport. By including three Bay Area operating TNCs in the pilot program rather than two significantly more information and data can be obtained for development of future agreements or ordinances related to TNC operations. It is anticipated that Port staff would return to the Board within the next eight to twelve months to recommend either an amended TNC Agreement or proposed revisions to the Airport Rules and Regulations to continue seamless TNC operations at OAK.

Other than the trip fee and minimum annual guarantee distinctions, the agreements contain similar, if not identical, terms in most respects and only vary slightly to address the different business models and mobile application platforms between Lyft, Sidecar, and Uber. As an example, Sidecar is able to geographically limit the scope of its drivers whereas Lyft is not. Minor variances were made to address these differences, but otherwise, the agreements are harmonious.

Other airports have taken a similar approach to addressing TNC operations. SFO has already negotiated a similar TNC Agreement with Sidecar, Lyft and Uber. SNA (John Wayne Airport) has also taken a similar approach and has an agreement in place. SJC (San Jose International), SMF (Sacramento International Airport), LAX (Los Angeles International Airport), and SAN (San Diego International Airport) also have adopted or are working on similar pilot programs or permit regulations which are moving through the approval process.

If Port staff identifies major difficulties or problems associated with TNC services during the pilot program, the Board would not be obligated in any way to continue authorization of these TNC services and would be entitled to follow another course of action.

Port staff has considered the various options associated with each of these alternatives and believes that approving the TNC agreements represents the most profitable and beneficial approach for the Port that would provide a desired service to OAK customers.

### **BUDGET & STAFFING**

The agreements would result in one-time permit fees of approximately \$85,500. While it is unknown how many customers may choose to use the permitted TNCs during the eight month pilot program, ground transportation surveys and data provided by the TNCs have indicated a growing market. If all three TNCs agree to the minimum revenue guarantee approach \$1,000,000 or greater in revenue would be generated during the first eight months (\$1,500,000 over twelve months). If only Uber agrees to the minimum revenue guarantee they will agree to a minimum of \$833,333 during the eight month period (\$1,250,000 over twelve months) and remaining revenues will be based on actual operations of Lyft and Sidecar. Thus total revenues would be greater than \$833,333 by an unknown amount. This additional revenue stream is currently not included in the FY2015-16 budget.

There will be no staffing impact.

### **MARITIME AVIATION PROJECT LABOR AGREEMENT (MAPLA)**

The matters contained in this Agenda Report do not fall within the scope of the Port of Oakland Maritime and Aviation Project Labor Agreement (MAPLA) and the provisions of the MAPLA do not apply.

### **STRATEGIC PLAN**

The action described herein would help the Port achieve the following goals and objectives in the Port's Strategic Plan (<http://www.portofoakland.com/pdf/about/strategicPlan2011-2015.pdf>)

- o Goal A – Objectives 1, 3 & 4: Create sustainable economic growth for the Port and beyond by maximizing the use of existing assets, increasing revenue, job creation and small business growth and pursuing strategic partnerships.
- o Goal B – Objectives 1, 2 & 5: Maintain and aggressively grow core businesses by retaining existing customers, strategically attracting new customers, and enhancing customer services.
- o Goal D – Objective 1: Improve the Port's financial position.

### **LIVING WAGE**

Living wage requirements, in accordance with the Port's Rules and Regulations for the Implementation and Enforcement of the Port of Oakland Living Wage Requirements (the "Living Wage Regulations"), do not apply because the requested action is not an agreement, contract, lease, or request to provide financial assistance within the meaning of the Living Wage Regulations.

### **ENVIRONMENTAL**

CEQA Determination: The proposed approval of the attached TNC Agreements would be exempt from the California Environmental Quality Act (CEQA) Guidelines pursuant to Section 15061(b)(3) of the CEQA Guidelines, which states that CEQA applies only to activities that have a potential for causing a significant effect on the environment. Approving the TNC Agreements and allowing TNC operations at OAK will not result in a physical change in the environment, and therefore is not subject to CEQA and no further environmental review is required.

### **GENERAL PLAN**

This action does not change the use of any existing facility, make alterations to an existing facility, or create a new facility; therefore, a General Plan conformity determination pursuant to Section 727 of the City of Oakland Charter is not required.

### **OWNER-CONTROLLED INSURANCE PROGRAM (OCIP)/ PROFESSIONAL LIABILITY INSURANCE PROGRAM (PLIP)**

The Owner Controlled Insurance Program (OCIP) and Professional Liability Insurance Program (PLIP) do not apply to the matters addressed by this Agenda Report as they are not capital improvement construction or design projects.

### **OPTIONS**

Staff has identified the following options for the Board's consideration:

1. Authorize the Executive Director to enter into separate TNC Agreements using either approach described in this agenda report with Lyft, Inc. and Sidecar Technologies, Inc., and Raiser-CA, LLC. This is the recommended option.
2. Do not adopt the resolution to authorize the approval of the TNC Agreements and direct staff to renegotiate certain terms of the TNC Agreements. This option will delay the legal operation of TNCs at OAK and may not result in an improved agreement with the TNCs.
3. Do not authorize the approval of the TNC Agreements and direct staff to take legal action to prevent ground transportation services from these two TNCs. This action would delay legal operation of TNCs at OAK, would require additional staff time and funding to issue violations under the Rules and Regulations, and ultimately may lead to a protracted legal battle with the TNCs. Further, the Port's relationship with the customers who prefer to use TNC services may be negatively impacted as well.

### **RECOMMENDATION**

Staff recommends that the Board adopt a resolution authorizing the Executive Director to enter into TNC Agreements using either approach described in this Agenda Report with Lyft, Sidecar, and Raiser-CA, LLC respectively.

## EXHIBIT 3



SAN DIEGO COUNTY  
REGIONAL AIRPORT AUTHORITY  
**STAFF REPORT**

Item No.  
**12**

Meeting Date: **FEBRUARY 19, 2015**

**Subject:**

**Transportation Network Company (TNC) Pilot Program Parameters**

**Recommendation:**

Provide Board input on the TNC Pilot Program parameters.

**Background/Justification:**

Transportation Network Companies (TNCs) have a very unique business and technology model, allowing them to operate very differently from taxicabs, Vehicle for Hire (VFH)/ Shuttles and Limousines (TCP charter party carriers). These differences make it necessary for the Airport to formulate regulatory rules and regulations applicable to the TNC business model. The inherent conflict between the highly regulated taxicab, VFH and TCP transportation modes and the very loosely regulated but technology intensive TNCs raises some very difficult and contentious issues. These divergences challenge Airport policymakers to balance regulation and the legacy operating model with innovation and consumer demand for TNC services. The new Airport TNC operational model will add a new dimension of passenger ground transportation app-enabled service that has not been previously attempted at SDIA.

At issue is a fundamental change in the ground transportation systems and models that have existed for many years, not just at airports but within municipalities and states as well. Technological advances, as with many of today's app-enabled services, provide a significant "game changing" advantage for the TNCs. State and local regulators have taken a "wait and see" attitude, relying instead on TNC operators to self-regulate their business operations and their drivers. In comparison, the traditional more highly regulated commercial transportation service providers are held to more stringent and higher standards, especially for driver background checks, qualifications, driving records, vehicle inspections, safety and registration and rates and fares.

The California Public Utilities Commission (PUC) defines a Transportation Network Company ("TNC") as "an organization whether a corporation, partnership, sole proprietor, or other form, operating in California that provides prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles." In Decision 13-09-045 dated September 19, 2013, the PUC "found that TNCs are charter party passenger carriers, and therefore we [PUC] will exercise our existing jurisdiction pursuant to Article XII of the California Constitution and the Passenger Charter-party Carriers' Act, PU Code § 5351 et seq. (the Act). In this decision, under the broad grant

of authority pursuant to PU Codes § 5381 and 701, we [PUC] create the category of TNC to accompany the existing category of TCP." (Conclusion of Law 6, p.71)

The PUC decision rules and regulations for TNCs were adopted to ensure that public safety was not compromised by the operation of this new transportation business model. Among other things, the PUC ordered that "TNCs shall not conduct any operations on the property of or into any airport unless such operations are authorized by the airport authority involved." (Id., Regulatory Requirements, p.33)

San Diego County Regional Airport Authority Code BUSINESS AND COMMERCIAL ACTIVITIES SECTION 8.41 states "(a) It shall be unlawful for any person to engage in any performance as an entertainer or engage in any business or commercial activity on any of the facilities or airports under the jurisdiction of the San Diego County Regional Airport Authority (the "Authority"), except as authorized by a valid grant, franchise, lease, certificate or permit from the Authority." TNCs are engaged in a commercial activity at the airport thus requiring the grant of a valid Ground Transportation Permit.

This Staff Report:

- I. Summarizes the current regulatory framework, requirements and restrictions of the SDIA Commercial Ground Transportation Operators and outlines the major differences for Taxicabs, Passenger Stage Corporation (Vehicle for Hire/Shuttle Van), Transportation Charter Party (TCP) carriers (limousines) and TNCs.
- II. Summarizes the critiques, questions and concerns raised by the TNC representatives at a meeting on January 13, 2015 and the SDIA Ground Transportation operators and stakeholders (e.g. taxicab, VFH and limousine) at a meeting on January 14, 2015 to review the TNC Draft Permit (Attachment A) distributed December 18, 2014.
- III. Identifies the similarities and differences between the permit currently in use at San Francisco International Airport (SFO) (Attachment B) and SDIA's draft permit. The San Francisco TNC permit was signed in October 2014.

The Authority seeks to ensure the travelling passenger and the general public have access to a safe and secure facility, an effective and efficient travel experience and access to transportation options and conveniences they desire. TNCs are promoting a different but responsive transportation service, competitive fares and customer-friendly drivers. They are implementing a new commercial transportation model and disrupting the status quo of current commercial transportation providers. Their model is causing existing commercial operators great concern and challenging lawmakers to take a second look at potentially outdated regulations. While this period of change is occurring, airport staff must work with all parties to determine how best to integrate TNC services into the Airport's ground transportation system. Staff is therefore recommending a limited duration "TNC pilot program" be approved to monitor, evaluate and enforce the requirements and criteria outlined in this staff report.

SDIA Commercial Ground Transportation Regulatory Framework and Requirements

The following summary outlines some key differences in the ground transportation regulations and requirements applicable to taxicabs, Vehicles for Hire, Limousines and TNCs. The summary elements are not all inclusive.

	<b>Taxicabs</b>	<b>Passenger Stage Corporation (PSC)- Vehicles for Hire (VFH)</b>	<b>Transportation Charter Party (TCP) carrier- Limousines</b>	<b>Transportation Network Company (TNCs)</b>
<b>Regulatory Authority</b>	Metropolitan Transit System (MTS) SDC Sheriff's Dept. SDC Weights and Measures Airport Authority Codes, Rules and Regulations, MOAs	California Public Utilities Commission (PUC) California Highway Patrol (CHP) Airport Authority Codes, Rules and Regulations and MOAs	California Public Utilities Commission (PUC) California Highway Patrol (CHP) Airport Authority Rules and Regulations	California Public Utilities Commission (PUC) California Highway Patrol (CHP) Airport Authority Rules and Regulations
<b>Driver</b>	Licensed under the California Vehicle Code (commercial driver's license)  Requires a Sheriff's License and an Airport Driver's Permit background check (Security Threat Assessment)	Licensed under the California Vehicle Code (commercial driver's license)  Airport Authority issued driver's placard	Licensed under the California Vehicle Code (commercial driver's license)  May only transport passengers on a prearranged basis  Comply with Title 13, California Code of Regulations. Driver must be under the permit or certificate (CPUC authority) holder  and must be (a) an employee of the authority holder, or (b) an employee of a sub-carrier, or (c) an independent owner-driver who holds charter-party carrier authority and is operating as a sub-carrier.	Licensed under the California Vehicle Code (personal driver's license)  May only able to transport passengers on a prearranged basis.  The app used by a TNC to connect drivers and passengers must display for the passenger: 1) a picture of the driver, and 2) a picture of the vehicle the driver is approved to use, including the license plate number to identify the vehicle.
<b>Permit Holder, Vehicle Owner</b>	May be either the permit holder (owner) or a leased driver.	May be either the permit holder (owner) or a leased driver.	May be either the permit holder (owner) or a leased driver.	TNCs are not authorized to own vehicles or fleets

	Taxicabs	Passenger Stage Corporation (PSC)- Vehicle for Hire (VFH)	Transportation Charter Party (TCP) carrier- Limousines	Transportation Network Company (TNCs)
Vehicle	<p>MTS Medallion with annual safety inspection Meter calibration to ensure proper fares Inspection for vehicles between 7 and 10 years</p> <p>Commercial license plates required</p>	<p>PSC and/or TCP registration from the PUC with annual CHP inspection Brake and lamp inspection Inspection for vehicles between 7 and 10 years</p> <p>Commercial license plates required</p>	<p>California Vehicle Code (CVC) does not require inspection of commercial vehicles with a seating capacity of 10 or fewer persons, including the driver. CPUC rules provide that "every carrier must inspect all vehicles and maintain documentation." (GO 157-D, Rule 4.02). PUC Code section 5374 (a)(1)(C) requires carriers have a preventive maintenance program that complies with California Highway Patrol (CHP) regulations in Title 13 of the Code of Federal Regulations (CFR).</p> <p>Commercial license plates required</p>	<p>Prior to operating, and annually thereafter, vehicles used to provide TNC services must pass a 19-point inspection by a facility licensed by the California Bureau of Automotive Repair, including foot and emergency brakes; steering; windshield; rear window and other glass; windshield wipers; headlights; tail lights; turn indicator lights; stop lights; front seat adjustment mechanism; doors; horn; speedometer; bumpers; muffler and exhaust; tires; rear view mirrors; and safety belts.</p> <p>Private license plates allowed</p>

	Taxicabs	Passenger Stage Corporation-Vehicle for Hire (VFH)	Transportation Charter Party (TCP) carrier-Limousines	Transportation Network Company (TNCs)
<b>Insurance</b>	Combined Single Limit (CSL) of \$1million CSL	Combined Single Limit (CSL) of \$750,000 CSL (7 passengers)	Liability coverage for death, bodily injury, and property damage, based on vehicle seating capacity, including the driver for up to 7 passengers: \$750,000	TNC services are defined with three periods. Period 1: App open - waiting for a match. Period 2: Match accepted - but passenger not yet picked up (i.e. driver is on his/her way to pick up the passenger). Period 3: Passenger in the vehicle and until the passenger safely exits the vehicle.  Period 1. A minimum of at least \$100,000 for one person, \$300,000 for more than one person, and \$50,000 for property damage of excess commercial insurance is required.  Periods 2 & 3. A minimum of at least \$1 million primary commercial insurance is required.
<b>Consortium Memorandum of Agreement (MOA)</b>	MOA signed with three (3) taxicab consortiums establishing performance requirements and consequences	MOA signed with three (3) VFH consortiums establishing performance requirements and consequences	No MOA	No MOA

	<b>Taxicabs</b>	<b>Passenger Stage Corporation-Vehicle for Hire (VFH)</b>	<b>Transportation Charter Party (TCP) carrier-Limousines</b>	<b>Transportation Network Company (TNCs)</b>
<b>Fares, rates and tariffs</b>	Maximum fares established by MTS for trips originating from the Airport. Current airport fare: \$2.80 Flag drop \$3.00/ mile \$24 wait time/hr.	Must file tariffs containing rates assessed the public. Carriers must file timetables, in accordance with General Order 158-A, Part 8. Tariff is for the information and use of the general public.	The level of charges assessed by the TCP operator is not regulated. Law provides that their charges must be based on vehicle mileage or time of use, or a combination thereof.	Fares and other charges are set by the TNC and not regulated or established by any public agency.  Surge pricing is allowed when customer demand reaches certain thresholds.
<b>Airport Operation &amp; Vehicle tracking</b>	Airport regulations require taxicabs and drivers to be permitted by the Airport (354 vehicles). Permittees are able to use the airport facilities to stage and pick up passengers. Unpermitted operators may only drop off.  Taxicabs and drivers are permitted annually.  Vehicles are assigned an Automated Vehicle Identification (AVI) transponder to record airport activity.	Airport regulations require VFH and drivers to be permitted by the Airport (132 vehicles). Permitted operators may use the airport facilities to stage and pick up passengers. Unpermitted operators may only drop off.  VFH and drivers are permitted annually.  Vehicles are assigned an Automated Vehicle Identification (AVI) transponder to record airport activity.	Airport regulations require TCP vehicles to be permitted by the Airport (1245 vehicles). Permitted vehicles may use airport facilities to stage and pick up passengers. Unpermitted operators may only drop off.  TCP vehicles are permitted annually	TNCs shall not conduct any operations on the airport unless such operations are authorized by the airport.  Airport regulations are being developed to define airport operation and vehicle tracking.  TNCs use a Global Positioning System (GPS) and a "geo-fence" which establishes a perimeter around the airport to record airport activity.
<b>Airport Access (Trip and Permit) Fees</b>	Driver pays trip fee Permit holder pays vehicle permit fees	Permit holder pays vehicle permit fees	Permit holder pays vehicle permit fees	Permit holder pays trip fees

	Taxicabs	Passenger Stage Corporation-Vehicle for Hire (VFH)	Transportation Charter Party (TCP) carrier-Limousines	Transportation Network Company (TNCs)
Waybill	No waybill required (metered fare)	Waybill for prearranged service pickup; no waybill is required for walk up (free call) passengers	Carriers are required by §5381.5 and G.O. 157-D, Part 3.01 to possess a waybill for each trip containing the following: <ol style="list-style-type: none"> <li>1. Carrier name and TCP number.</li> <li>2. Vehicle license plate number.</li> <li>3. Driver's name.</li> <li>4. Name &amp; address of person requesting or arranging charter.</li> <li>5. Time &amp; date charter was arranged.</li> <li>6. How charter was arranged [phone or written contract].</li> <li>7. Number of persons in charter.</li> <li>8. Name of 1 passenger or traveling party.</li> <li>9. Origin and Destination.</li> </ol>	TNC drivers must be able to prove that a ride was matched on the TNC software application as evidence of prearrangement. In other words, information in the software application must be the equivalent of an electronic waybill.

TNC and SDIA Ground Transportation Operators and Permit Holders Feedback (Attachment C)

A draft TNC permit was issued to the TNCs and the Airport's GT Operators and Permit Holders on December 18, 2014 for comment. The draft permit incorporated many key vehicle, driver and operational conditions currently in place for permitted taxicabs, VFH and limousines. The draft document described more stringent requirements for airport operation such as TNC vehicle permitting, identification and tracking, driver background checks and permitting, pickup and drop off locations and restrictions, permit limitations and data reporting. TNC representatives from UBER, LYFT, SIDECAR, WINGZ, RAPID, and OPOLI provided written comments and met with Airport staff on January 13, 2015 to clarify their positions and gather additional information. Taxicab, VFH and limousine representatives met with Airport staff on January 14, 2015 to share their comments and concerns.

The following comments were compiled from their feedback.

	TNC comments	SDIA Ground Transportation Stakeholders: Taxicabs Vehicle for Hire (VFH) Limousines/ Charter Party Carriers' comments
<b>Pilot Program</b>	<p>Requests airport not restrict the number of vehicle and driver permits or adopt a 60-90 day pilot period. "A cap on permits will not only severely limit the effectiveness of Uber's product by artificially lowering supply, but it will not give the Airport an accurate test period for how the market will operate." (UBER)</p> <p>"Very concerned" (SIDECAR)</p>	<p>Supports an airport pilot program that restricts the number of permits and sets a reasonable amount of time to fully assess the impact of TNC operations.</p> <p>Existing airport-permitted ground transportation operators should be allowed to participate in the TNC pilot program evaluation.</p>
<b>Vehicle tracking and Airport trip charges</b>	<p>Automated Vehicle Identification (AVI) transponders are considered redundant and should not be required; the TNC geo-fence is able to provide requested trip data and allow billing of trip fees. Removable transponders can be lost or mishandled.</p> <p>Request self-reporting of fees with the Airport able to audit and investigate.</p> <p>(Would prefer SDIA use) SFO data interface ("Ping") system to track vehicles</p>	<p>Taxicabs and VFH are equipped with AVI transponders to record trips and assess trip fees. TNCs should be required to have the same requirement as taxis and shuttles</p> <p>Limos will be required to have SDIA AVI transponders (or a workable transponder from another airport) effective Jan. 1, 2016.</p>
<b>Driver and vehicle identification airport placard and airport permit, waybill</b>	<p>Vehicle placards and airport permits should not be required; trade dress should be sufficient to identify/verify a TNC vehicle.</p> <p>Private and personal vehicles should not have to display a permanent marking</p> <p>Requiring drivers to obtain an airport permit places an undue burden on them; the administrative requirements for permitting and management should be placed directly on the TNC.</p> <p>Drivers should be allowed to operate under different TNC platforms (i.e. UBER permitted drivers to drive for LYFT).</p> <p>Electronic waybill complies with PUC decision.</p> <p>TNC drivers face app deactivation if they do not follow the terms and conditions.</p>	<p>All airport-permitted commercial vehicles should be required to have a sticker/decal affixed to the vehicle. Thus, TNC vehicles should be mandated to comply with taxicab and shuttle regulations for permanent vehicle identification.</p> <p>TNC drivers should have valid business license.</p>

	TNC comments	SDIA Ground Transportation Stakeholders: Taxicabs Vehicle for Hire (VFH) Limousines/ Charter Party Carriers' comments
<p><b>Background Checks (Attachment D)</b></p>	<p>PUC allows TNCs to conduct their own national background checks including the national sex offender database. The criminal background check which is done through an on-line application uses the applicant's social security number. Any felony criminal convictions within seven years prior to the date of the background check for violent crime, sexual offense, a crime involving property damage and/or theft will make the applicant ineligible to be a TNC driver.</p> <p>The CPUC requires quarterly DMV driving record checks. A driver may have no more than 3 points within the preceding 3 years, no "major violations e.g. reckless driving, hit and run, driving with a suspended license within the preceding 3 years and no driving under the influence convictions within the past 7 years.</p> <p>TNCs claim FBI background checks are flawed and do not fully investigate the individual's criminal history. TNC drivers are required to have a valid California driver's license</p>	<p>Taxicab drivers are required to have a valid California commercial driver's license, comply with the Metropolitan Transit System (MTS) licensing and permitting requirements, apply for and obtain a San Diego County Sheriff's license, secure a city business license and obtain clearance for the Homeland Security TSA Security Threat Assessment (STA). Drivers are issued an airport badge (credential) when their background check clears.</p> <p>VFH drivers are required to comply with the California Public Utilities Commission (PUC) for Passenger Stage Corporation (PSC) and/or Transportation Charter Party (TCP) carrier. Drivers of passenger stage and charter-party vehicles must be licensed as required under the California Vehicle Code, and must comply with the driver provisions of Title 13, California Code of Regulations. They must also be the permit or certificate (CPUC authority) holder or under the complete supervision, direction and control of the operating carrier, and must be (A) an employee of the authority holder, or (B) an employee of a sub-carrier, or (C) an independent owner-driver who holds charter-party carrier authority and is operating as a sub-carrier</p> <p>TNCs drivers and vehicles should be subject to the same requirements</p>
<p><b>Airport requested vehicle and driver listing</b></p>	<p>Vehicle and Drivers listing is unnecessary since the TNCs maintain their own list of drivers and vehicles.</p>	<p>Taxicabs and VFH operators are required to update their list of permitted vehicles and drivers as they change and annually as part of their permits.</p> <p>Limousine operators are required to list of their permitted vehicles as they change and annually as part of their permits.</p> <p>TNCs drivers and vehicles should be subject to the same requirements</p>

	TNC comments	SDIA Ground Transportation Stakeholders: Taxicabs Vehicle for Hire (VFH) Limousines/ Charter Party Carriers' comments
<b>Driver drug testing</b>	TNCs are required via the PUC ruling to "institute a zero tolerance intoxicating substance policy with respect to drivers. Promptly after a zero-tolerance complaint is filed, TNCs shall suspend the driver for further investigation.	All TNC drivers should be required to have mandatory and random drug tests
<b>Insurance</b>	Be consistent with the PUC insurance requirements	Hold the TNCs to the same insurance requirements as the Taxicabs and VFH - \$1 million Combined Single Limits (CSL) at all times
<b>Regulated rates of fare and surge pricing</b>	Fares are set through the TNC app; customers have the option of accepting a "surge price." Uber is willing to report surge pricing events on a monthly basis but not on a 24 hour basis (requirement is onerous and excessive). Less than 0.1% of trips originating at SDIA have been subject to surge pricing.	There is no oversight of the fares and fees being charged by TNCs. Lawsuits have been filed challenging the TNC fare structures and their legitimacy. Surge pricing is not authorized where fares are regulated.
<b>Vehicle age restrictions or AFV/CAV requirements</b>	Since there are no PUC regulations restricting vehicle age, the Airport cannot impose anything more burdensome.	TNCs should conform to the same vehicle age restrictions and fuel types as the other SDIA commercial ground transportation providers.
<b>Vehicle staging (within the Airport's cell phone lot)</b>	15 minute "wait time" limit is unnecessary given that (Uber) uses a First In-First out electronic geofence and drivers will not wait in designated staging areas for extended times.	TNC vehicles will stage in and dispatch from in the cell phone lot. They should be required to pay for this privilege. TNCs pickups in the Airport's parking lot does not contribute to the parking lot's cost recovery.
<b>24 local telephone call line</b>	Uber routinely deals with lost items using multiple channels (phone, app, email, local office, social media) to recover or turn in lost property	TNCs should have a local telephone number staffed during regular business hours for complaints, lost property or general information.
<b>ADA Compliance</b>	(Uber) working hard to partner with more service providers who can meet accessibility needs (Uber however, is not subject to the requirements of Title III, Americans with Disabilities Act.	TNCs should be expected and required to provide ADA compliant services.

The feedback from two groups highlights their major operational differences and illustrates the more contentious points on the part of the existing ground transportation providers in an effort to preserve and perhaps strengthen many of current Airport regulatory and permitting requirements.

TNC Permit Comparison (SDIA Draft Permit and SFO Signed Permit)

To date SFO is the only California airport to negotiate a TNC permit (Attachment B) with all PUC licensed TNCs. Airport staff has reviewed and discussed the SFO permit with the SFO staff and is recommending the following requirements and conditions be incorporated into the final version of the SDIA TNC permit. Staff therefore, is seeking Board input on the parameters for each category.

TNC Permit terms & conditions	San Francisco International Airport (SFO)	San Diego International Airport (SDIA)
<b>Airport Pilot Program</b>	<p>10 months (pilot expires 8/21/15)                      No limitations on authorized drivers and vehicles                      May be modified or cancelled at any time at the sole and absolute discretion of the Airport Director</p>	<p>9 months (pilot expires 12/31/15)                      No permit limitations for TNC drivers and vehicles                      Modified or cancelled at any time at the sole and absolute discretion of the Airport President/CEO                      Permit evaluation and success criteria:                      1) Passenger safety- zero (0) accidents/incidents; 2) Airport operational and security issues- zero (0) occurrences; 3) TNC adherence to Permit terms and conditions- zero (0) non-compliances; 4) On-time data reporting and trip fee payment</p>
<b>Insurance</b>	<p>Workers' Compensation Insurance in statutory limits with Employer's Liability limits not less than \$1,000,000 each accident.</p> <p>Commercial, primary liability insurance policies shall provide per-incident coverage while on Airport premises:                      Period 1: Not less than \$50,000 for death and injury per person, \$100,000 for death and injury per incident, and \$30,000 for property damage for all of the following conditions: (a) a TNC Vehicle is on Airport property; (b) the TNC Driver's app is on or open (or otherwise indicating availability through the TNC platform); (c) the TNC Vehicle has no passenger; and (d) the TNC Driver has not accepted a ride request. All TNC Drivers shall have their apps open for the entire time they are on Airport property.</p> <p>Period 2: Not less than \$1,000,000 per-incident when the driver's app is on and the driver has accepted a ride request.</p>	<p>Workers Compensation Insurance in statutory limits with Employer's Liability limits not less than \$1,000,000 each accident. TNC may request a waiver of this requirement if exempt from Workers' Compensation coverage in accordance with California law.</p> <p>Commercial Automobile and/or Excess Liability, Uninsured and Underinsured Motorist insurance coverage in the following amounts while a TNC vehicle is on Airport premises:                      Note: TNC vehicles are only allowed to stage on airport property provided they have a prearranged pickup (as indicated on the app). TNCs shall only stage at the cell phone lot only and under this condition (trigger Period 2)</p> <p>Insurance requirements by period:                      Period 1: Excess commercial liability insurance of not less than \$100,000 per occurrence to cover any liability arising from a participating driver using a vehicle in connection with a TNC's online-enabled application or platform.</p>

TNC Permit terms & conditions	San Francisco International Airport (SFO)	San Diego International Airport (SDIA)
<p><b>Insurance (cont.)</b></p>	<p>For purposes of this Pilot Program a TNC Driver is in Period 2 either (a) after dropping off a passenger on Airport and accepting a ride request for pick-up on or off Airport or (b) after entering Airport for the purpose of meeting a requested pick-up.</p> <p>Period 3: Not less than \$1,000,000 per-incident when a TNC driver is carrying a passenger on Airport property.</p> <p>(c) Excess commercial liability insurance of not less than \$200,000 per-incident for all of the following conditions: (a) a TNC Vehicle is on Airport ; (b) the TNC Driver's app is on or open (or otherwise indicating availability through the TNC platform); (c) the TNC Vehicle has no passenger; and (d) the TNC Driver has not accepted a ride request. Consistent with § 3.3(c)(ii), all TNC Drivers shall have their apps open for the entire time they are on Airport. In all cases, the insurance coverage shall be available to cover claims regardless of whether a TNC Driver maintains insurance adequate to cover any portion of the claim.</p> <p>In all cases, the insurance coverage shall be available to cover claims regardless of whether a TNC Driver maintains insurance adequate to cover any portion of the claim.</p> <p>All liability insurance policies shall be endorsed or otherwise to provide the following:</p> <p>(a) The City and County of San Francisco, the Airport Commission and its members, and all of the officers, agents, and employees are named as additional Insureds.</p> <p>(b) Such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of the Permit, and that insurance is to be applied separately to each insured against who claim is made or suit is brought. No other insurance of City will be called upon to contribute to a loss covered.</p>	<p>Period 2: Commercial Automobile and/or Excess Liability insurance not less than \$1,000,000 per occurrence to cover any liability arising from a participating driver using a vehicle in connection with a TNC's online-enabled application or platform.</p> <p>Period 3: Commercial Automobile and/or Excess Liability, Uninsured and Underinsured Motorist insurance not less than \$1,000,000 per occurrence to cover any liability arising from a participating driver using a vehicle in connection with a TNC's online-enabled app or platform.</p> <p>In all cases, the insurance coverage shall be available to cover claims regardless of whether a TNC Driver maintains insurance adequate to cover any portion of the claim.</p> <p>The insurance shall include and insure Authority, its Board and all its officers, employees, and agents, their successors and assigns, as additional insureds with respect to the acts or omissions of TNC, and any of its directors, officers, employees, contractors, drivers, representatives or agents in their performance of services pursuant to this Permit, in their operations, use, and occupancy of the Airport, or other related functions performed by or on behalf of TNC in, on or about the Airport.</p> <p>At a minimum, TNC shall carry all policies and coverages required in the CPUC Decision and any subsequent CPUC Rule or state or federal statute, or applicable local ordinance.</p> <p>All insurance policies required herein shall have a minimum A.M. Best Company financial rating of A- minus 7.</p>

TNC Permit terms & conditions	San Francisco International Airport (SFO)	San Diego International Airport (SDIA)
<b>Insurance (cont.)</b>	(c) Severability of Interests (Cross Liability): The term "the insured" is used severally and not collectively, and the insurance afforded under the liability coverages applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability. (d) All policies shall provide that the insurance company shall provide thirty (30) days prior written notice to City of cancellation, or reduction in coverage or limits. Permittee shall provide evidence to City of proof of insurance coverage for a minimum period of not less than ninety (90) days.	Submission of insurance from a non-California admitted carrier is subject to the provisions of California Insurance Code §§ 1760 through 1780, and any other regulations and/or directives from the State Department of Insurance or other regulatory board or agency. TNC agrees, except where exempted, to provide Authority proof of said insurance by and through a surplus line broker Permitted by the State of California.
<b>Driver Background Checks &amp; Vehicle inspections</b>	TNCs are required to ensure public safety performing criminal background checks and California DMV checks on all drivers, and a 19-point vehicle inspection on all vehicles its drivers will use to perform TNC services. TNC Vehicles inspected annually through a licensed automotive repair dealer (Bureau of Automotive Repair licensed auto repair facilities)	TNCs are required to perform criminal background checks and California DMV checks on all drivers The PUC mandated 19-point vehicle inspection used to perform TNC services. TNC Vehicles inspected annually through a licensed automotive repair dealer (Bureau of Automotive Repair licensed auto repair facilities) with a "VALID STATUS" and maintain proper documentation of such inspections Airport will accept approved TNC background check subject to the Airport's random driver audit and driver (finger print) background verification (based on % of trips)
<b>Airport operations</b>	(Permit) For pickups and drop offs. TNC waiting (Period 1) at TNC Staging lot; Wait time in staging lot is limited to 30 minutes and will be monitored Passenger pickups and drop offs at Terminal curb white zones (L2 Departures) TNCs are not allowed to stage, drop off or pickup at the terminal curb	Permit will allow for prearranged pickups only; solicitation and curbside "hails" are not authorized (drop offs are allowed without a permit). TNCs may only stage at Airport's cell phone lot provided they have the prearranged passenger (Period 2) with 15 minute max. wait time. TNC usage of the cell phone lot will be evaluated throughout the pilot program and may be terminated at any point by the President/CEO. Passenger pickups will be done in the Terminal parking lot within the designated limousine parking spaces. Airport TNC contact coordinators will oversee and track vehicle and driver activity while TNC is waiting to load their

TNC Permit terms & conditions	San Francisco International Airport (SFO)	San Diego International Airport (SDIA)
<b>Airport operations (cont.)</b>		<p>customers.</p> <p>TNCs are not allowed to stage or pickup at the terminal curb</p> <p>TNCs shall not allow their drivers to negatively impact or impede traffic flow in or out of airport roadways and parking facilities, congregate on airport access roadways or off-airport parking areas outside the geo-fence or in any way allow their drivers obstruct airport access within a 2 mile radius of the airport.</p>
<b>TNC Vehicle and Driver Identification</b>	<p>Electronic waybill (PUC requirement)</p> <p>Trade dress (PUC requirement)</p> <p>SFO electronic placard (removable) which the TNC issues to the driver/vehicle</p> <p>Vehicle and driver identification requirements subject to change</p>	<p>Electronic waybill (PUC requirement) to be shown to law enforcement or airport representatives when requested.</p> <p>Trade dress (PUC requirement)</p> <p>SDIA electronic placard (removable) which the TNC issues to the driver/vehicle</p> <p>Vehicle and driver identification requirements subject to change</p>
<b>10 year age restriction</b>	No SFO TNC Permit terms and conditions	TNC will attest in writing that no TNC vehicle servicing the airport exceeds the ten (10) year age limit restriction
<b>AGMOU AFV/CAV conversion program</b>	No SFO TNC Permit terms and conditions	TNC is subject to the SDIA vehicle conversion requirements. Vehicles complying with the conversion requirements will be granted a trip fee incentive, those that do not comply will be charged the premium.
<b>Airport trip tracking and charges</b>	<p>TNC geo-fence</p> <p>Unique driver identifiers and license plate nos.</p> <p>Airport "ping system" with tracking triggers at airport entry, passenger pickup and airport exit</p> <p>Monthly reports with periodic audits</p> <p>TNC trip charges of \$3.50 for each pickup and \$3.50 for each drop off is assessed monthly.</p>	<p>Airport TNC parking coordinators will collect and tally Airport parking tickets (interim) to determine TNC airport trips.</p> <p>TNC geo-fence and the SFO "ping system" will be licensed to provide tracking triggers at airport entry, passenger pickup and airport exit.</p> <p>Unique driver identifiers and license plates will be used.</p> <p>Monthly reports with periodic audits in a format acceptable to the Airport will be provided (See Monthly Reports)</p> <p>TNC trip charges of \$0.97 for AFV/CAV, \$1.62 for non AFV/CAV through 6/30/15 have been established; the FY16 trip fees will be set during the FY16 budget process).</p>

TNC Permit terms & conditions	San Francisco International Airport (SFO)	San Diego International Airport (SDIA)
<b>Prohibited Activities</b>	<p>Following activities are prohibited</p> <ul style="list-style-type: none"> <li>(a) Turning off or disabling the TNC app when a TNC Vehicle is on Airport property.</li> <li>(b) Operation of a TNC Vehicle on Airport roadways by an unauthorized driver;</li> <li>(c) Transporting a TNC passenger in an unauthorized vehicle;</li> <li>(d) Picking up or discharging passengers or their baggage at any terminal level or location other than the Designated Areas;</li> <li>(e) Leaving a vehicle unattended;</li> <li>(f) Failing to maintain TNC vehicle interior and exterior in a clean condition;</li> <li>(g) Littering on the Airport;</li> <li>(h) Failing to provide information or providing false information to law enforcement or Airport personnel;</li> <li>(i) Operating a TNC Vehicle without the Trade Dress and Placard;</li> <li>(j) Soliciting passengers on Airport property;</li> <li>(k) Recirculating on Airport roadways;</li> <li>(l) Using or possessing any alcoholic beverage or dangerous drugs or narcotic while on Airport roadways;</li> <li>(m) Failing to operate a TNC Vehicle in a safe manner as required by the California Vehicle Code;</li> <li>(n) Failing to comply with posted speed limits and traffic control signs;</li> <li>(o) Using profane or vulgar language in the presence of any member of the public;</li> <li>(p) Soliciting for or on behalf of any hotel, motel, club, nightclub or other business;</li> <li>(q) Soliciting of any activity prohibited by the California Penal Code;</li> <li>(r) Operating a vehicle which is not in a safe mechanical condition or which lacks mandatory safety equipment as defined in the California Vehicle Code and the California Bureau of Automotive Repair;</li> <li>(s) Disconnecting any pollution control equipment;</li> <li>(t) Double parking on Airport roadways;</li> <li>(u) Operating a vehicle without CPUC certification or at any time during which Permittee's CPUC authority is suspended or revoked;</li> <li>(v) Engaging in any criminal activity.</li> </ul>	<p>Following activities are prohibited</p> <ul style="list-style-type: none"> <li>(a) Turning off or disabling the TNC app when a TNC Vehicle is on Airport property.</li> <li>(b) Operation of a TNC Vehicle on Airport roadways by an unauthorized driver;</li> <li>(c) Transporting a TNC passenger in an unauthorized vehicle;</li> <li>(d) Picking up or discharging passengers or their baggage at any terminal level or location other than the Designated Areas;</li> <li>(e) Leaving a vehicle unattended;</li> <li>(f) Failing to maintain TNC vehicle interior and exterior in a clean condition;</li> <li>(g) Littering on the Airport;</li> <li>(h) Failing to provide information or providing false information to law enforcement or Airport personnel;</li> <li>(i) Operating a TNC Vehicle without the Trade Dress and Placard;</li> <li>(j) Soliciting passengers on Airport property;</li> <li>(k) Recirculating on Airport roadways;</li> <li>(l) Using or possessing any alcoholic beverage or dangerous drugs or narcotic while on Airport roadways;</li> <li>(m) Failing to operate a TNC Vehicle in a safe manner as required by the California Vehicle Code;</li> <li>(n) Failing to comply with posted speed limits and traffic control signs;</li> <li>(o) Using profane or vulgar language in the presence of any member of the public;</li> <li>(p) Soliciting for or on behalf of any hotel, motel, club, nightclub or other business;</li> <li>(q) Soliciting of any activity prohibited by the California Penal Code;</li> <li>(r) Operating a vehicle which is not in a safe mechanical condition or which lacks mandatory safety equipment as defined in the California Vehicle Code and the California Bureau of Automotive Repair;</li> <li>(s) Disconnecting any pollution control equipment;</li> <li>(t) Double parking on Airport roadways;</li> <li>(u) Operating a vehicle without CPUC certification or at any time during which TNC CPUC authority is suspended or revoked;</li> <li>(v) Engaging in any criminal activity.</li> </ul>

TNC Permit terms & conditions	San Francisco International Airport (SFO)	San Diego International Airport (SDIA)																					
<p><b>Permit Activation Fee</b></p>	<p>Permittee shall pay a Permit Activation Fee of either (a) an amount representing actual unpaid per trip fees during the Unpermitted Operations Period; or (b) the flat rate of \$100,000.</p>	<p>TNC shall pay a Permit Activation Fee based on the estimated percentage of Airport trips (costs estimated through the Permit Pilot Program end date) covering the expenses associated with airport enforcement and administrative personnel, electronic vehicle tracking system software licensing fees and driver background and fingerprinting checks audited by the Airport. The Permit Activation Fee for each TNC:</p> <table border="1" data-bbox="951 758 1390 961"> <thead> <tr> <th>TNC</th> <th>% of Trips</th> <th>Est. Cost</th> </tr> </thead> <tbody> <tr> <td>UBER</td> <td>33%</td> <td>\$70,980</td> </tr> <tr> <td>LYFT</td> <td>24%</td> <td>\$52,052</td> </tr> <tr> <td>SIDECAR</td> <td>16%</td> <td>\$33,124</td> </tr> <tr> <td>WINGZ</td> <td>11%</td> <td>\$23,660</td> </tr> <tr> <td>RAPID</td> <td>9%</td> <td>\$18,928</td> </tr> <tr> <td>OPOLI</td> <td>7%</td> <td>\$14,196</td> </tr> </tbody> </table> <p>Permit Activation Fees will be paid upon submittal of the TNC application. Fee payments will be placed in an escrow account and drawn against to cover the above Pilot Program expenses or any other expenses incurred as part of the Pilot Program. Expenses exceeding the estimate will be paid prior to the next permit period. Expenses below the estimate will be refunded to the TNC.</p>	TNC	% of Trips	Est. Cost	UBER	33%	\$70,980	LYFT	24%	\$52,052	SIDECAR	16%	\$33,124	WINGZ	11%	\$23,660	RAPID	9%	\$18,928	OPOLI	7%	\$14,196
TNC	% of Trips	Est. Cost																					
UBER	33%	\$70,980																					
LYFT	24%	\$52,052																					
SIDECAR	16%	\$33,124																					
WINGZ	11%	\$23,660																					
RAPID	9%	\$18,928																					
OPOLI	7%	\$14,196																					
<p><b>Audits and Inspections</b></p>	<p>At any time, the City may conduct an inspection or audit of Permittee's operations at the Airport to confirm that such operations comply with the requirements set forth in the Permit.</p>	<p>At any time, the Airport may conduct an inspection or audit of TNC's operations at the Airport to confirm that such operations comply with the requirements set forth in the Permit.</p>																					
<p><b>Deposit</b></p>	<p>Amount of Deposit. Upon execution of this Permit, Permittee will deliver to Director a security deposit (the "Deposit") equal to the minimum Deposit amount specified in the Permit Application. The Director may, at his sole discretion, adjust the Deposit amount at any time after three months from the date the Permit is issued to establish a Deposit amount approximately equal to two months of the Monthly Permit Fee.</p>	<p>Amount of Deposit. Upon execution of this Permit, TNC will deliver to the President/CEO a security deposit (the "Deposit") equal to the minimum Deposit amount specified in the Permit Application. The President/CEO may, at her sole discretion, adjust the Deposit amount at any time after three months from the date the Permit is issued to establish a Deposit amount approximately equal to two months of the Monthly Permit Fee.</p>																					

TNC Permit terms & conditions	San Francisco International Airport (SFO)	San Diego International Airport (SDIA)
<b>Deposit (cont.)</b>	<p>Form of Deposit. Such Deposit shall be in the form of: (a) a surety bond payable to City, naming City as obligee, and otherwise in form satisfactory to the City Attorney, and issued by a surety company satisfactory to Director; or (b) a letter of credit naming City as beneficiary, and otherwise in form satisfactory to the City Attorney, issued by a bank satisfactory to Director. With Director's consent, Permittee shall be permitted to submit as a Deposit a treasury bond.</p> <p>Use of Deposit. If Permittee fails to pay a Monthly Permit Fee or otherwise defaults with respect to any provision of this Permit, City may use, apply or retain all or any portion of the Deposit for the payment of a Monthly Permit Fee or other charge in default or for the payment of any other sum to which City may become obligated by reason of Permittee's default or to compensate City for any loss or damage which City may suffer thereby</p>	<p>Form of Deposit. Such Deposit shall be in the form of: (a) a surety bond payable to Airport, naming Airport as obligee, and otherwise in form satisfactory to the Airport's General Counsel and issued by a surety company satisfactory to President/CEO; or (b) a letter of credit naming Airport as beneficiary, and otherwise in form satisfactory to the Airport's General Counsel, issued by a bank satisfactory to President/CEO. With President/CEO's consent, TNC shall be permitted to submit as a Deposit a treasury bond.</p> <p>Use of Deposit. If TNC fails to pay a Monthly Permit Fee or otherwise defaults with respect to any provision of this Permit, Airport may use, apply or retain all or any portion of the Deposit for the payment of a Monthly Permit Fee or other charge in default or for the payment of any other sum to which Airport may become obligated by reason of TNC's default or to compensate Airport for any loss or damage the Airport may suffer.</p>
<b>Monthly Reports</b>	<p>Within fifteen (15) calendar days of the close of any calendar month, Permittee shall submit to the City its operations report for the previous calendar month. The monthly report shall be in an agreed-upon electronic format and shall include for each date of operations and for each trip (a) license plate number of the TNC vehicle and (b) time of entry into and exit from Airport property. The monthly report shall also include the total number of trips for the reporting period.</p>	<p>Within fifteen (15) calendar days of the close of any calendar month, TNC shall submit to the Airport its operations report for the previous calendar month. The monthly report shall be in an agreed-upon electronic format and shall include for each date of operations and for each trip (a) license plate number of the TNC vehicle and (b) time of entry into and exit from Airport property. The monthly report shall also include the total number of trips for the reporting period.</p>
<b>Compliance with Americans With Disabilities Act</b>	<p>Permittee acknowledges that pursuant to the ADA, programs, services and other activities provided by a public entity, whether directly or through a contractor, must be accessible to the disabled public. Permittee shall provide the services specified in this Permit in a manner that complies with the ADA and any and all other applicable federal, state and local disability rights legislation. Permittee agrees not to discriminate against disabled persons in the provision of services, benefits or activities provided</p>	<p>TNC acknowledges that all programs, services and other activities at SDIA must be accessible to the disabled public. TNC shall provide the services specified in this Permit in a manner that complies with the ADA and any and all other applicable federal, state and local disability rights legislation. TNC agrees not to discriminate against disabled persons in the provision of services, benefits or activities provided under this</p>

TNC Permit terms & conditions	San Francisco International Airport (SFO)	San Diego International Airport (SDIA)
Compliance with Americans With Disabilities Act (cont.)	under this Permit and further agrees that any violation of this prohibition on the part of Permittee, its employees, agents or assigns shall constitute a material breach of this Permit.	Permit and further agrees that any violation of this prohibition on the part of TNC, its employees, agents or assigns shall constitute a material breach of this Permit.
Driver training	TNC responsible to provide training on Airport's Rules and Regulations	TNC responsible to provide training on Airport's Rules and Regulations
Notice to Drivers	TNC responsible to communicate current and changed permit conditions promptly and notify the Airport in writing.	TNC responsible to communicate current and changed permit conditions promptly and notify the Airport in writing.
TNC Representative and Duties	Permittee shall provide Airport with name, address, telephone and email address for at least one qualified representative authorized to represent and act for it in matters pertaining to its operation, and shall keep Director informed in writing of the identity of each such person.	<p>TNC shall provide Airport with name, address, telephone and email address for at least one qualified representative authorized to represent and act for it in matters pertaining to its operation, and shall keep President/CEO informed in writing of the identity of each such person.</p> <p>Should the Airport or any of its representatives issue notice to the TNC (either verbally or in writing) of a permit noncompliance or violation, the TNC shall respond within one business day as to the corrective action. TNC drivers and vehicles found violating the terms of this permit shall be "deactivated" immediately from providing TNC services at the Airport.</p>

**Fiscal Impact:**

The incremental revenue generated from FY 2015 trip fees paid by the Transportation Network Companies under the pilot program is expected to be nominal. Future fee amounts will be determined as part of the FY 2016 budget process.

The Transportation Network Companies will be assessed a startup / permit activation fee of approximately \$213K to cover initial startup, administration and technology upgrade costs. These costs are not included the FY 2015 budget but will be absorbed through other Authority budget savings. Expenses that will impact budget years that have not been adopted by the Board will be included in future year budget requests.

**Authority Strategies:**

This item supports one or more of the Authority Strategies, as follows:

- Community Strategy     Customer Strategy     Employee Strategy     Financial Strategy     Operations Strategy

**Environmental Review:**

A. CEQA: This Board action is not a project that would have a significant effect on the environment as defined by the California Environmental Quality Act ("CEQA"), as amended. 14 Cal. Code Regs. §15378. This Board action is not a "project" subject to CEQA. Cal. Pub. Res. Code §21065.

B. California Coastal Act Review: This Board action is not a "development" as defined by the California Coastal Act. Cal. Pub. Res. Code §30106.

**Application of Inclusionary Policies:**

Not Applicable

**Prepared by:**

DAVID BOENITZ  
DIRECTOR, GROUND TRANSPORTATION

EXHIBIT 4



Los Angeles World Airports

Item Number

15

# REPORT TO THE

# BOARD OF AIRPORT COMMISSIONERS

*Shirlene Sue*  
Approved by: Shirlene Sue, Chief Management Analyst

*Wei Chi*  
Reviewed by: Wei Chi, Deputy Executive Director

*Timothy J. J.*  
City Attorney

*Deborah A. Flint*  
Deborah A. Flint - Executive Director

Meeting Date:

7/16/2015

CAO Review:

Completed  
 Pending  
 N/A

Reviewed for	Date	Approval Status	By
Capital Budget	7/8/15	<input checked="" type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> NA	DS
Operating Budget	7/2/2015	<input checked="" type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> NA	RW
CEQA	7/13/15	<input checked="" type="checkbox"/> Y <input type="checkbox"/> N	AE
Procurement	7/16/2015	<input checked="" type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> Cond	MT
Guest Experience	7/3/2015	<input checked="" type="checkbox"/> Y <input type="checkbox"/> N	BY

**SUBJECT: Adopt a Blanket Resolution for a Non-Exclusive License Agreement for Transportation Network Companies.**

Adopt a Blanket Resolution for issuance and execution of Non-Exclusive License Agreements covering Transportation Network Company services to and from Los Angeles International Airport.

**RECOMMENDATIONS:**

Management RECOMMENDS that the Board of Airport Commissioners:

1. ADOPT the Staff Report.
2. DETERMINE that this action is exempt from the California Environmental Quality Act (CEQA) pursuant to Article III, Class 1 (18)(c), (3), (14), of the Los Angeles City CEQA Guidelines, and is also subject to Sections 15301 and 15061(b)(3) of the State CEQA Guidelines.
3. ADOPT a Blanket Resolution approving the Non-Exclusive License Agreement covering Transportation Network Company services to and from Los Angeles International Airport.
4. AUTHORIZE the Executive Director to execute Non-Exclusive License Agreements for Los Angeles International Airport upon approval as to form by the City Attorney.

## **DISCUSSION:**

### **1. Purpose**

Adopt a Blanket Resolution for issuance and execution of Non-Exclusive License Agreements (NELAs) to permit Transportation Network Company (TNC) services to and from Los Angeles International Airport (LAX). The NELA will ensure TNC compliance with City and Los Angeles World Airports (LAWA) policies, rules and regulations.

### **2. Prior Related Actions**

- None

### **3. Current Action**

LAWA patrons access the airport by various modes of ground transportation. The current Ground Transportation Permit Program permits and regulates the activities of commercial operators, including taxis, shared-ride vans, scheduled service buses, courtesy shuttles (hotel, private parking, and rental car), and charter carriers.

LAWA patrons, in large number, continue to use private vehicles for pick up and drop off, which contributes to greater traffic and congestion. Permitting TNCs will allow our guests an additional transportation choice that may provide a viable and effective alternative for some private vehicle users, which would increase use of commercial vehicle alternatives and improve the efficient use of LAX and LA/ONT facilities.

The proposed Non-Exclusive License Agreement (NELA) for services at LAX includes the following terms and conditions:

- Authority from the California Public Utilities Commission (CPUC) – TNC shall have certification and an active permit issued by the CPUC.
- Insurance – TNC shall have the required minimum liability coverage at all times while operating on Airport property at the level set by the CPUC.
- Dual Authority – Drivers with vehicles who operate under TNC authority and who also have a separate CPUC authority and a separate LAWA NELA, shall abide by the terms pursuant to the non-TNC NELA Agreement. (Operator with both TNC authority and TCP NELA must abide by terms of TCP NELA).
- Upper Level – TNC shall operate only on the upper/departure level of the LAX Central Terminal Area (CTA).
- Geo-Fence- The established boundary defined by Geographic Information System coordinates, passage through which by a TNC vehicle engaged in a mobile app transaction to or from the Airport CTA shall constitute a trip.
- Designated TNC Airport Assignment Area – The area exclusively available from which the TNC mobile app is permitted to receive an assignment from an Airport passenger inside the Geo-Fence Area.

- Designated TNC Staging Area – One or more LAWA-designated area(s) where unassigned TNC Vehicles may wait for an Airport passenger assignment, as may be amended from time to time by the Executive Director.
- Vehicle Cap – TNC shall be limited to 40 unassigned vehicles inside the Geo-Fence Area, Designated TNC Airport Assignment Area, and Designated TNC Staging Area at any time, or such number approved by the Executive Director.
- Shared Rides – TNC shall be prohibited from picking up more than one party within the Geo-Fence Area.
- Trade-Dress – Each TNC vehicle within the Geo-Fence, Designated TNC Airport Assignment Area, and Designated TNC Staging Area shall, at all times, have the Trade Dress (i.e. company logo/identifier) properly displayed and distinguishable within 50 feet of the vehicle.
- Fees – TNC shall pay a \$4.00 per trip fee, applied to both pick up and drop off trips, when crossing the Geo-Fence, or such fee as set by the Board of Airport Commissioners (Board).
- Monthly License Fee –TNC shall remit a Monthly License Fee the greater of 1) \$25,000, or 2) the product of (a) the number of Trips conducted by TNC in the calendar month and (b) the per Trip Fee then in effect, subject to monthly reconciliation.
- Faithful Performance Guarantee (FPG) – TNC shall maintain an FPG in the amount of \$100,000 or three times the estimated monthly payment, whichever is greater.
- Tracking and Audit- TNC shall track, limit and report the activity within the LAX Geo-Fence and Designated TNC Staging Area. TNC shall allow audit of records, including tracking data, upon request by LAWA.
- Training - TNC shall demonstrate that each TNC Driver using Airport property has been instructed on the terms of the license, including compliance with LAX Rules and Regulations.

***Action Requested***

Staff requests adoption of a Blanket Resolution for the issuance and execution of a NELA for TNC services to and from LAX.

***Fiscal Impact***

Staff estimates subsequent execution of each NELA for LAX will provide a minimum of \$300,000 in annual revenue to LAWA.

#### **4. Alternatives Considered**

- ***Take No Action***

If no action is taken, TNCs will not be permitted to operate and pick up patrons at LAX.

#### **APPROPRIATIONS:**

As this is an administrative action, staff does not request any appropriations for this item.

#### **STANDARD PROVISIONS:**

1. The issuance of permits, leases, agreements, gate and space assignments, and renewals, amendments or extensions thereof, or other entitlements granting use of existing airport facilities or its operations is exempt from the requirements of the California Environmental Quality Act (CEQA) pursuant to Article III, Class 1 (18)(c); and operation, repair, maintenance or minor alteration of existing highways and streets, sidewalks, gutters, parking lots, aircraft parking areas, service roads, and fire lanes except where the activity will involve removal of a scenic resource including but not limited to a stand of trees, a rock outcropping or an historic building pursuant to Article III, Class 1(3); and issuance, renewal or amendment of any lease, license or permit to use an existing structure or facility involving negligible or no expansion pursuant to Article III, Class 1 (14) of the Los Angeles City CEQA Guidelines; and is also subject to Sections 15301 and 15061(b)(3) of the State CEQA Guidelines.
2. This agreement will be approved as to form by the City Attorney.
3. Actions taken on this item by the Board of Airport Commissioners will become final pursuant to the provisions of Los Angeles City Charter Section 245.
4. Permittees will comply with the provisions of the Living Wage/Service Contractor Worker Retention Ordinances.
5. The Small Business Enterprise Program does not apply to Non-Exclusive License Agreements.
6. Permittees will comply with the provisions of the Affirmative Action Program.
7. Permittees must provide a Business Tax Registration Certificate number prior to issuance of the Non-Exclusive License Agreement.
8. Permittees will comply with the provisions of the Child Support Obligations Ordinance.
9. Permittees must have approved insurance documents, in the terms and amounts required, on file with Los Angeles World Airports prior to issuance of the Non-Exclusive License Agreements.
10. This action is not subject to the provisions of City Charter Section 1022 (Use of Independent Contractors).

11. Non-Exclusive License Agreements are not subject to the provisions of the Contractor Responsibility Program.
12. Permittees are subject to the provisions of the Equal Benefits Ordinance.
13. Permittees will be required to comply with the provisions of the First Source Hiring Program for all non-trade LAX airport jobs.
14. Permittees will be required to comply the provisions of the Bidder Contributions CEC Form 55.

EXHIBIT 5

COM/MP1/avs

Date of Issuance 9/23/2013

Decision 13-09-045 September 19, 2013

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on Regulations  
Relating to Passenger Carriers, Ridesharing, and  
New Online-Enabled Transportation Services.

Rulemaking 12-12-011  
(Filed December 20, 2012)

**DECISION ADOPTING RULES AND REGULATIONS TO  
PROTECT PUBLIC SAFETY WHILE ALLOWING NEW ENTRANTS  
TO THE TRANSPORTATION INDUSTRY**

TABLE OF CONTENTS

Title	Page
DECISION ADOPTING RULES AND REGULATIONS TO PROTECT PUBLIC SAFETY WHILE ALLOWING NEW ENTRANTS TO THE TRANSPORTATION INDUSTRY .....	2
Summary .....	2
1. Procedural History .....	4
2. Jurisdiction.....	7
2.1. Comments on the Rulemaking.....	8
2.2. Discussion.....	11
2.2.1. Neither the Federal Telecommunications Act of 1996 nor Public Utilities Code Section 710 Exempts TNCs from State Jurisdiction .....	12
2.2.2. TNCs Transport Passengers for Compensation.....	18
2.2.3. TNCs Operate on a Prearranged Basis .....	20
2.2.4. The Commission Has the Jurisdiction and the Duty to Establish Regulations Governing the Provision of TNC Services.....	21
3. Safety .....	35
3.1. Comments on the Rulemaking.....	36
3.2. Discussion.....	39
4. Ridesharing.....	44
4.1. Comments on the Rulemaking.....	44
4.2. Discussion.....	48
5. Transportation Access.....	52
5.1. Comments on the Rulemaking.....	52
5.2. Discussion.....	54
6. Insurance.....	56
6.1. Comments on the Rulemaking.....	57
6.2. Discussion.....	58
7. Workshop Report.....	59
7.1. Discussion.....	62
8. Comments on Proposed Decision .....	63
9. Assignment of Proceeding .....	64
Findings of Fact.....	64
Conclusions of Law .....	70
ORDER.....	72

**DECISION ADOPTING RULES AND REGULATIONS  
TO PROTECT PUBLIC SAFETY WHILE ALLOWING NEW ENTRANTS  
TO THE TRANSPORTATION INDUSTRY**

**Summary**

This decision adopts rules and regulations for New Online Enabled Transportation Services, referred to hereafter as a Transportation Network Company<sup>1</sup> (TNC), to ensure that public safety is not compromised by the operation of this new transportation business model. TNCs are not just Lyft, SideCar, InstantCab, and UberX.<sup>2</sup> This Commission defines a TNC as an organization whether a corporation, partnership, sole proprietor, or other form, operating in California that provides prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles.<sup>3</sup> Among other

---

<sup>1</sup> In the Rulemaking, we referred to these companies as New Online-Enabled Transportation Services (NOETS). We are changing the acronym to Transportation Network Company (TNC) for ease of use.

<sup>2</sup> The Commission's Safety and Enforcement Division issued cease and desist letters and \$20,000 citations against Uber, Lyft, and SideCar for operating without authority and other violations of state law. However, in 2013, the Safety and Enforcement Division entered into settlement agreements intended to ensure the public safety of both riders and drivers with Uber, Lyft, and SideCar, allowing the companies to operate while the Commission's TNC rulemaking is underway.

<http://www.cpuc.ca.gov/PUC/transportation/Passengers/CarrierInvestigations/>.

<sup>3</sup> There are eleven exemptions to the Passenger Charter-party Carriers' Act contained in Public Utilities Code § 5353. Our definition of a TNC does not in any way usurp those existing exemptions. For example, one of the exemptions is passenger vehicles carrying passengers on a non-commercial enterprise basis. This exception has been defined by the Commission to mean non-profit organizations. See D.91.-06-025 ("The term 'noncommercial enterprise basis' in PU Code Section 5353(f) includes operations conducted on a not-for-profit, tax-exempt basis, as authorized by federal or state law."). Another exemption is the rideshare exemption itself, which exempts: Transportation of

requirements established in this decision, we require each TNC (not the individual drivers) to obtain a permit from the California Public Utilities Commission (Commission), require criminal background checks for each driver, establish a driver training program, implement a zero-tolerance policy on drugs and alcohol, and require insurance coverage as detailed below.

This decision orders a second phase to this proceeding to review the Commission's existing regulations over limousines and other charter-party carriers to ensure that the public safety rules are up to date, and that the rules are responsive to the needs of today's transportation market. In addition, the second phase will consider the potential impact of any legislative changes that could affect our ability to regulate the TNC industry. When the second phase is complete, the Commission will initiate the Commission's resolution process to update the General Order (GO) 115 and 157 series to include the new regulations relating to the charter-party carrier subclass of TNC.

Finally, the Commission is aware that TNCs are a nascent industry. Innovation does not, however, alter the Commission's obligation to protect public safety, especially where, as here, the core service being provided -- passenger transportation on public roadways -- has safety impacts for third parties and property. The Commission is familiar with and confident in its ability to protect public safety in the face of rapid technological change. Consequently, while the Commission adopts these rules and regulations, it will

---

persons between home and work locations or of persons having a common work-related trip purpose in a vehicle having a seating capacity of 15 passengers or less, including the driver, which are used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code, when the ridesharing is incidental to another purpose of the driver.

also look for further guidance from the legislature should it decide that there is a need for legislation to provide guidance in regulating this new industry.

### **1. Procedural History**

On December 20, 2012, the Commission opened this Rulemaking in order to determine whether and how TNC services arranged through online-enabled apps such as Uber, SideCar, and Lyft might affect public safety.<sup>4</sup>

In the Order Instituting Rulemaking (Rulemaking), the Commission stated that:

We initiate this proceeding to protect public safety and encourage innovators to use technology to improve the lives of Californians.<sup>5</sup> The purpose of this Rulemaking is not to stifle innovation and the provision of new services that consumers want, but rather to assess public safety risks, and to ensure that the safety of the public is not compromised in the operation of these business models. The Commission invites all interested parties to participate in this proceeding to ensure that regulation is not a hindrance, but continues to be the safety net that the public can rely on for its protection.<sup>6</sup>

The Commission sought comment on issues including: how the Commission's existing jurisdiction should be applied to businesses such as Uber, SideCar, and Lyft; the consumer protection and safety implications of these new

---

<sup>4</sup> The Commission's Safety and Enforcement Division issued cease and desist letters and \$20,000 citations against Uber, Lyft, and SideCar for operating without authority and other violations of state law. However, in 2013, the Safety and Enforcement Division entered into settlement agreements intended to ensure the public safety of both riders and drivers with Uber, Lyft, and SideCar, allowing the companies to operate while the Commission's TNC rulemaking is underway.

<http://www.cpuc.ca.gov/PUC/transportation/Passengers/CarrierInvestigations/>.

<sup>5</sup> R.12-12-011, Rulemaking at 1.

<sup>6</sup> R.12-12-011, Rulemaking at 2.

methods for arranging transportation services; whether and how the new transportation business models differ from longstanding forms of ridesharing; and the new transportation business models' potential effect on insurance and transportation access.

On January 28, 2013, opening comments were filed by: Willie L. Brown, Jr., Luxor Cab Company, Greater California Livery Association, San Francisco Airport Commission, International Association of Transportation Regulators, Uber Technologies, Personal Insurance Federation of California (PIFC), Center for Accessible Technology (CforAT), Zimride, TransForm, SideCar Technologies, San Francisco Municipal Transportation Agency, Ed Healy, United Taxicab Workers, San Francisco Cab Drivers Association, Taxicab Limousine and Paratransit Association, and Taxicab Paratransit Association of California.

On February 11, 2013, reply comments were filed by: Electronic Frontier Foundation, International Association of Transportation Regulators, United Taxicab Workers, Zimride, CforAT, Luxor Cab Company, San Francisco Municipal Transportation Agency, Transform, SideCar Technologies, Taxicab Paratransit Association of California, Ed Healy, Willie J. Brown, Jr., eRideshare, and San Francisco Cab Drivers Association.

On February 15, 2013, the Commission held a Prehearing Conference in order to, *inter alia*, establish the service list, determine the positions of the parties, identify issues for inclusion in the April 2, 2013 Assigned Commissioner and Administrative Law Judge's Scoping Memo and Ruling (Scoping Memo), and discuss the procedural schedule. Prehearing Conference Statements were filed by: United Taxicab Workers, International Association of Transportation Regulators, Willie J. Brown, Jr., Transform, Taxicab Paratransit Association of

California, San Francisco Municipal Transportation Agency, Zimride, Uber Technologies, CforAT, and San Francisco Airport Commission.

On March 7, 2013, the Administrative Law Judge (ALJ) issued a notice to the parties via e-mail, setting a workshop schedule and directing parties to file workshop statements answering specific questions about the following issues: TNC operations; jurisdiction; public safety; insurance; background checks; accessibility and equal access; and how Commission regulations may enhance or impede access to public roadways.

On April 2, 2013, the assigned Commissioner and ALJ issued the Scoping Memo which established the scope and schedule of the Rulemaking, categorized the Rulemaking as quasi-legislative, and determined that hearings were not necessary.

On April 3, 2013, workshop statements were filed by: Willie L. Brown, Jr., The Utility Reform Network, San Francisco Cab Drivers Association, Zimride, SideCar Technologies, TransForm, San Francisco Airport Commission and San Francisco Municipal Transportation Agency, Uber Technologies, Taxicab Paratransit Association of California, United Taxicab Workers, Luxor Cab Company, and CforAT.

On April 10 and 11, 2013, the Commission held a workshop to facilitate dialogue among the parties on issues including: jurisdiction, public safety, accessibility, insurance, and proposed modifications for California statutes or Commission regulations. Two parties, TransForm and Taxicab Paratransit Association of California, took notes during the workshop and prepared a draft report summarizing all parties' positions as articulated during the workshop. Parties reviewed the draft report to ensure that their positions were captured

correctly, and on May 17, 2013, TransForm and Taxicab Paratransit Association of California filed the final workshop report with the Commission.

On April 25, 2013, CforAT filed a motion requesting an additional round of comments on the issues raised in the Scoping Memo. On May 10, 2013, the ALJ granted the motion, determining that opening comments were due on June 3, 2013 and reply comments were due on June 10, 2013. On July 17, 2013, the California Highway Patrol (CHP) filed its comments.<sup>7</sup>

The purpose of this Rulemaking is not to stifle innovation and the provision of new services that consumers want, but rather to assess public safety risks, and to ensure that the safety of the public is not compromised in the operation of these business models. The Commission invited all interested parties to participate in this proceeding to ensure that regulation is not a hindrance, but continues to be the safety net that the public can rely on for its protection.<sup>8</sup>

## **2. Jurisdiction**

As noted in the Rulemaking,<sup>9</sup> the Commission's jurisdiction over charter-party carriers is clear. Nevertheless, new technology and innovation require that the Commission continually review its regulations and policies to ensure that the law and the Commission's safety oversight reflect the current state of the industry and that these regulations are just and fair for all passenger carriers.

---

<sup>7</sup> R.12-12-011, Rulemaking at 1.

<sup>8</sup> R.12-12-011, Rulemaking at 2.

<sup>9</sup> R.12-12-011, Rulemaking at 2-3.

The Commission sought comment on how the Commission's existing jurisdiction pursuant to the California Constitution and the Public Utilities Code (PU Code) should be applied to businesses like Uber, Sidecar, and Lyft and the drivers employed or utilized by these or similar entities. The Commission also sought comment on whether any existing legislation should be modified or if new legislation should be enacted.

### **2.1. Comments on the Rulemaking**

The parties that filed opening comments all addressed jurisdiction in varying degrees. The summaries of the positions of parties below capture all the positions that have been voiced in this Rulemaking on the subject of jurisdiction.

The CHP asserts that TNCs fall under existing Commission jurisdiction, because the CHP views TNCs as for-hire passenger carriers.<sup>10</sup> The CHP views a donation for transportation service equivalent to direct compensation, because the intent is to conduct a for-hire operation.<sup>11</sup>

Luxor Cab asserts that these businesses should be regulated the same as all other passenger carriers. Furthermore, it asserts that the presence of new technology for summoning a car does not in any way change the nature of the business that they are engaged in.<sup>12</sup>

Greater California Livery Association (GCLA) asserts that, based on their experience, these transportation technology companies should be subject to the same Commission regulation and enforcement as charter party carriers.<sup>13</sup>

---

<sup>10</sup> California Highway Patrol comments filed on 07/17/13 at 1-2.

<sup>11</sup> California Highway Patrol comments filed on 07/17/13 at 1.

<sup>12</sup> Luxor Cab Opening Comments filed on 01/28/13 at 1.

<sup>13</sup> GCLA Opening Comments filed on 01/28/13 at 2.

Uber suggests that the Commission does not currently have jurisdiction over Uber because Uber is not a charter-party carrier within the meaning of PU Code § 5351 *et seq.* Further, Uber advocates against extending the Commission's jurisdiction to companies like Uber because: 1) no public policy or public interest is advanced by such an extension of the law; 2) the Legislature has recently enacted new legislation exempting Internet Protocol-enabled (IP-enabled) services from regulation by the Commission; and 3) extending Commission regulation to Uber would conflict with Federal and State policies promoting further development of, and innovation in, information services provided over the Internet by prohibiting regulation of information services providers.<sup>14</sup>

TransForm acknowledges that the Commission has jurisdiction over charter-party carriers not meeting the statutory exemptions for taxicabs and work-related ridesharing, and has exercised this jurisdiction to ensure consumer protection and safety for traditional chartered transportation services.<sup>15</sup> TransForm further asserts that the Commission should exercise its jurisdiction carefully so that it is applied in a way that allows growth of technology-enabled ridesharing services rather than eliminating an innovative tool to help address transportation access and climate change. The Commission should recommend to the legislature any necessary modifications to existing statutory exemptions to create a coherent regulatory framework that allows for ridesharing services to grow, while ensuring that consumer protection and safety is addressed. At the same time it is important for high-volume services to consult and coordinate .

---

<sup>14</sup> Uber Opening Comments filed on 01/28/13 at 5.

<sup>15</sup> TransForm Opening Comments filed on 01/28/13 at 2.

with local cities, counties, and public transit agencies to avoid potential impacts.<sup>16</sup>

The San Francisco Municipal Transportation Authority (SFMTA) says state law defines a charter-party carrier as any “person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this state.”<sup>17</sup> Drivers affiliated with businesses like Lyft and Sidecar drive passengers to destinations of their choice in exchange for payment. These businesses collect payments from passengers, share revenue with the drivers, and manage the exchange of information between passengers and drivers to facilitate interactions and commerce between drivers and passengers. SFMTA goes on to say that although certain transportation providers that would otherwise meet the definition of a “charter-party carrier” are exempted by statute from the Commission’s regulatory oversight, services like Lyft and SideCar do not fall within any of these exemptions.<sup>18</sup>

SideCar asserts that it is neither a charter-party carrier nor a transportation service, but rather it is a technology platform that facilitates exempt ridesharing and, to that extent, should be exempt from Commission jurisdiction under PU Code § 5353(f) and (h).<sup>19</sup>

---

<sup>16</sup> TransForm Opening Comments filed on 01/28/13 at 4.

<sup>17</sup> SFMTA Opening Comments filed on 01/28/13 at 2, citing PU Code § 5360.

<sup>18</sup> SFMTA Opening Comments filed on 01/28/13 at 2.

<sup>19</sup> SideCar Opening Comments filed on 01/28/13 at 9.

Lyft asserts that the Commission should solely focus on regulation necessary to fulfill its responsibility for public safety.<sup>20</sup> Lyft cautions the Commission to not force-fit existing regulations onto such an emerging industry.

International Association of Transportation Regulators (IATR) recommends that the Commission should conduct further investigation to determine whether TNCs operate without a profit. IATR believes that companies that operate for-profit, and that use on-line apps that directly connect passengers to drivers, clearly fall under the Commission's definition of a charter-party carrier, and should be subject to all the existing regulations.<sup>21</sup>

Taxicab Paratransit Association of California asserts that TNCs operate as on demand services and therefore fail to comply with the legal requirements for operation as a Transportation Charter Party (TCP).<sup>22</sup>

## **2.2. Discussion**

California law currently recognizes and regulates three modes of passenger transportation for compensation: taxi services, regulated by cities and/or counties; and charter-party carrier services, and passenger-stage companies, regulated by the Commission. In recent years, the communications revolution in wireless service, smartphones, and on-line apps has further facilitated the development and adoption of passenger transportation for compensation to a point where passengers seeking rides can be readily connected with drivers willing to provide rides in private vehicles. This

---

<sup>20</sup> Zimride (Lyft) Opening Comments filed on 01/28/13 at 4.

<sup>21</sup> IATR Opening Comments filed on 01/28/13 at 3.

<sup>22</sup> TPAC Opening Comments filed on 02/04/13 at 5. The term TCP is defined and discussed, *infra*, in this Decision.

development in passenger transportation for compensation, referred to in this proceeding as TNCs and associated with companies including UberX, Lyft, and Sidecar, does not fit neatly into the conventional understandings of either taxis or limousines, but that does not mean that this Commission's responsibility to public safety in the transportation industry should be ignored and/or left for individual companies or the market place to control.

**2.2.1. Neither the Federal Telecommunications Act of 1996 nor Public Utilities Code Section 710 Exempts TNCs from State Jurisdiction**

We reject Uber's assertion that TNCs are nothing more than an application on smart phones, rather than part of the transportation industry. Uber is the means by which the transportation service is arranged, and performs essentially the same function as a limousine or shuttle company dispatch office. Accordingly, Uber is not exempt from the Commission's jurisdiction over charter-party carriers. Nonetheless, because of the novelty of these new services, we will address Uber's jurisdictional arguments here.

As Uber notes in its comments, the 1996 Federal Telecommunications Act<sup>23</sup> (FTA) distinguishes between "telecommunications" and "information services." In so doing, Congress codified the Federal Communications Commission's (FCC) historical determination that "basic" services were to be treated differently from "enhanced" services. Uber seeks to convince the Commission further with a detailed discussion of a Vonage case, in which the FCC concluded that nomadic Voice over Internet Protocol (VoIP) service is a purely interstate service, not subject to state jurisdiction. Uber recounts a California Court of Appeal case

---

<sup>23</sup> P.L. No. 104-104, 110 Stat. 56 (1996).

involving actions brought against eBay, where the court held eBay immune from state causes of action.

In addition, Uber notes passage of Senate Bill 1161 in 2011 codified §§ 239 and 710 of the PU Code. Section 710 prohibits the Commission from “exercising any regulatory jurisdiction” over VoIP or IP-enabled services, subject to a delegation of federal authority, other express statutory authority, or exceptions contained in § 710.

Uber’s citations are beside the point as none of the cited statutes or precedents prevent this Commission from regulating passenger transportation over public roadways. Specifically, we reject the argument that TNCs are simply providers of IP-enabled services and therefore exempt from our jurisdiction. We find this argument to be factually and legally flawed and, therefore, do not accept that the method by which information is communicated, or the transportation service arranged, changes the underlying nature of the transportation service being offered.

First, the Commission is not attempting to enact rules that would impose regulations on the smart phone applications used to connect passengers with drivers. Instead, the Commission is promulgating rules that will govern the transportation service itself. Second, we do not believe that this Commission loses its jurisdiction over transportation services simply because a smart phone application is used to facilitate the transportation service. Nothing Uber has cited in California or federal law would mandate that result based on the facts here. Indeed Uber and Sidecar’s position would effectively obviate the Commission’s authority under PU Code § 5371.6(a) to prevent TCPs from operating illegally in order to protect the public and prevent unfair competition:

The Legislature finds and declares that advertising and use of telephone service is essential for charter-party carriers of passengers to obtain business and to conduct intrastate passenger transportation services. Unlawful advertisements by unlicensed charter-party carriers of passengers has resulted in properly licensed and regulated charter-party carriers of passengers competing with unlicensed charter-party carriers of passengers using unfair business practices. Unlicensed charter-party carriers of passengers have also exposed citizens of the state to unscrupulous persons who portray themselves as properly licensed, qualified, and insured charter-party carriers of passengers. Many of these unlicensed charter-party carriers of passengers have been found to have operated their vehicles without insurance or in an unsafe manner, placing the citizens of the state at risk.

Similarly, the Legislature has created additional safeguards in Government Code § 53075.8(b)(1) that allow for the termination of a taxicab's telephone service if the taxi is operating without proper authority:

The Legislature further finds and declares that the termination of telephone service utilized by taxicabs operating without proper authority is essential to ensure the public safety and welfare. Therefore, local agencies should take enforcement action, as specified in this section, to disconnect telephone service of unauthorized taxicab operators who unlawfully advertise passenger transportation services in yellow page directories and other publications. The enforcement actions provided for by this section are consistent with the decision of the California Supreme Court in *Goldin v. Public Utilities Commission* (1979) 23 Cal. 3d 638.

We deem it is inconsistent with our grant of authority over transportation services to be barred from regulating a transportation service provided by TNCs based on the means of communication used to arrange the service.

Moreover, to date neither the FCC, nor a court of higher jurisdiction, has ruled that this Commission, or any other state commission, is precluded by the FTA from regulating TNCs. It is interesting to note that the Federal Trade Commission (FTC) has intervened in state proceedings by filing comments but has not, to date, gone so far as to claim that state-regulatory efforts to assert jurisdiction over TNCs is preempted by the FTA. For instance, on June 7, 2013, the FTC sent a letter to General Counsel of the District of Columbia Taxicab Commission that offered comments in the proposed TNC-related rulemaking. Previously, the FTC filed comments in TNC-related rulemaking proceedings in Alaska<sup>24</sup> and Colorado.<sup>25</sup> Tellingly, neither the FTC nor the FCC has claimed that the state regulatory bodies are preempted from promulgating regulations to deal with the growing TNC business.

In response to the proposed decision, Uber continued its argument by comparing itself to Google PowerMeter. In its August 19, 2013 comments to this decision, Uber stated that in the same way that Google did not become an energy utility by developing the Google PowerMeter software application, Uber does not become a transportation company by developing the Uber Software Application. The major difference between Uber and Google PowerMeter is that Uber controls the financial transaction between the customer and the company. Uber receives the customer fare and then transfers those funds to the driver

---

<sup>24</sup> FTC comments dated April 19, 2013 to the Honorable Debbie Ossiander Concerning AO NO. 2013-36 Regarding the Regulatory Framework for the Licensing and Permitting of Taxicabs, Limousines, and Other Vehicles for Hire in Anchorage, Alaska.

<sup>25</sup> FTC comments dated March 6, 2013 to the Colorado Public Utilities Commission *In The Matter of the Proposed Rules Regulating Transportation by Motor Vehicle*, 4 Code of Colorado Regulations 723-6.

minus its share, while Google PowerMeter does not take any money from the customer. Google PowerMeter was a tool that allowed an electricity consumer to view his or her electricity usage. The data displayed by Google PowerMeter was measured by a measurement device installed by the customer with his or her consent. The goal of the Google PowerMeter was to inform the energy customers of their energy use, which could help the consumer identify ways to save energy. The customer was not charged a fare, and Google did not generate other revenues from the tool. If all Uber did was to show customers maps of available cars, without giving them a way to book a ride and without controlling or taking a share of the fare, then the analogy might be more appropriate.

The Commission elects to use a more appropriate analogy involving Google. Google Search is an app and a software platform, and uses that software to provide a product: search listings. In 2011, Google agreed to pay a settlement of \$500 million for allowing fraudulent pharmaceutical advertisements.<sup>26</sup> In the case of pharmaceutical listings, Google Search was connecting people with products that were harmful or fraudulent, and which represented a threat to public safety. The people selling the illegal drugs had to be held accountable, but so did the software platform that connected people with the illegal drugs. The same is true with Uber. The Uber brand is now a known brand for car service. It is expected that a passenger requesting an Uber car will get a black town car or something of similar stature. It is expected that this service may cost more, but it is a higher service with professional drivers. Passengers may call Uber more frequently because of its name recognition. Uber by its name alone is selling a

---

<sup>26</sup> See <http://www.wired.com/threatlevel/2013/05/google-pharma-whitaker-sting/all/>.

type of car service. Because Uber is profiting from this service it should also be held responsible if the driver is negligent or not applying Uber safe practices. The same way Google was held responsible for allowing fraudulent advertisements is the same reason why Uber should be held responsible for its drivers.

Uber argues that the taxi cabs and limousines that arrange rides on the Uber platform are already regulated and insured, and that no additional regulation of Uber itself is necessary to protect the public interest. Perversely, however, the fact that regulated forms of transportation arrange rides through the Uber platform injects a considerable degree of uncertainty into the question of whether a taxi cab or limousine's insurance coverage would cover a claim. For example, if a limousine driver uses Uber's method of fare calculation and billing rather than the method otherwise required by TCP rules or limousine company policy, in the event of an incident the limousine's existing insurance policy may deny a claim on the grounds that the limousine had stopped operating, strictly speaking, and for insurance purposes, as a covered vehicle. In this same hypothetical incident, based on Uber's comments in this proceeding, we anticipate that Uber would deny that it has any obligation to insure the parties injured in the accident, on the grounds that Uber is an app and the limousine driver was already insured.

Until this Decision becomes effective, there is a real possibility that parties suffering losses in an incident would find that there is no insurance available to cover their potential claim.

Due to the considerable uncertainty that exists concerning the insurance coverage applicable to rides (other than UberX rides) arranged through the Uber app, and the threat to public safety and well-being created by this uncertainty,

the Commission is strongly inclined to require Uber to obtain a TCP permit in order to continue operating in California. As discussed elsewhere in this Decision, the Commission intends to open a second phase of this proceeding (Phase II) to consider the rules applicable to TCPs in California. In order to ensure the greatest possible evidentiary record, the Commission would prefer to leave all non-TCN issues, including Uber's potential TCP status, to Phase II. However, the Commission will not allow the uncertainty regarding Uber's insurance to persist during the pendency of Phase II. We require Uber to demonstrate to the Commission within 30 days of the issuance of this decision that it maintains commercial liability insurance policies providing not less than \$1,000,000 (one million dollars) per-incident coverage for incidents involving vehicles and drivers in transit to or during trips arranged through the Uber app, the Commission reserves the right to require Uber to obtain a TCP permit through Commission resolution. while they are providing Uber services. The insurance coverage shall be available to cover claims regardless of whether an Uber driver maintains insurance adequate to cover any portion of the claim.

### **2.2.2. TNCs Transport Passengers for Compensation**

Public Utilities Code § 5360 states in part:

Subject to the exclusions of Section 5353, "charter-party carrier of passengers" means every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this state.

We reject the arguments made by Lyft and SideCar that any payment for rides arranged through their apps is voluntary and find that current TNCs are engaged in the transportation of persons for compensation. Although the phrase "for compensation" is not defined by PU Code § 5360, the plain-meaning

interpretation of PU Code § 5360 in D. 69231 (June 15, 1965) informs our decision in this proceeding.

In D.69231, a skate arena owner was ordered to cease and desist transporting passengers to his skate arena until he obtained his TCP certificate. While the record was unclear as to whether the owner would charge a fee for the proposed service, the Commission determined that even if the transportation was for free, "transportation furnished by business enterprises without charge is also 'for compensation' if the organization sponsoring the trip receives a business benefit."<sup>27</sup> The Commission reiterated this interpretation in D.81805 (August 28, 1973) where we reasoned that "it was not necessary for the staff to prove that respondent actually received money consideration for the transportation in question. It is enough that he received an economic benefit."<sup>28</sup>

Clearly each TNC is receiving either an economic benefit or a business benefit. At a minimum, they are receiving increased patronage with the growth of their businesses. This possibility was an important factor for the Commission in rendering its decision in D.69231 that the skate arena owner's status was a TCP: "Applicant would receive a business benefit and compensation from the

---

<sup>27</sup> D.69231 at 409.

<sup>28</sup> D.69231 at 493. The Commission has reached a similar conclusion with respect to free service provided by PSCs, finding that the service was for compensation. (See *Peter J. Van Loben Sels (Valley Transit Lines) v. B.J. Smith et al., copartners (Cal. Transit Lines)*, 49 Cal. P.U.C. 290 (1950); and *Richard Chala v. Morris Gordon of Gordon's Outlet Store, et al.*, Decision No. 57356 in Case No. 6152 (1958), unreported. Our reasoning is also similar the Legislature's when it added Section 17510.1 to the Business and Professions Code: "As used in this article, 'sale' shall include a gift made with the hope or expectation of monetary compensation." Thus, a donation or a gift can still be considered a form of compensation.

increased patronage for his skate arena business resulting from the advertising.”<sup>29</sup>

### **2.2.3. TNCs Operate on a Prearranged Basis**

Unlike taxi cabs, which may pick up passengers via street hails, PU Code § 5360.5 requires that charter party carriers operate on a prearranged basis.

We find that TNCs operate on a prearranged basis. PU Code § 5360.5 does not define “prearranged,” and we are reluctant to impose a minimum time requirement as some other jurisdictions have done.<sup>30</sup> Instead, we are guided by the plain meaning of “prearranged” as something arranged in advance, which has been our custom and practice in interpreting “prearranged” at the Commission. For example, our information packet for prospective TCP applicants says that all transportation performed by TCPs must be arranged beforehand, and the driver must have a completed waybill in his or her possession at all times during the trip.<sup>31</sup>

We believe TNCs satisfy the “prearranged” requirement in two ways: first, before a passenger can request a ride, the passenger must download the app and agree to the TNC service agreement. Examples can be found in the TNC written

---

<sup>29</sup> 409.

<sup>30</sup> For example, the Washington Administrative Code requires that for-hire vehicles must be prearranged for at least 15 minutes. (Washington Rev. Code Section 308-83-200.) The International Association of Transportation Regulators issued proposed model regulations for smartphone applications in the for-hire industry and suggested that the “prearranged or prearrangement” should require “a minimum of thirty (30) minutes between the request for transportation service and the arrival of the vehicle at the transportation origin location.”

<sup>31</sup> Basic Information for passenger carriers and applicants (Rev. /28/11) issued by the Transportation License Section of the Commission.

terms of use.<sup>32</sup> Uber makes our point clearly in its description of its service that “persons who use the Uber App to request *prearranged transportations* have sole discretion over whether or not to use the Uber App, if ever.”<sup>33</sup> Second, for a particular trip, the passenger must input information such as current location. A TNC driver cannot be hailed like a cab where no information is exchanged until the passenger enters the vehicle. As such, each TNC is offering transportation on a “prearranged” basis.

Prearrangement has typically been verified through the use of a waybill. TCPs must possess a waybill for each ride that includes information on the driver’s name, vehicle license plate number, and time and date when the charter was arranged, and similar information.<sup>34</sup> Pursuant to more recent legislation, waybills may be kept in an electronic format beginning January 1, 2014.<sup>35</sup> In order to comply with the applicable statutes and regulations, all TNC drivers must be able to prove that a ride was matched on the TNC software application as evidence of prearrangement. In other words, information in the software application must be the equivalent of an electronic waybill.

#### **2.2.4. The Commission Has the Jurisdiction and the Duty to Establish Regulations Governing the Provision of TNC Services**

Based on the record in this proceeding, and as the Rulemaking originally made clear, this Commission regulates charter party passenger carriers pursuant

---

<sup>32</sup> See Exhibits B (Uber), D (SideCar), F (Lyft), and H (Tickengo) to the Workshop brief, filed on April 3 by TPAC.

<sup>33</sup> Pre-Workshop Statement, 4, filed on April 3, 2013 by Uber. (*Italics added.*)

<sup>34</sup> General Order 157-D, Part 3.01.

<sup>35</sup> See PU Code § 5381.5.

to Article XII of the California Constitution and the Charter-party Carriers' Act, PU Code § 5351 *et seq.* (the Act). Section 5360 states in part:

Subject to the exclusions of Section 5353, "charter-party carrier of passengers" means every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this state.

Section 5381 states in part:

...(t)he commission may supervise and regulate every charter-party carrier of passengers in the State and may do all things...necessary and convenient in the exercise of such power and jurisdiction.

We are persuaded by the comments made by the CHP, TransForm, and to a certain extent Lyft. Our focus is public safety and secondarily ensuring that regulations reflect changing technology and ways of doing business to ensure that rules are in place to improve the lives of Californians. We agree with the CHP that a "donation" for passenger transportation service is equivalent to direct compensation for the service provided, which falls under the jurisdiction of this Commission. TransForm states in their comments in part:

TransForm believes that all people deserve affordable, safe, and easy access to jobs, housing, services, and nature on foot, bicycle, or public transportation. TransForm envisions that in the future transportation will be redefined in terms of access and sustainability, and residents will be able to quickly get where they want to go in ways that fully meet their needs, whether these needs are health, happiness, saving time, or saving money. Our transportation system will provide the public with choices that amount to a system that is exceptional and state-of-the-art.

TransForm believes that rideshare services have the potential to advance several California policy goals, including improving transportation access, reducing

greenhouse gas emissions, reducing vehicle miles travelled, and reducing congestion. When the legislature passed the landmark transportation law SB 375 in 2008, the legislature found that “[w]ithout improved land use and transportation policy, California will not be able to achieve the goals of AB 32,” the Global Warming Solutions Act. The legislature also found that the transportation sector contributes over 40 percent of the greenhouse gas emissions in the State of California, the largest of any sector, with automobiles and light trucks alone contributing almost 30 percent. The California Air Resources Board, in setting regional greenhouse gas reduction targets, adopted targets requiring each region’s Sustainable Communities Strategy and Regional Transportation Plan to achieve specified reductions in the transportation sector by the years 2020 and 2035.<sup>36</sup>

We agree with TransForm with respect to the above two points. Additionally, Lyft has been the only TNC that has acknowledged that safety is not only a priority, but there should also be some overarching rules and regulations. We applaud Lyft for its leadership in this area and we certainly agree with Lyft in this area.

For the reasons discussed *supra*, we find that TNCs are charter-party passenger carriers, and therefore we will exercise our existing jurisdiction pursuant to Article XII of the California Constitution and the Passenger Charter-party Carriers’ Act, PU Code §§ 5351, *et seq.* (the Act). Additionally, the Commission has very broad powers under PU Code § 701 which gives the Commission the ability (via a rulemaking process) to develop new categories of regulation when a new technology is introduced into an existing industry. In

---

<sup>36</sup> TransForm Opening Comments filed on 01/28/13 at 1.

this Decision, under the broad grant of authority pursuant to PU Code §§ 5381 and 701, we create the category of Transportation Network Company (TNC) to accompany the existing category of TCP.<sup>37</sup> Again, a TNC is defined as an organization, whether a corporation, partnership, sole proprietor, or other form, operating in California that provides transportation services for compensation using an online-enabled app or platform to connect passengers with drivers using their personal vehicles. The primary distinction between a TNC and other TCPs is that a TNC connects riders to drivers who drive their personal vehicle, not a vehicle such as a limousine purchased primarily for a commercial purpose. To that end, a TNC is not permitted to itself own vehicles used in its operation or own fleets of vehicles.

With this definition in mind, the Commission finds that Uber (in contrast to UberX) is not a TNC. Uber connects riders with drivers who do not drive their own personal vehicle, but typically operate in town cars or limousines, which the driver may often as well use to transport customers for another limousine/town car company. As such, Uber does not meet the definition of a TNC. As discussed elsewhere in this Decision, the Commission intends to open a second phase of this proceeding (Phase II) to consider the rules applicable to TCPs in

---

<sup>37</sup> The Commission has previously developed new types of transportation services with unique rules relevant to that specific form of transportation. Namely, in D.97-07-063, the Commission “adopt[ed] rules for a new niche form of passenger stage corporation (PSC) that specializes in the common carriage of infants and children . . .” The Commission required such carriers to apply for a PSC permit, but developed a special set of rules applicable to these forms of transportation. D.97-07-063 stated, “This is a restricted class of PSC carrier not previously designated by this Commission, and special requirements need to be imposed on these carriers.” In creating these new rules, the Commission relied on its broad power under § 701, and the Passenger-Stage Corporation provisions of the Public Utilities Code § 5351.

California. In order to ensure the greatest possible evidentiary record, the Commission would prefer to leave all non-TNC issues, including Uber's potential TCP status, to Phase II. UberX, however, does meet the TNC definition and must apply for a TNC license.

A company or individual wishing to provide transportation or facilitate transportation of passengers can choose to either get a TCP certificate/permit or a TNC permit.<sup>38</sup> Further, TNCs need not apply for a certificate of public convenience and necessity pursuant to PU Code § 5371. TNCs are exempted from this requirement, as are many charter-party carriers regulated by the Commission, pursuant to PU Code § 5384(b), which authorizes the Commission to issue permits to passenger carrier operations who use only vehicles with seating capacities of under 15-passengers. TNC permits will only be granted to companies utilizing smart phone technology applications to facilitate transportation of passengers in the driver's personal vehicle.

Within 45 days after the effective date of this Decision, the Commission's Safety Enforcement Division (SED) will post a TNC Application Packet on its website, and TNCs currently operating in California are required to file their TNC Applications with SED 60 days thereafter if they wish to continue operating. The TCP requirements are already in place, although as suggested *supra* the Commission will open a second phase to this Rulemaking to update those rules and regulations to ensure that safety requirements are up to date. Based on the record of this proceeding and the safety and other concerns expressed by parties, the settlement agreements that were entered into with Lyft,

---

<sup>38</sup> There is also a third choice and that is to apply for a taxicab license.

SideCar, and Uber, and our existing TCP rules we have created the following rules and regulations for all TNCs. The following rules and regulations shall be applied for all TNCs effective immediately:

**Safety Requirements**

- a) TNCs shall maintain commercial liability insurance policies providing not less than \$1,000,000 (one million dollars) per-incident coverage for incidents involving vehicles and drivers while they are providing TNC services. The insurance coverage shall be available to cover claims regardless of whether a TNC driver maintains insurance adequate to cover any portion of the claim.<sup>39</sup>
- b) TNC drivers shall be required to provide proof of both their personal insurance and the commercial insurance in the case of an accident.
- c) TNCs shall perform criminal background checks on each TNC driver before the driver begins offering service. In order to protect public safety, any person who has been convicted, within the past seven years, of driving under the influence of drugs or alcohol, fraud, sexual offenses, use of a motor vehicle to commit a felony, a crime involving property damage, and/or theft, acts of violence, or acts of terror shall not be permitted to provide TNC services.
- d) TNCs shall institute a zero tolerance intoxicating substance policy with respect to drivers as follows:
  - 1. The TNC shall include on its website, mobile application and riders' receipts, notice/information on the TNC's zero-tolerance

---

<sup>39</sup> TNCs must make their certificate of insurance public and the Commission will put this certificate on its website.

- policy and the methods to report a driver whom the rider reasonably suspects was under the influence of drugs or alcohol during the course of the ride.
2. The website and mobile application must include a phone number or in-app call function and email address to contact to report the zero-tolerance complaint.
  3. Promptly after a zero-tolerance complaint is filed, the TNC shall suspend the driver for further investigation.
  4. The website and mobile application must also include the phone number and email address of the Commission's Passenger Section: 1-800-894-9444 and [CIU\\_intake@cpuc.ca.gov](mailto:CIU_intake@cpuc.ca.gov).
- e) TNCs shall obtain each TNC driver's driving record before the driver begins providing service and quarterly thereafter. Drivers with convictions for reckless driving, driving under the influence, hit and run, or driving with a suspended or revoked license shall not be permitted to be a TNC driver. Drivers may have a maximum of two points on their driving records for lesser offenses, e.g., equipment problems, speeding, or child safety seat violations.
- f) TNCs shall establish a driver training program to ensure that all drivers are safely operating the vehicle prior to the driver being able to offer service. This program must be filed with the Commission within 45 days of the adoption of this decision. TNCs must report to the Commission on an annual basis the number of drivers that became eligible and completed the course.
- g) TNC drivers must possess a valid California driver's license, be at least 21 years of age, and must provide at least one year of driving history before providing TNC services.

- h) TNCs may only use street-legal coupes, sedans, or light-duty vehicles including vans, minivans, sport utility vehicles (SUVs) and pickup trucks. Hatchbacks and convertibles are acceptable.
- i) TNC drivers are prohibited from transporting more than 7 passengers on any given ride.<sup>40</sup>
- j) The app used by a TNC to connect drivers and passengers must display for the passenger: 1) a picture of the driver, and 2) a picture of the vehicle the driver is approved to use, including the license plate number to identify the vehicle.
- k) TNC vehicles shall not be significantly modified from factory specifications, e.g., no “stretch” vehicles.
- l) Prior to allowing each TNC driver to operate a vehicle, and annually thereafter, a TNC must inspect the driver’s vehicle, or have the vehicle inspected at a facility licensed by the California Bureau of Automotive Repair, and maintain complete documentation of such inspections. A TNC driver’s vehicle must, at a minimum, pass a 19 point inspection prior to allowing the driver to operate the vehicle under the TNC’s platform:
  - 1. Foot brakes;
  - 2. Emergency brakes;
  - 3. Steering mechanism;
  - 4. Windshield;

---

<sup>40</sup> If a TNC elects to carry insurance up to \$1.5 million per incident for all of its drivers, then pursuant to PU Code § 5391 and General Order 115-F, the TNC vehicles can include up to 10 people including the driver. However, no TNC driver is permitted to operate a bus, which is defined by California Vehicle Code § 233(b) as “a vehicle designed, used, or maintained for carrying more than 10 persons, including the driver, which is used to transport persons for compensation or profit . . .”

5. Rear window and other glass;
6. Windshield wipers;
7. Headlights;
8. Tail lights;
9. Turn indicator lights;
10. Stop lights;
11. Front seat adjustment mechanism;
12. Doors (open, close, lock);
13. Horn;
14. Speedometer;
15. Bumpers;
16. Muffler and exhaust system;
17. Condition of tires, including tread depth;
18. Interior and exterior rear view mirrors; and
19. Safety belts for driver and passenger(s).

#### **Regulatory Requirements**

For all reports identified below required to be provided by TNCs, the reports must be verified. Verification consists of provision of a signature of a corporate officer of the TNC verifying under penalty of perjury under the laws of the State of California that the report is accurate and contains no material omissions.

- a. TNCs (not the drivers) must be permitted by this Commission before operating as a TNC.<sup>41</sup>
- b. TNCs shall clearly disclose, on their app and website, that TNCs facilitate rides between

---

<sup>41</sup> There are six types of charter party carrier permits/certificates. TNCs shall apply for a class P permit.

passengers and private drivers using their own personal vehicles. Additionally, the disclosure should state that each TNC is required to maintain insurance policies providing a minimum of \$1,000,000 (one million dollars) per-incident coverage for incidents involving vehicles and drivers while they are providing TNC services.

- c. TNC drivers may only transport passengers on a prearranged basis. For the purpose of TNC services, a ride is considered prearranged if the ride is solicited and accepted via a TNC digital platform before the ride commences. TNC drivers are strictly prohibited from accepting street hails.
- d. TNCs shall participate in the California Department of Motor Vehicle's Employer Pull Notice Program to obtain timely notice when any of the following are added to a TNC driver's driving record:
  - i. Convictions;
  - ii. Accidents;
  - iii. Failures to appear;
  - iv. Driver's license suspension or revocation; and
  - v. Any other action taken against the driving privilege.
- e. TNCs shall obtain proof of insurance from each TNC driver before the driver begins providing service and for as long as the driver remains available to provide service.
- f. TNCs shall allow passengers to indicate whether they require a wheelchair-accessible vehicle or a vehicle otherwise accessible to individuals with disabilities.
- g. One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a report detailing the number and percentage of their customers who

requested accessible vehicles, and how often the TNC was able to comply with requests for accessible vehicles.

- h. TNC vehicles shall display consistent trade dress (i.e., distinctive signage or display on the vehicle) when providing TNC services that is sufficiently large and color contrasted as to be readable during daylight hours at a distance of at least 50 feet. The trade dress shall be sufficient to allow a passenger, government official, or member of the public to associate a vehicle with a particular TNC (or licensed transportation provider). Acceptable forms of trade dress include, but are not limited to, symbols or signs on vehicle doors, roofs, or grills. Magnetic or removable trade dress is acceptable. TNC shall file a photograph of their trade dress with the Safety and Enforcement Division.
- i. Although TNCs may provide platforms allowing drivers and passengers to "rate" each other, TNCs shall ensure that such ratings are not based on unlawful discrimination, and that drivers do not discriminate against passengers or potential passengers on the basis of geographic endpoints of the ride, race, color, national origin, religion, sex, disability, age, or sexual orientation/identity.
- j. One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a verified report detailing the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates; and the number of rides that were requested but not accepted by TNC drivers within each zip code where the TNC operates. The verified report provided by TNCs must contain the above ride information in electronic Excel or other spreadsheet format with information, separated by columns, of the date, time, and zip code of each request and the concomitant date, time, and zip code

of each ride that was subsequently accepted or not accepted. In addition, for each ride that was requested and accepted, the information must also contain a column that displays the zip code of where the ride began, a column where the ride ended, the miles travelled, and the amount paid/donated. Also, each report must contain information aggregated by zip code and by total California of the number of rides requested and accepted by TNC drivers within each zip code where the TNC operates and the number of rides that were requested but not accepted by TNC drivers.

- k. One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a verified report in electronic Excel or other spreadsheet format detailing the number of drivers that were found to have committed a violation and/or suspended, including a list of zero tolerance complaints and the outcome of the investigation into those complaints. Each TNC shall also provide a verified report, in electronic Excel or other spreadsheet format, of each accident or other incident that involved a TNC driver and was reported to the TNC, the cause of the incident, and the amount paid, if any, for compensation to any party in each incident. The verified report will contain information of the date of the incident, the time of the incident, and the amount that was paid by the driver's insurance, the TNC's insurance, or any other source. Also, the report will provide the total number of incidents during the year.
- l. One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a verified report

detailing the average and mean number of hours and miles each TNC driver spent driving for the TNC.<sup>42</sup>

- m. Upon request, drivers shall display to Commission or airport enforcement officers, law enforcement, or city or county officials a physical or electronic record of a ride in progress sufficient to establish that it was prearranged. To the extent that trip records are contained on electronic devices, TNC drivers are not required to relinquish custody of the devices in order to make the required display.
- n. If a passenger files a complaint against a TNC or TNC driver with the Commission, Commission staff shall have the right to inspect TNC records and vehicles as necessary to investigate and resolve the complaint to the same extent the Commission and Commission staff is permitted to inspect all other charter-party carriers.
- o. Operations at Airports. TNCs shall not conduct any operations on the property of or into any airport unless such operations are authorized by the airport authority involved.
- p. Similar to our regulations over limousines one-third of one percent of the total revenues from TNC services in California shall be collected by this Commission on a quarterly basis as part of overall fees.

The Commission will convene a workshop one year after the issuance of this decision to hear from all stakeholders on the impacts of this new mode of transportation and the accompanying regulations. Workshops topics will

---

<sup>42</sup> For the requested reporting requirements, TNCs shall file these reports confidentially unless in Phase II of this decision we require public reporting from TCP companies as well.

include, but not necessarily be limited to, a consideration of safety, competition, innovation, accessibility, congestion, the California Environmental Quality Act, and other pollution related issues. Specifically, the Commission will be interested to get an update on TNCs' commercial insurance policies and how these policies have performed. The Commission may choose to open a new proceeding to update its rules based on the information learned in this workshop.

TNCs that fail to adhere to these requirements may have their permits revoked or be otherwise subject to sanctions by the Commission. The Commission is authorized to conduct inspections of charter-party carriers including TNCs. For instance, PU Code § 5371.5 states that: "Upon receipt of a complaint containing sufficient information to warrant conducting an investigation, the commission shall investigate any business that advertises limousine-for-hire or passenger charter transportation service for compensation in motor vehicles." Therefore, each TNC must keep records of all trips made by its TNC drivers. The Commission is also authorized to "cancel, revoke, or suspend any operating permit or certificate" if the carrier violates any of the provisions of the Act, provisions of the operating permit or certificate issued thereunder, or any order, decision, rule, regulation, direction, demand, or requirement established by the Commission.<sup>43</sup> The Commission is also authorized to issue fines.<sup>44</sup>

Sections 5411 to 5420 of the Act contain relevant provisions regarding issuing fines and penalties. In addition, the Commission has established a

---

<sup>43</sup> PU Code § 5378.

<sup>44</sup> See e.g., PU Code § 5378(b).

citation program in Resolution ALJ-187, which provides a process by which the Commission may issue fines, carriers may appeal fines, and the Commission may hold a hearing pursuant to that appeal.

These provisions authorizing the Commission to inspect, investigate, and issue fines and other penalties apply in equal measure to all TNCs as they do to other charter-party carriers. Therefore, the Commission must have access to a TNC's records whenever it requests them.

Parties have raised a number of concerns regarding the Terms & Conditions used by certain TNCs, which include general disclaimers of liability. No Term & Condition in a TNC's Terms of Service or elsewhere, can be inconsistent with this decision. Nor can any Term & Condition in a TNC's Terms of Service be used or relied on by the TNC to deny insurance coverage, or otherwise evade the insurance requirements established in this decision. Moreover, the Terms of Service does not absolve the TNC of its responsibilities to comply with the stated regulations in this decision to ensure safety of the public. As stated earlier in this decision, the Commission will open a Phase II to consider updating its regulations over TCP certificate holders. Phase II will also consider the standard and appropriate language for Terms & Conditions for both TCP and TNC certificate holders.

### **3. Safety**

The Commission opened this proceeding to protect public safety and secondarily encourage innovators to use technology to improve the lives of Californians. The Commission has a responsibility for determining whether and how public safety might be affected by these TNCs. In opening this Rulemaking,

the Commission wanted to assess public safety risks, and to ensure that the safety of the public is not compromised in the operation of TNCs.

### **3.1. Comments on the Rulemaking**

As with the issue of jurisdiction a number of parties filed comments about the effect of TNC service on public safety. In this section we will summarize all the positions filed.

The CHP asserts that it is too early to determine the effect of this type of service on both the passengers and public safety. It goes on to caution, however, that passenger transportation left unregulated unnecessarily increases the potential for operation of unsafe vehicles, unqualified drivers, and uninsured transportation drivers.<sup>45</sup>

Luxor Cab's comments focus more on the need to keep drivers safe. Luxor Cab asserts that taxicab drivers have the highest risk of occupational homicide of all US occupations, and that this is why taxi regulators require safety equipment such as bullet-resistant partitions and digital security cameras, as well as crime-prevention training for drivers.<sup>46</sup>

The GCLA believes that the transportation technology companies can put the public at risk of potential dangers arising from having unregulated and perhaps even unlicensed drivers and unsafe vehicles providing for-hire transportation services without oversight or enforcement.<sup>47</sup>

The San Francisco Airport Commission believes that lack of adequate liability insurance, criminal background checks, driver training and regular

---

<sup>45</sup> CHP Comments filed on 7/17/13 at 2.

<sup>46</sup> Luxor Cab Comments filed on 01/28/13 at 2.

<sup>47</sup> GCLA Comments filed on 01/28/13 at 2.

vehicle inspections all decrease public safety, and although some TNCs represent that they do all of the above, the Airport Commission is asking for regulatory verification.<sup>48</sup>

The SFMTA asserts that TNCs have a negative effect on public safety because of a lack of regulatory oversight. The SFMTA asserts that at the state and local level, California regulators of taxi and limousine service protect the public with the following kinds of requirements:

1. Criminal background checks of drivers;
2. Drug and alcohol testing of drivers;
3. DMV "pull notice" checks to enable suspension of drivers with new safety related moving violations;
4. Driver training for local geography, traffic safety and customer service values;
5. Vehicle age and mileage limitations;
6. Routine, professional vehicle inspections; and
7. Transparent pricing regulations.<sup>49</sup>

The San Francisco Cab Drivers Association asserts that the proliferation and acceptance of private vehicles and unlicensed public passenger drivers for hire creates a false sense of trust by the general public. Furthermore, it asserts that they are witnessing private vehicles being flagged down and soliciting passengers on the street which will result in an assault or worse, on a passenger or a driver, unprotected by security cameras, dispatch or a shield, and no readily identifiable markings on the vehicle.<sup>50</sup>

---

<sup>48</sup> San Francisco Airport Commission Opening Comments filed on 01/28/13 at 2.

<sup>49</sup> SFMTA Opening Comments filed on 01/28/13 at 8.

<sup>50</sup> San Francisco Cab Association's Opening Comments filed on 01/29/13 at 2.

In their comments, Lyft notes that ridesharing is nothing new and has been occurring on a relatively large scale for many decades – from casual carpools and bulletin boards to more recent on-line forums – without any regulation and with few if any institutional safety mechanisms. Lyft goes on to say that rather than creating a new activity requiring scrutiny as a public safety concern, responsible peer-to-peer platforms such as Lyft have introduced innovative and highly effective institutional safety mechanisms that increase public safety over existing alternatives. New tools made available by modern technologies – online criminal background checks, mobile application photo identification, and Global Positioning System (GPS) positioning – can advance public safety beyond existing measures.<sup>51</sup>

SideCar asserts that TNCs are mission-driven and have strong incentives to protect the trust and safety of their communities and the public. SideCar goes on to claim that its safety program and rules aim to reduce and prevent accidents or other incidents, and it has implemented a 10-point safety program to create a safe experience for drivers and riders alike. Under this safety program, all drivers are required to undergo thorough background checks and safety training.<sup>52</sup>

United Taxicab Workers assert that TNCs provide service through non-professional drivers of private vehicles, and since they claim that they are not regulated by the state or local authorities, the public can only take the word of the company. United Taxicab Workers go on to note that safety is the paramount concern in the taxi regulation and that taxis are inspected regularly and are

---

<sup>51</sup> Lyft Opening Comments filed on 01/28/13 at 4-5.

<sup>52</sup> SideCar Opening Comments filed on 01/28/13 at 17.

subject to age and mileage requirements. Furthermore, drivers receive training and must go through background checks prior to becoming a taxi driver.<sup>53</sup>

In its comments, TPAC asserts that the primary reason for regulation of the passenger transportation industry is the need to ensure safety. It goes on to say that public safety is promoted through the screening of drivers, and by ensuring that those who take on the responsibility of transporting passengers can be held accountable for their actions.<sup>54</sup>

### **3.2. Discussion**

We agree that protecting and enhancing public safety is the paramount purpose behind regulating this industry. We initiated this Rulemaking for the sole purpose of determining how TNCs affect public safety. We further agree with the CHP, the San Francisco Airport Commission, the SFMTA, and other parties who have urged us to adopt safety rules and regulations that will hold TNCs accountable for safety. We also agree with Lyft that ridesharing is nothing new and has been occurring on a relatively large scale for many decades - from casual carpools and bulletin boards to more recent on-line forums. We note, however, that there is a specific exemption for the true form of ridesharing in the PU Code. PU Code § 5353(h) exempts:

Transportation of persons between home and work locations or of persons having a common work-related trip in a vehicle having a seating capacity of 15 passengers or less, including the driver, which are used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code, when the ridesharing is incidental to another purpose of the driver.

---

<sup>53</sup> United Taxicab Workers Opening Comments filed on 01/29/13 at 4-5.

<sup>54</sup> TPAC Opening Comments filed on 02/04/13 at 6.

The section also states:

This exemption does not apply if the primary purpose for the transportation of those persons is to make a profit. "Profit," as used in this subdivision does not include the recovery of actual costs incurred in owning and operating a vanpool vehicle, as defined in Section 668 of the Vehicle Code.

In our view the Commission firmly believes that TNCs do not meet the rideshare exemption and actually are providing transportation services for compensation.

Lyft and SideCar have both entered into settlement agreements with the Commission's Safety and Enforcement Division as stated above and have complied with the safety requirements in those agreements. Therefore, it is not entirely correct to state (as some parties have in their comments) that the public must only rely on the company's word. These agreements, however, are interim arrangements pending the conclusion of this Rulemaking. Therefore, in this decision we adopt strict safety regulations and guidelines that are similar in nature and in some cases more stringent than current and past practice in the transportation industry as a whole. The regulations for TNCs will require the company to conduct criminal background checks, establish a driver training program, maintain a zero-tolerance policy on drugs and alcohol, register in the Department of Motor Vehicle (DMV) Pull Notice program, conduct a 19-point car inspection, and require a one-year driving history from the driver. These regulations along with other requirements are stated above in the summary section as well as the jurisdiction section.

Regarding the criminal background checks, we will require each TNC to conduct a criminal background check for each driver prior to that applicant becoming a TNC driver. The criminal background check must be a national

criminal background check including the national sex offender database. The criminal background check should be using the applicant's social security number and not just the applicant's name. Any felony criminal conviction within seven years prior to the date of the background check for violent crime, a sexual offense, a crime involving property damage, and/or theft will make the applicant ineligible to be a TNC driver.

Regarding the 19-point vehicle inspection, we require the TNC or an authorized third party facility licensed by the California Bureau of Automotive Repair to conduct the car inspections and for the TNC to maintain the record of such inspections in case of an audit.

Regarding the DMV Pull Notice Program, we are aware that the California DMV does not currently permit TNCs to enroll non-employee drivers in the Employer Pull Notice Program. We are also aware that it was established to provide employers and regulatory agencies with a means of promoting driver safety through the ongoing review of driver records. An employer enrolled in the program is assigned a requester code. The requester code is added to an employee's driver license (DL) record. When an employee's DL is updated to record an action/activity, a check is made electronically to determine if a pull notice is on file. If the action/activity is one that is specified to be reported under the program, a driver record is generated and mailed to that employer. The DMV Pull Notice program allows a transportation company to monitor DL records of employees. This monitoring accomplishes the following:

- Improves public safety;
- Determines if each driver has a valid DL;
- Reveals problem drivers or driving behavior; and
- Helps to minimize the transportation company's liability.

The Commission began enrolling owner operators into this program in 1990. We are similarly hopeful that the DMV is able to amend the requirements of the program to allow TNCs to participate automatically in the program once they have completed the other requirements for the driver to begin providing service. Specifically, we encourage the DMV to modify the language about employers being the only entity to qualify for this automatic service. We understand that currently TNCs can manually enter into the program, but automatic enrollment improves public safety in that the notification to TNCs will be automatic and timely. We are hoping to work with the DMV to find a solution that improves public safety as we have added new rules and regulations to allow TNCs to provide transportation services. Until the DMV Employer Pull Notice Program is available for use by TNCs, TNCs shall perform, prior to allowing a driver on the platform and quarterly thereafter, driving record checks through the DMV in order to ensure that drivers meet applicable requirements. The DMV check criteria shall provide that a user may have no more than three points within the preceding three years, no "major violations" (reckless driving, hit and run, or driving with a suspended license conviction) within the preceding three years, and no driving under the influence conviction within the past seven years.

Regarding the accessibility plan which each TNC is required to file within 45 days of the issuance of this decision, each plan shall include the following:

- a. A timeline for modifying apps so that they allow passengers to indicate their access needs, including but not limited to the need for a wheelchair accessible vehicle. A passenger should be allowed to state other access needs, either from a drop-down menu with room for comments or through a field requesting information.

- b. A plan for how the TNC will work to provide appropriate vehicles for passengers who specify access needs, including but not limited to a plan to provide incentive to individuals with accessible vehicles to become TNC drivers.
- c. A timeline for modifying apps and TNC websites so that they meet accessibility standards. The relevant standard for web access is WCAG 2.0 AA. Guidance on accessibility standards for iPhone apps can be found at [http://developer.apple.com/library/ios/documentation/UserExperience/Conceptual/iPhone Accessibility](http://developer.apple.com/library/ios/documentation/UserExperience/Conceptual/iPhoneAccessibility) and [http://developer.apple.com/library/ios/documentation/UserExperience/Conceptual/iPhone Accessibility/Making Application Accessible/Making Application Accessible.html](http://developer.apple.com/library/ios/documentation/UserExperience/Conceptual/iPhoneAccessibility/MakingApplicationAccessible/MakingApplicationAccessible.html). Guidance on accessibility standards for Android apps can be found at <http://developer.android.com/training/accessibility/accessible-app.html>.
- d. A timeline for modifying apps so that they allow passengers to indicate that they are accompanied by a service animal, and for adopting a policy that service animals will be accommodated.
- e. A plan for ensuring that drivers' review of customers will not be used in a manner that results in discrimination, including any policies that will be adopted and any monitoring that will take place by the TNC to enforce this requirement.

Each aspect of the accessibility plan will be addressed in the annual reports required of each TNC regarding compliance, necessary improvements (if any) and additional steps to be taken by the TNC to ensure that there is no divide between service provided to the able and disabled communities. These reports will be served by SED on the service list for this proceeding, and input from interested parties will be invited. Based on SED's review of the annual reports as well as input from interested parties, the Commission will determine what, if

any, changes need to be made in the TNC business model, or new regulations adopted, in order to ensure that TNCs are accessible to, and do not discriminate against, persons with disabilities.

#### **4. Ridesharing**

The definition of ridesharing does not permit transportation performed for profit.<sup>55</sup> Recovery of actual costs incurred only applies to vanpool vehicles, which is defined by the Vehicle Code as seating more than 10 passengers, but less than 15 passengers, including the driver. The Commission sought comment on whether the TNCs' business models qualify as ridesharing for the purpose of the PU Code § 5353(h) exemption and, with respect to its passenger carrier regulation, whether the Commission should recommend a broader or narrower definition of ridesharing than that contained in the California Vehicle Code.

##### **4.1. Comments on the Rulemaking**

Various parties filed comments in response to the questions asked in the Rulemaking. This section will summarize all the various positions. We may not cite every party that filed comments, but we will cite every position.

Opening comments filed by former San Francisco Mayor Willie L. Brown Jr. proposes a mandatory cap on TNC driver earnings and an updated definition that includes this cap in the PU Code § 5353 (f).<sup>56</sup> These comments further state that the issue for sites such as Tickengo and 511.org is that there is no clear definition of vehicles carrying passengers on a noncommercial enterprise basis, and that a clear definition of ridesharing would help eliminate confusion with TCPs, fill empty seats in cars, and reduce pollution and congestion while

---

<sup>55</sup> Rulemaking at 7.

<sup>56</sup> Comments from Willie Brown filed on 01/18/13 at 1-2.

lowering the cost of door-to-door transportation.<sup>57</sup> Tickengo proposes that we limit the maximum share-the-expense carpool amount drivers can collect on a yearly basis to the American Automobile Association's (AAA) official annual cost of vehicle ownership (currently \$8,776 per year).<sup>58</sup>

Luxor Cab, on the other hand, asserts that the statutory definition of ridesharing is adequate, but what is lacking is compliance with regulations by unlicensed for-hire TNCs.<sup>59</sup> Luxor Cab further comments that legitimate ridesharing does not include the transportation of a passenger on a trip the driver was not otherwise planning to take. Luxor asserts that it is the very nature of taxicab service that the ride is offered on demand and in accordance with the passenger's desired location. Finally, Luxor Cab comments that the amount of compensation should not determine the need for compliance with regulations, but rather it is the nature of the service that ought to be determinative.<sup>60</sup>

The SFMTA asserts that there is no reason for the Commission to change the definition of ridesharing under the Vehicle Code in order to accommodate for-profit transportation services delivered through smartphone applications. It further asserts that there is nothing about the 'new business model' of offering for-hire transportation services through the mechanism of a smartphone application that justifies abandoning the fundamental regulatory infrastructure of the transportation for-hire industry, or that changes the level of regulatory concern when members of the public place themselves in the care and control of

---

<sup>57</sup> Comments of Willie Brown filed on 01/18/13 at 2.

<sup>58</sup> Comments of Willie Brown filed on 01/18/13 at 3.

<sup>59</sup> Luxor Cab comments filed on 01/28/13 at 3.

<sup>60</sup> Luxor Cab comments filed on 01/28/13 at 3.

a private individual who they pay to carry them safely to their destination in a motor vehicle over the public right of way.<sup>61</sup>

Lyft asserts that the Commission is reading the PU Code too narrowly and recommends that the Commission explicitly acknowledge and clarify that: 1) a voluntary donation, regardless of the amount, does not constitute "compensation" as the term is used in § 5360 and that 2) the "primary purpose" of any driver that only receives voluntary donations from riders and no other pay from the company operating the rideshare platform is not to make a "profit," as defined in § 5353(h). Lyft also suggests that the Commission consider recommending that the Legislature clarify or broaden the definition of ridesharing.<sup>62</sup>

SideCar urges the Commission to clarify the rideshare exemption in PU Code § 5353(h) and establish a bright line "safe harbor" for ridesharing drivers and authentic peer-to-peer rideshare technology providers. It goes on to say that while the Public Utilities Code currently has no provision for the recovery of the costs incurred in owning and operating a vehicle, except a vanpool vehicle, SideCar believes that a standard should be adopted for ridesharing in regular passenger vehicles.<sup>63</sup>

The San Francisco Cab Drivers Association asserts that businesses like Sidecar and Lyft clearly do not qualify for exemption from charter carrier laws under the definition of ridesharing as defined in § 522 of the Vehicle Code. This transportation is not between home and work locations or of persons having a

---

<sup>61</sup> SFMTA comments filed on 01/28/13 at 9.

<sup>62</sup> Lyft comments filed on 01/28/13 at 7.

<sup>63</sup> SideCar comments filed on 01/28/13 at 11.

common work-related trip. The sole purpose of these trips is to convey passengers to their requested destination, for profit.<sup>64</sup>

IATR asserts that while the PU Code exempts from regulation passenger vehicles that carry passengers on a “noncommercial enterprise basis,” this term is not defined. It goes on to say that TNCs fail to meet the definition for ridesharing (as they operate outside of strictly work and home locations, and transport passengers on trips that are NOT incidental to the driver) and fail to qualify for the Commission exemption because they are operating for profit/compensation.<sup>65</sup> IATR further suggests that the definition of ridesharing be narrowed whereas Lyft says that the Commission is reading the definition too narrowly. IATR says that the Commission should act to clarify the regulatory exemption and to make clear that to qualify for the exemption, a driver is prohibited from making any profit and/or accepting compensation.<sup>66</sup>

The CHP asserts that the term “ridesharing” is a term-of-art within the lexicon of transportation – notwithstanding the vehicle used, ridesharing is essentially deemed to be reserved for like-minded individuals with a transportation motivation incidental to another purpose and not seated in profit-making derived from the transportation.<sup>67</sup>

---

<sup>64</sup> San Francisco Cab Drivers Association comments filed on 01/28/13 at 3.

<sup>65</sup> IATR Comments filed on 01/28/13 at 4.

<sup>66</sup> IATR Comments filed on 01/28/13 at 5.

<sup>67</sup> CHP comments filed on 7/17/13 at 4-5.

#### 4.2. Discussion

We agree with the vast majority of the parties that filed comments that TNCs do not qualify for the rideshare exemption under PU Code § 5353(h).

PU Code § 5353(h) exempts from Commission regulation:

Transportation of persons between home and work locations or of persons having a common work-related trip purpose in a vehicle having a seating capacity of 15 passengers or less, including the driver, which are used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code, when the ridesharing is incidental to another purpose of the driver. This exemption also applies to a vehicle having a seating capacity of more than 15 passengers if the driver files with the commission evidence of liability insurance protection in the same amount and in the same manner as required for a passenger stage corporation, and the vehicle undergoes and passes an annual safety inspection by the Department of the California Highway Patrol. The insurance filing shall be accompanied by a one-time filing fee of seventy-five dollars (\$75). This exemption does not apply if the primary purpose for the transportation of those persons is to make a profit. "Profit," as used in this subdivision, does not include the recovery of the actual costs incurred in owning and operating a vanpool vehicle, as defined in Section 668 of the Vehicle Code.<sup>68</sup>

---

<sup>68</sup> Vehicle Code § 522 defines "ridesharing" as "two or more persons traveling by any mode, including, but not limited to, carpooling, vanpooling, bus pooling, taxi pooling, jitney, and public transit."

Section 5353(h) provides two opportunities to qualify for the rideshare exemption:

Transportation of persons between home and work locations or of persons having a common work-related trip purpose in a vehicle having a seating capacity of 15 passengers or less, including the driver, which are used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code, when the ridesharing is incidental to another purpose of the driver.

TNCs fail to satisfy either of these requirements.

In our review of the filings and supporting documents, there is no evidence that TNC drivers have a common work-related or incidental purpose with their passengers. Instead, drivers transport passengers entirely at the convenience of the passenger:

Lyft is recruiting drivers with the following language: "Be a Lyft Driver" material states that "drivers are making up to \$35/hour + choosing their own hours!"<sup>69</sup>

Uber's service is defined as "your on-demand private driver."<sup>70</sup>

SideCar offers the following pitch to its prospective drivers: "Drive where you want, when you want, and who you want. You are your own boss. Some of our SideCar drivers are earning \$30+ per hour."<sup>71</sup>

InstantCab tells prospective drivers that it makes "it easy for customers and cab drivers to find each other. We're looking for drivers to help us launch and provide high quality service to anyone who needs a taxi. We're not a taxi company, you

---

<sup>69</sup> <http://www.lyft.me/drivers>.

<sup>70</sup> Exhibit A, 34, Workshop Brief, filed by TPAC on April 3, 2013.

<sup>71</sup> Exhibit C, 48, Workshop Brief, filed by TPAC on April 3, 2013.

can work for any existing taxi company and use our app to find guaranteed customers.”<sup>72</sup>

Tickengo tells its prospective drivers that they can “accept any ride if you want to go to the same destination, *or if you just want to help.*”<sup>73</sup>

Services provided by TNCs are thus very different from traditional, longstanding forms of ridesharing.<sup>74</sup> TNCs are clearly designed to provide a car service for compensation. There is no requirement that there be a common purpose. Instead, TNCs operate as an alternative to other traditional car services. Several parties in comments on the proposed decision expressed concern that the proposed decision would, as former San Francisco Mayor Brown described in his comments, limit the ability of “a regular citizen [to] request a ride from a family member who may wish to give them a ride to the airport for free.”<sup>75</sup> Similarly, eRideShare, which has provided an online carpool matching service since 1999, expressed concerns that the proposed decision would override existing statutory exemptions for ridesharing services.<sup>76</sup> These concerns are ill founded. We reiterate that our Decision in no way impacts the exemptions in Section 5353 of the Public Utilities Code. To the extent that services such as Rideshare meet

---

<sup>72</sup> <https://instantcab.wordpress.com/join/>.

<sup>73</sup> <https://tickengo.com/a/becomedriver/>. (Italics added.)

<sup>74</sup> The TNCs should be contrasted with <http://www.511.org>, a ridesharing service which is managed by a partnership of public agencies led by the Metropolitan Transportation Commission, the California Highway Patrol, and the California Department of Transportation. There are no references to Terms and Conditions, donations, and other forms of compensation.

<sup>75</sup> Comments on Proposed Decision – from former San Francisco Mayor Willie L. Brown Jr. on 8/12/2013.

<sup>76</sup> Final Opening Comments of eRideShare Inc. on 08/19/2013.

either the “non-commercial enterprise” or rideshare exemption under Section 5353, or other exemptions as applicable, such services would be exempt from Commission regulation. The Commission has never regulated the ability of a “regular citizen [to] request a ride from a family member who may wish to give them a ride to the airport for free,” and nothing in the Public Utilities Code or our Decision would extend the Commission’s jurisdictional reach to such lengths. Further, the Commission would again note that the basis for regulating TNCs is that they meet the definition of a charter-party carrier under the Public Utilities Code. That is, they are “engaged in the transportation of persons by motor vehicle for compensation.”<sup>77</sup>

We agree with SFMTA that there is no reason for the Commission to change the definition of ridesharing under the Vehicle Code in order to accommodate for-profit transportation services delivered through smartphone applications. Furthermore, there is nothing about the ‘new business model’ of offering transportation services for compensation through the mechanism of a smartphone application that justifies abandoning the fundamental regulatory infrastructure of the transportation for compensation industry, or that changes the level of regulatory concern. The underlying principal continues to be ensuring public safety. Regulation is the safety net that the public should rely on for its protection. We are not persuaded by the TNCs that would like us to create a regulatory gap because they are using a smartphone to facilitate transportation for compensation. We are, however, encouraged by the TNC’s embrace of

---

<sup>77</sup> PU Code § 5360 (emphasis added).

technology and innovation to bring choice and convenience to the public in a safe manner.

## **5. Transportation Access**

The Commission's authority over passenger carriers is grounded in the need to protect the public's safe and reliable access to California's roadways.

Section 5352 of the Act states:

The use of the public highways for the transportation of passengers for compensation is a business affected with a public interest. It is the purpose of this chapter to preserve for the public full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon the highways; to secure to the people adequate and dependable transportation by carriers operating upon the highways; to secure full and unrestricted flow of traffic by motor carriers over the highways which will adequately meet reasonable public demands by providing for the regulation of all transportation agencies with respect to accident indemnity so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public; and to promote carrier and public safety through its safety enforcement regulations.

PU Code § 5352 places public safety as a key goal in ensuring that the public enjoys full access to the roadways. In this Rulemaking the Commission sought comment on the ways that safety regulations may enhance or impede public access to the roadways.

### **5.1. Comments on the Rulemaking**

Many parties filed comments in response to this issue and there were some that remained silent. We will summarize those positions that were submitted in this section.

Luxor Cab asserts that unlicensed for-hire carriers such as Uber, Lyft, and SideCar do not invest in safety equipment and crime-prevention training for drivers. It goes on to say that TNCs and their drivers try to compensate for the lack of professional safety measures by cherry-picking the customers whom they believe are safest to convey. Luxor Cab then cautions that the result of this type of cherry-picking is de facto red-lining of low-income neighborhoods and discrimination against customers based on drivers' profiling that may be little more than stereotyping according to ethnicity or disability. Luxor Cab also says that such practices are illegal for licensed operators because they have the effect of reducing public access to the roadways.<sup>78</sup>

The CHP asserts that the Commission's oversight responsibilities relative to transportation access are rooted in two essential areas. First, the regulation of accident indemnity to ensure adequate and dependable service by transportation operators and preservation of full use of the highways; and secondly, to promote public and operator safety through enforcement regulations.<sup>79</sup>

Perhaps the most detailed and focused comments on this issue came from Center for Accessible Technology (CforAT). CforAT rightly reminds us that any demand-response transit service must also comply with state and federal anti-discrimination statutes, including requirements that such services be accessible to people with disabilities.<sup>80</sup>

San Francisco Cab Drivers Association asserts that they have personally witnessed an abundance of Lyft and other private vehicles transporting people in

---

<sup>78</sup> Luxor Cab opening comments filed on 01/28/13 at 3-4.

<sup>79</sup> CHP comments filed on 07/17/13 at 3.

<sup>80</sup> CforAT comments filed on 01/28/13 at 1-2.

the back seat, blocking up traffic and making illegal maneuvers, while legal taxicabs drive around empty. They go on to say that this adds to traffic congestion. Additionally, the assertion is made that a Lyft driver nearly ran into the individual head-on while making an illegal left turn across Van Ness Avenue in San Francisco onto California Street and a professional driver would not do that.<sup>81</sup>

## **5.2. Discussion**

We agree with CforAT that TNCs must endeavor to provide equal access to all consumers. Because TNCs are in their infancy we cannot determine at this point whether equal access is being hampered. As a threshold matter, TNCs must do the following:

- a. TNCs shall allow passengers to indicate whether they require a wheelchair-accessible vehicle or a vehicle otherwise accessible to individuals with disabilities.
- b. One year from the effective date of these rules and annually thereafter, each TNC shall submit to the Safety and Enforcement Division a report detailing the number and percentage of their customers who requested accessible vehicles, and how often the TNC was able to comply with requests for accessible vehicles. Upon receipt this report shall be made public by the Safety and Enforcement Division. This report shall also contain a description of any instances or complaints of unfair treatment or discrimination of persons with disabilities.

The above information will be used by the Commission to determine what, if any, changes need to be made to the regulations in order to ensure that TNCs are accessible to, and do not discriminate against, persons with disabilities. The

---

<sup>81</sup> San Francisco Cab Drivers Association comments filed on 01/29/13 at 3-4.

Commission also notes it currently has few provisions or protections to ensure equal access for passengers with disabilities under its current TCP regulations.<sup>82</sup> Updating any regulations in this area, as found to be needed, may also be something the Commission should consider in Phase 2 of this rulemaking.

We also agree with the CHP that the Commission must regulate TNCs to ensure adequate and dependable service by transportation operators and to promote public and operator safety. Consequently, we require TNCs to follow the safety and regulatory requirements stated above in section 3.2 of this decision.

And we also agree with Luxor Cab that discrimination against customers based on drivers' profiling that may be little more than stereotyping by ethnicity, disability, or economic class, will not be tolerated. It is noteworthy that, although not a party to this proceeding, Homobiles was created to serve a community that may not have been adequately served by the existing transportation forms. According to Homobiles' website, it was formed to serve underserved communities who experience stress or discrimination on various forms of transportation for hire due to their gender or sexual identity.<sup>83</sup> The Commission notes that while some parties argue that TNCs such as Lyft, UberX, and SideCar must be regulated either as taxi cabs or limousines in order to ensure nondiscrimination and public safety, Homobiles was formed to meet the needs of consumers whose transportation needs are not being adequately met by

---

<sup>82</sup> For instance, the Commission requires every carrier to maintain on file with the Commission an equipment list of all vehicles in use including whether each vehicle is handicap accessible. (GO 157-D, Section 4.01.)

<sup>83</sup> <http://www.homobiles.org/terms/>.

either taxi cabs or limousines. We applaud the founders of Homobiles for establishing a non-profit 501(c)(3) volunteer organization that caters to the underserved communities of San Francisco.

We agree with CforAT that the Commission should be informed by the legacy of transit discrimination and should work to ensure that the new services mark a break from this problematic history. Just as it would be unacceptable to allow any form of transit service to operate if it were to engage in racial discrimination, new forms of online-enabled transit services cannot be permitted to exclude people with disabilities. We agree. Therefore, we direct TNCs to submit a plan within 90 days of the effective date of this decision to tell us how they plan to ensure that TNCs will avoid creating a divide between the able and disabled communities. TNCs must explain how they plan to provide incentives to individuals with accessible vehicles to become TNC drivers. Furthermore, TNCs should ensure accessibility accommodations for their apps and websites to enable the disabled public access to the same services as clients who are not disabled.<sup>84</sup>

## **6. Insurance**

California Insurance Code § 11580.1(b) requires that non-commercial vehicles have a minimum liability coverage of \$15,000 for injury/death to one person, \$30,000 for injury/death to more than one person, and \$5,000 for damage to property. The Commission's GO 115-F requires that any charter party carrier vehicle with a seating capacity of seven passengers or fewer have a minimum

---

<sup>84</sup> Title III of the Americans with Disabilities Act (ADA) requires that businesses and nonprofit services providers make accessibility accommodations to enable the disabled public to access the same services as clients who are not disabled.

commercial coverage of \$750,000. In the Rulemaking, the Commission sought comments on, *inter alia*, the insurance aspects of this new transportation model. For instance, if a vehicle is insured as a private vehicle, but involved in an incident while transporting passengers for compensation, the Rulemaking asked what type of coverage would the insurance offer for injuries/damages to the driver, the paying passenger, and any other people or property involved in the incident, and whether the insurance industry had an opinion on the insurance coverage available for private vehicles used to transport passengers for compensation.

#### **6.1. Comments on the Rulemaking**

This Rulemaking has at least 18 parties who filed comments. No party claimed that TNCs should not have insurance or that liability insurance in the transportation business was not a key component of their business model. In this section we will note the PIFC's comments.<sup>85</sup> We also note that many parties claimed either in their comments or during the workshop that TNCs are uninsured.

In its comments, PIFC asserts that it surveyed its member insurance companies, finding that "the industry standard for personal auto insurance policy contracts is to exempt from insurance coverage claims involving vehicles used for transporting passengers for a charge."<sup>86</sup> PIFC goes on to say that in situations where a vehicle is insured as a private vehicle and is used to transport

---

<sup>85</sup> According to comments filed by PIFC on 01/28/13, the PIFC members represent six of the nation's largest insurance companies (State Farm, Farmers, Liberty Mutual Group, Progressive, Allstate and Mercury) which collectively write a majority of the personal lines of auto insurance in California.

<sup>86</sup> PIFC comments filed on 01/28/13 at 1-2.

passengers for a fee, no insurance coverage would exist.<sup>87</sup> The Commission also inquired about the sufficiency of the minimum liability coverage required under California Insurance Code § 1158.1(b). PIFC asserts that since there would be no coverage for the type of situations at issue, the minimum amount of coverage would be irrelevant.<sup>88</sup> Finally, with respect to California Insurance Code § 11580.24, PIFC notes that the legislature encouraged car sharing programs (i.e., renting out one's personal vehicle to another driver), as long as the owner does not earn more than the annual cost of owning the vehicle from the car sharing program. PIFC goes on to say that in doing so, it shields private passenger car insurers from any liability by shifting the responsibility for coverage to the private vehicle ridesharing program. The PIFC notes that the issue before the Commission is not ridesharing, but instead it is one of using a private passenger vehicle in a livery service. This is clearly not covered under a standard policy; if an incident occurs, coverage would not exist.<sup>89</sup>

## **6.2. Discussion**

We will require TNCs to maintain commercial liability insurance policies providing not less than \$1,000,000 (one million dollars) per-incident coverage for incidents involving vehicles and drivers while they are providing TNC services. The insurance coverage shall be available to cover claims regardless of whether a TNC driver maintains insurance adequate to cover any portion of the claim. This level of liability insurance is above what the Commission currently requires of

---

<sup>87</sup> PIFC comments filed on 01/28/13 at 1-2.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

TCP drivers. It is equal to the insurance that the SFMTA requires of taxicab companies.

We reject the claim that Lyft, SideCar, and Uber/UberX do not have insurance. The Commission's Safety & Enforcement Division, in entering into settlement agreements with these entities, made sure that each of these companies maintained excess liability insurance policies providing a minimum of \$1 million per incident. We note PIFC's comments in this Rulemaking, and note that, even if a TNC driver's personal insurance does not apply in the event of an accident, the insurance required by the Commission will apply.

We require that each TNC file their insurance policies under seal with the Commission as part of applying for a license. Furthermore, the license for the TNC will automatically expire upon expiration of the insurance policy unless and until the TNC provides an updated insurance policy and applies to renew its license. In Phase II of this proceeding we will consider whether these policies for both TCP as well as TNC certificate holders should be made public and included in the Commission's website.

## **7. Workshop Report**

As part of the Scoping Memo, parties were invited to attend a workshop to consider issues including but not limited to jurisdiction, safety, transportation access, and proposed modifications to existing rules and regulations. On April 10 and 11, 2013, the parties attended the Commission's workshop in San Francisco at the Commission's offices. The workshop sessions were publicly noticed and open to the public.

Two parties that we'd like to thank and extend our appreciation to for drafting the workshop report are TPAC and TransForm. On May 17th these two parties filed the Workshop Report on behalf of those parties who attended

the workshop.<sup>90</sup> The Workshop Report summarizes party positions as articulated during the workshop.

Most of the issues such as jurisdiction, safety, access, and the definition of ridesharing have already been discussed in the above sections of this decision. There are, however, two issues not addressed above that we will address in this section.

During the workshop, Commission staff asked whether there was a third way to regulate TNCs that protected public safety, but also allowed innovation and technology to bring choice and convenience to the public. The SFMTA/IATR stated that the idea that there is some third way to regulate these TNCs is offensive to the men and women who work as regulators to protect public safety and access. The SFMTA/IATR pointed out that the taxi industry is a highly managed transportation network that requires regulations to ensure universal access to door to door transportation in an urban environment.<sup>91</sup> TPAC stated that it believed that the Commission had inappropriately provided preapproval to a third-way regulatory approach via its settlement agreements with companies such as Uber and Lyft. TPAC stated that the third-way regulatory approach affected by the TNCs' settlement agreements amounted to the deregulation of the taxicab industry, and as such violated state law.<sup>92</sup> Counsel for the SFMTA and the San Francisco Airport Commission stated that

---

<sup>90</sup> TPAC, TransForm, CforAT, GCLA, Luxor Cab, IATR, PIFC, the San Francisco Cab Drivers Association, the San Francisco Limo Union, the San Francisco Medallion Association, SFMTA, The San Francisco Airport Commission, SideCar, Tickengo, Uber, The United Taxicab Workers, TURN, and Lyft.

<sup>91</sup> Workshop Report at 14.

<sup>92</sup> *Id.*

TNCs have presented no credible argument for a third way. The SFMTA and San Francisco Airport Commission stated that there are two possible regulatory schemes, the local system for taxicabs and the state system for charter-party carriers, but there is no justification for subjecting TNCs to lesser standards than those applicable to all other charter party carriers.<sup>93</sup> Luxor Cab stated that the topic of a third way to regulate TNCs is misleading because it assumes that there is something new about the TNCs, when taxi companies have been using similar technological services for several years before the inception of Uber, Lyft, and SideCar.<sup>94</sup> SideCar asserted the need for regulatory recognition of the innovative combination of services offered by communications platforms such as SideCar, in combination with noncommercial ridesharing.<sup>95</sup> Lyft stated that, to the extent the Commission finds that it should regulate to protect public safety interests, it is supportive of a third way regulatory approach because, if applied to TNCs, the current regulatory scheme would create unreasonable barriers for ridesharing services to enter the market.<sup>96</sup>

A second issue that was discussed during the workshops and does not neatly fit into any of the discussion above is the notion of fair competition among regulated and unregulated entities. TPAC commented that the goal of the Commission should be to create a fair system. They argue that where both a regulated system and an unregulated system exist, the natural inclination of the industry will be to move towards deregulation in order to avoid all of the costs of

---

<sup>93</sup> Workshop Report at 15.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

regulatory compliance. Consequently there will be no room left for a regulated industry.<sup>97</sup>

Several parties including the SFMTA, San Francisco Airport Commission, TPAC, United Taxicab Workers, and the SF Cab Drivers Association contend that regulated taxis cannot compete with TNCs. United Taxicab Workers argue that to allow TNCs to exist in their current unregulated form or subject to minimal regulation essentially creates a race towards the bottom with negative impact on safety and service. These groups contended that professional drivers will be pushed towards the TNC business model because of lower operational costs. The representative from the SFMTA/IATR states that when this unregulated system devastates the regulated environment, no one will be left to provide safe and accessible door to door service to city residents and visitors.<sup>98</sup>

### **7.1. Discussion**

We are not persuaded by the position taken by the SFMTA that updating regulation is offensive to those currently working to regulate public safety and access. Regulatory bodies must always look to update their rules and regulations in order to keep pace with time and technology. The Commission's goal in this Rulemaking is to strike the proper balance between safety and innovation, so that regulation provides a safety net that the public can rely on for its protection while new businesses innovate and use technology to better the lives of Californians. The regulations that we are adopting for TNCs are similar to what the SFMTA requires of taxicab drivers. Namely, we require a license for each TNC, require a criminal background check to be completed for each driver,

---

<sup>97</sup> Workshop Report at 26.

<sup>98</sup> *Id.*

require that each TNC establish a driver training program, and require liability insurance that is equal to what the SFMTA requires of taxicab drivers. We will not, however, meddle into their business model by forcing TNCs to designate each driver an employee or contractor. Again, our role is to protect public safety, not to dictate the business models of these companies.

We reject TPAC's allegation that a third way of regulation is the same as deregulation. The settlement agreements that SED entered into with three of the companies were a first step toward regulation. The regulations that we establish in this decision will ensure that safety is foundational to a TNC's business. Additionally, we support choice not only for passengers, but also drivers. Going forward, a company may either apply for a TNC license or a TCP license with the Commission.

We accept those party's comments calling for regulation of TNCs. As such, in this decision we exercise our existing jurisdiction pursuant to Article XII of the California Constitution and the Act. In this decision under the broad grant of authority pursuant to PU Code § 5381, we create the category of TNC to accompany the existing category of TCP. A company or individual wishing to provide transportation or facilitate transportation of passengers can choose to either get a TCP license or a TNC license. The TCP requirements are already in place, although as indicated, *supra*, the Commission will open a second phase to this Rulemaking to update those rules and regulations to ensure that safety requirements are up to date.

## **8. Comments on Proposed Decision**

The proposed decision of Commissioner Michael R. Peevey in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of

Practice and Procedure. Comments were filed on August 19, 2013 by Tickengo, CforAT, SideCar, Lyft, Uber, TPAC, IATR, Los Angeles Department of Transportation, GCLA, TransForm, Luxor Cab, eRideshare, SFMTA, California Airports Council, TLPA, San Francisco Cab Drivers Association (SFCDA), United Taxicab Workers, SFMTA/SFO, PIFC and Consumer Attorneys of California, and reply comments were filed on August 26, 2013 by TPAC, Luxor Cab, United Taxicab Workers, Lyft, IATR, CforAT, TLPA, SFMTA/SFO, SideCar, Uber, PIFC and SFCDA.

In response to comments, the proposed decision has been revised to further explain the definition of what constitutes a TNC. It is further noted that the existing exemptions under the Commission's Charter Party Carrier authority are not usurped by the creation of this new category. All of the existing eleven exemptions still apply. The proposed decision has also been revised to clarify what kind of a criminal background check is expected, the insurance requirements and what specifics should be included in the TNC plans to ensure accessibility. Other revisions in response to comments have been made as appropriate.

#### **9. Assignment of Proceeding**

Michael R. Peevey is the assigned Commissioner and Robert Mason III is the assigned ALJ in this proceeding.

#### **Findings of Fact**

1. The Commission opened this Rulemaking on December 20, 2012, to protect public safety and to encourage innovators to use technology to improve the lives of Californians.

2. The Commission has a responsibility for determining whether and how public safety might be affected by these TNCs.

3. Parties filed comments in this proceeding on January 28, 2013 and reply comments were filed on February 11, 2013.

4. On February 15, 2013, the Commission held a Prehearing Conference and on April 2, 2013, the assigned Commissioner and ALJ issued a Scoping Memo.

5. Workshops were held on April 11 and 12, 2013, at the Commission's auditorium.

6. In the Rulemaking we referred to these companies as New Online-Enabled Transportation Services. We are changing the abbreviation to TNC for ease of use.

7. TNCs are not just Lyft, SideCar, InstantCab, and UberX.

8. A TNC is defined as an organization whether a corporation, partnership, sole proprietor, or other form, operating in California that provides prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles.

9. California law currently recognizes and regulates three modes of passenger transportation for compensation: taxi services, regulated by cities and/or counties; and charter party carrier services, and passenger stage companies, regulated by the California Public Utilities Commission.

10. It is reasonable to conclude that in recent years, the communications revolution in wireless service, smartphones and apps has further facilitated the development and adoption of passenger transportation for compensation, to a point where passengers seeking rides are readily connected with drivers willing to provide rides in private vehicles.

11. It is reasonable to conclude that current TNCs are providing passenger transportation for compensation.

12. TNCs do not fit neatly into the conventional understandings or statutory definitions of either taxis or limousines, but that does not mean that this Commission's responsibility to public safety in the transportation industry should be ignored and/or left for individual companies to dictate.

13. TNCs operate on a prearranged basis because 1) before a passenger can request a ride, the passenger must download the software application, provide identification information and agree to the TNC service agreement, and 2) for a particular trip, the passenger must input information regarding current location, and finally 3) a TNC driver cannot be hailed on the street similar to a taxicab where no information is shared until the passenger enters the vehicle.

14. In order to comply with the applicable statutes and regulations, all TNC drivers must be able to prove that a ride was matched on the TNC software application as evidence of prearrangement.

15. The California DMV does not currently permit TNCs to enroll non-employee drivers in the Employer Pull Notice Program. Until the DMV Employer Pull Notice Program is available for use by TNCs, TNCs should perform, prior to allowing a driver on the platform and quarterly thereafter, driving record checks through DMV in order to ensure that drivers meet applicable requirements. The DMV check criteria shall provide that a user may have no more than 3 points within the preceding 3 years, no "major violations" (reckless driving, hit and run, or driving with a suspended license conviction) within the preceding 3 years, and no driving under the influence conviction within the past 7 years.

16. It is reasonable to conclude that TNCs are charter party passenger carriers, and therefore we will exercise our existing jurisdiction over these services

pursuant to Article XII of the California Constitution and the Passenger Charter-party Carriers' Act, PU Code § 5351 *et seq.*

17. It is reasonable to exercise this Commission's broad grant of authority pursuant to PU Codes §§ 5381 and 701 to create the category of TNC to accompany the existing category of TCP. A company or individual wishing to provide transportation or facilitate transportation of passengers can choose to either get a TCP license or a TNC permit.

18. The definition of ridesharing does not permit transportation performed for profit.

19. Recovery of actual costs incurred only applies to vanpool vehicles, which is defined by the Vehicle Code as seating more than 10 passengers, but less than 15 passengers, including the driver.

20. It is reasonable to conclude that TNCs do not qualify for the rideshare exemption under PU Code § 5353(h), because § 5353(h) provides two opportunities to qualify for the rideshare exemption: either the transportation must have a common work-related purpose; or the transportation must be incidental to another purpose of the driver. TNCs fail to satisfy either of these requirements.

21. Pursuant to PU Code § 5352 the Commission's authority over passenger carriers is grounded in the need to protect the public's safe and reliable access to California's roadways.

22. PU Code § 5352 positions public safety as a key goal in ensuring that the public enjoys full access to the roadways.

23. The primary distinction between a TNC and other TCPs is that a TNC connects riders to drivers who drive their personal vehicle, not a vehicle such as a limousine purchased primarily for a commercial purpose.

24. A TNC shall not be permitted to accept street hails.

25. A TNC is not permitted to itself own vehicles used in its operation or own fleets of vehicles. With this definition in mind, the Commission finds that Uber (in contrast to UberX) is not a TNC.

26. Uber connects riders with drivers who do not drive their own personal vehicle, but typically operate in town cars or limousines, which the driver may often as well use to transport customers for another limousine/town car company.

27. In order to ensure the greatest possible evidentiary record, the Commission would prefer to leave all non-TNC issues, including Uber's potential TCP status, to Phase II.

28. The Commission will not allow the uncertainty regarding Uber's insurance to persist during the pendency of Phase II. Uber should be required to demonstrate to the Commission within 30 days of the issuance of this decision that it maintains commercial liability insurance policies providing not less than \$1,000,000 (one million dollars) per-incident coverage for incidents involving vehicles and drivers while they are providing Uber services. The insurance coverage shall be available to cover claims regardless of whether an Uber driver maintains insurance adequate to cover any portion of the claim.

29. UberX does meet the TNC definition and should apply for a TNC license.

30. In this decision we will require TNCs to maintain commercial liability insurance policies providing not less than \$1,000,000 (one million dollars) per-incident coverage for incidents involving vehicles and drivers while they are providing TNC services. The insurance coverage shall be available to cover claims regardless of whether a TNC driver maintains insurance adequate to cover any portion of the claim.

31. The criminal background check must be a national criminal background check including the national sex offender database. The criminal background check should be using the applicant's social security number and not just the applicant's name. Any felony criminal conviction within seven years prior to the date of the background check for violent crime, a sexual offense, a crime involving property damage, and/or theft will make the applicant ineligible to be a TNC driver.

32. The Commission is authorized to conduct inspections of charter-party carriers which will now include TNCs. For instance, § 5371.5 of the Act states that: "Upon receipt of a complaint containing sufficient information to warrant conducting an investigation, the commission shall investigate any business that advertises limousine-for-hire or passenger charter transportation service for compensation in motor vehicles."

33. The Commission is also authorized to issue fines pursuant to PU Code § 5378(b).

34. PU Code § 5411 to 5420 of the Act contain relevant provisions regarding issuing fines and penalties. These provisions allow the Commission to issue fines to carriers who have violated one or more provisions of the California Public Utilities Code. In addition, the Commission has established a citation program in Resolution ALJ-187.

35. The Commission's purpose in this Rulemaking is to ensure that regulation is the safety net that the public relies on for its protection and secondarily encouraging innovation and utilization of technology to better the lives of Californians.

36. No Term and Condition in a TNC's Terms of Service or elsewhere, can be inconsistent with this decision's commercial liability insurance requirements for

TNCs. Nor can any Term and Condition in a TNC's Terms of Service be used or relied on by the TNC to deny insurance coverage, or otherwise evade the insurance requirements established in this decision.

37. The Commission will open a Phase II to consider updating its regulations over TCP certificate holders. Phase II will also consider the standard and appropriate language for Terms & Conditions for both TCP and TNC certificate holders.

### **Conclusions of Law**

1. The Federal Telecommunications Act of 1996 and recently adopted California legislation (Senate Bill 1161 authored by Senator Alex Padilla) limit California's ability to regulate IP-enabled services, but they do not prevent California from regulating passenger transportation over public roadways.

2. TNCs are not providers of IP-enabled services and are not exempt from our jurisdiction.

3. To date neither the FCC, nor a court of higher jurisdiction, has ruled that this Commission, or any other state commission, is precluded by the Federal Telecommunication Act of 1996 from regulating TNCs.

4. The Commission regulates charter party passenger carriers pursuant to Article XII of the California Constitution and the Passenger Charter-party Carriers' Act, PU Code, §§ 5351, *et seq.* Section 5360 states in part:

Subject to the exclusions of Section 5353, "charter-party carrier of passengers" means every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this state.

Section 5381 states in part:

...(t)he commission may supervise and regulate every charter-party carrier of passengers in the State and may do all

things...necessary and convenient in the exercise of such power and jurisdiction.

5. The Commission has very broad powers under PU Code § 701 which suggests that the Commission has the ability (via a rulemaking process) to develop new categories of regulation when a new technology disrupts an existing industry.

6. We find that TNCs are charter party passenger carriers, and therefore we will exercise our existing jurisdiction pursuant to Article XII of the California Constitution and the Passenger Charter-party Carriers' Act, PU Code § 5351 *et seq.* (the Act). In this decision, under the broad grant of authority pursuant to PU Codes § 5381 and 701, we create the category of TNC to accompany the existing category of TCP.

7. Section 5353(h) provides two opportunities to qualify for the rideshare exemption: Transportation of persons between home and work locations or of persons having a common work-related trip purpose in a vehicle having a seating capacity of 15 passengers or less, including the driver, which are used for the purpose of ridesharing, as defined in § 522 of the Vehicle Code, when the ridesharing is incidental to another purpose of the driver.

8. PU Code § 5353(h) exempts transportation of persons between home and work locations or of persons having a common work-related trip in a vehicle having a seating capacity of 15 passengers or less, including the driver, which are used for the purpose of ridesharing, as defined in § 522 of the Vehicle Code, when the ridesharing is incidental to another purpose of the driver.

9. The section also states the exemption does not apply if the primary purpose for the transportation of those persons is to make a profit. "Profit," as

used in this subdivision does not include the recovery of actual costs incurred in owning and operating a vanpool vehicle, as defined in § 668 of the Vehicle Code.

10. Current TNCs do not fulfill the rideshare exemption and actually are providing transportation services for compensation.

11. PU Code § 5352 positions public safety as a key goal in ensuring that the public enjoys full access to the roadways.

## O R D E R

### IT IS ORDERED that:

1. Transportation Network Companies shall follow the safety and regulatory requirements as detailed in Section 2.2.4 of this decision.

2. All reports required by this decision to be submitted by Transportation Network Companies must be verified by the provision of a signature of an officer of the corporation stating under penalty of perjury under the laws of the State of California that the report is accurate and contains no material omissions.

3. Each Transportation Network Company (TNC) (not the driver) must have a license with this Commission. There are six types of charter party carrier permits/certificates. TNCs shall apply for a class P permit.

4. Each Transportation Network Company (TNC) is required to conduct a criminal background check for each driver prior to that applicant becoming a TNC driver. The criminal background check must be a national criminal background check including the national sex offender database. The criminal background check must use the applicant's social security number and not just the applicant's name. Any felony criminal conviction within seven years prior to the date of the background check for driving under the influence of drugs or alcohol, fraud, use of a motor vehicle to commit a felony, a violent crime or act of

terror, a sexual offense, a crime involving property damage, and/or theft will make the applicant ineligible to be a TNC driver.

5. We require the Transportation Network Company (TNC) or an authorized third party facility licensed by the California Bureau of Automotive Repair to conduct and ensure that each vehicle passes a 19-point vehicle inspection prior to allowing a vehicle to be driven as part of the TNC's service, and annually thereafter, and for the TNC to maintain the record of such inspections in case of an audit.

6. We require TNCs to maintain commercial liability insurance policies providing not less than \$1,000,000 (one million dollars) per-incident coverage for incidents involving vehicles and drivers while they are providing TNC services. The insurance coverage shall be available to cover claims regardless of whether a TNC driver maintains insurance adequate to cover any portion of the claim. This insurance requirement shall be disclosed on each TNC's app and website.

7. Until the Department of Motor Vehicle (DMV) Employer Pull Notice Program is available for use by Transportation Network Companies (TNC), TNCs shall perform, prior to allowing a driver on the platform and quarterly thereafter, driving record checks through the DMV in order to ensure that drivers meet applicable requirements. The DMV check criteria shall provide that a user may have no more than 3 points within the preceding 3 years, no "major violations" (reckless driving, hit and run, or driving with a suspended license conviction) within the preceding 3 years, and no driving under the influence conviction within the past 7 years.

8. Drivers for Transportation Network Companies are prohibited from accepting street hails from potential passengers.

9. This decision orders a second phase to this proceeding to review the Commission's existing regulations over limousines and other charter party carriers in order to ensure that these rules have kept pace with the needs of today's transportation market, and that the public safety rules are up to date. In addition, the second phase will consider the potential impact of any legislative changes that could affect our ability to regulate the Transportation Network Company industry.

10. The Commission will convene a workshop one year after the issuance of this decision to hear from all stakeholders on the impacts of this new mode of transportation and accompanying regulations. Workshops topics will include, but not necessarily be limited to, a consideration of safety, competition, innovation, accessibility, congestion, the California Environmental Quality Act, and other pollution related issues.

11. Transportation Network Companies must submit a plan within 90 days of the issuance of this decision to the Safety and Enforcement Division to explain how they plan to ensure that this new form of transportation service does not create a divide between the able and disabled communities.

12. Within 45 days after the effective date of this Decision, the Commission will post a Transportation Network Company Application Packet on its website, and Transportation Network Companies currently operating in California must file their Transportation Network Company Applications with the Safety and Enforcement Division 60 days thereafter if they wish to continue operating.

13. Uber is required to demonstrate to the Commission within 30 days of the issuance of this decision that it maintains commercial liability insurance policies providing not less than \$1,000,000 (one million dollars) per-incident coverage for incidents involving vehicles and drivers while they are providing Uber services.

The insurance coverage shall be available to cover claims regardless of whether an Uber driver maintains insurance adequate to cover any portion of the claim.

14. UberX meets the Transportation Network Company (TNC) definition and must apply for a TNC license.

15. No Term and Condition in a TNC's Terms of Service or elsewhere, can be inconsistent with this decision. Nor can any Term and Condition in a TNC's Terms of Service be used or relied on by the TNC to deny insurance coverage, or otherwise evade the insurance requirements established in this decision.

16. Taxicab Paratransit Association of California's motion to compel discovery is denied without prejudice.

17. Rulemaking 12-12-011 remains open.

This order is effective today.

Dated September 19, 2013, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
MICHEL PETER FLORIO  
CATHERINE J.K. SANDOVAL  
MARK J. FERRON  
CARLA J. PETERMAN  
Commissioners

EXHIBIT 6

JANUARY 27, 2015 | NUMBER 767

## Is Ridesharing Safe?

BY MATTHEW FEENEY

### EXECUTIVE SUMMARY

**R**ideshare companies Uber and Lyft are facing predictable complaints as they continue to grow. Many of these complaints concern safety, with some in the taxi industry claiming that ridesharing is less safe than taking a traditional taxicab.

Ridesharing safety worries relate to the well-being of drivers, passengers, and third parties. In each of these cases there is little evidence that the sharing economy services are more dangerous than traditional taxis. In fact, the ridesharing business model offers big safety advantages as far as drivers are concerned. In particular, ridesharing's cash-free transactions and self-identified customers substantially mitigate one of the worst risks associated with traditional taxis: the risk of violent crime.

An analysis of the safety regulations governing vehicles for hire does not suggest that ridesharing companies ought to be more strictly regulated. It does highlight, however, that in many parts of the country lawmakers and regulators have not adequately adapted to the rise of ridesharing, which fits awkwardly into existing regulatory frameworks governing taxis.

There will be many real and substantive issues to sort out as the rideshare industry continues to develop. In particular, heavily regulated taxi drivers have a valid point when they complain that they have to compete on an unlevel playing field with less regulated rideshare companies. But the appropriate response to this problem is to rationalize and modernize the outdated and heavy-handed restrictions on taxis—not to extend those restrictions to ridesharing.

“In the United States cease and desist orders have been issued to Uber and Lyft, which have faced pressure to conform to regulations designed for taxis.”

## INTRODUCTION

The rise of the so-called “sharing economy,” in which customers and service providers interact in a peer-to-peer marketplace facilitated by the Internet, has been accompanied by predictable complaints both in the United States and abroad. While the sharing economy has proven popular in a variety of fields such as transportation, accommodation, and cuisine, it remains hampered in many jurisdictions across the world by outdated regulations and political opposition from established competitors.

In the case of sharing economy companies Uber and Lyft,<sup>1</sup> both of which offer ridesharing services via their smartphone apps, taxi companies have taken steps to block their growth, while some legislators and regulators have attempted to craft new rules aimed at regulating ridesharing. In the United States cease and desist orders have been issued to Uber and Lyft, which have faced pressure to conform to regulations designed for taxis. The two companies have also both been the subjects of protests held by taxi drivers, who claim that Uber and Lyft are unfairly flouting existing regulations.

While companies like Lyft, Uber, and other players in the sharing economy have been facing resistance, some investors have indicated that they believe these innovators are here to stay. Uber, for example, has enjoyed a multi-billion dollar valuation since June 2014.<sup>2</sup>

However, critics claim that rideshare companies, by ignoring existing regulations, enjoy an unfair competitive advantage over their regulated competitors in the taxi industry. Furthermore, they argue that the absence of effective ridesharing regulation threatens not only competitors but consumers as well.

In particular, they claim that peer-to-peer ridesharing is less safe than traditional taxi service. “All of these components—primary commercial auto liability insurance coverage, criminal background checks that involve the use of fingerprinting and are conducted by public entities, vehicle inspections that make certain that the vehicle is held to a certain standard, drug testing—cost money, and they

cost somewhere between 35% and 40% of all of a typical taxi company’s operating costs,” says Dave Sutton, spokesperson for Who’s Driving You?, a national anti-ridesharing campaign backed by the taxi industry. “These companies are skirting all of these costs, and it’s how they’re able to provide cheaper service. People love cheaper service, but it comes at an absolute cost and risk to the community.”<sup>3</sup>

These claims about the safety of ridesharing relate to the well-being of both drivers and passengers, as well as third parties who might suffer personal injury or property damage in accidents involving ridesharing vehicles. In all of these cases, however, there is little evidence that the sharing economy services are more dangerous than traditional taxis. Indeed, the ridesharing business model offers big safety advantages as far as drivers are concerned. That said, there are legitimate concerns about how ridesharing is insured, which will need to be sorted out as the new industry continues to develop. Overall, however, concerns about the safety risks of ridesharing are overblown—not terribly surprising, as they are being trumpeted most loudly by industry groups with a big financial stake in maintaining the heavily regulated status quo.

## SAFETY FOR DRIVERS

Uber (originally called UberCab) launched in San Francisco in 2010. Its original black car service uses professional drivers with chauffeur’s licenses and commercial liability insurance. In 2012 the company introduced a new peer-to-peer ridesharing service, UberX, which allows any car owner who passes Uber’s background checks to use Uber’s app to pick up passengers. As of September 2014 the company operated in over 200 different cities in 45 countries around the world.

Lyft introduced its peer-to-peer ridesharing service in 2012 and currently operates in more than 65 U.S. cities. Cars offering rides through Lyft can often be identified by a furry pink mustache on the front grill, which Lyft drivers are encouraged to attach.

Any discussion of the relative safety of ride-sharing versus traditional taxis should begin with the drivers, who historically have borne the greatest safety risks associated with rides for hire. In particular, taxi drivers face an unusually high risk of being victimized by crime. According to data from the Census of Fatal Occupational Injuries gathered by the Bureau of Labor Statistics (BLS), the occupational fatal injury rate (which includes homicides) of taxi drivers and chauffeurs ranged from 14.7 per 100,000 to 19.7 per 100,000 between 2006 and 2012—many times higher than the rate of all workers (see Figure 1).<sup>4</sup>

The BLS's Census of Fatal Occupational Injuries shows that homicides make up a significant portion of total work-related taxi service deaths (See Figure 2). Between 2003 and 2012 homicides accounted for between 56 percent (in 2005) and 80 percent (in 2003) of all work-related deaths in the taxi industry.<sup>5</sup> Taxi drivers also face an unusually high risk of non-fatal violent assaults.

Why are taxi drivers so vulnerable? First, they often carry cash, which criminologist

Marcus Felson has called “the mother’s milk of crime.”<sup>6</sup> Second, their job consists of giving rides to anonymous strangers: “picking up hitchhikers” is how James Szekely, director of the International Taxi Driver’s Safety Council, describes driving a cab.<sup>7</sup> It is therefore unsurprising that taxis make such inviting targets for robberies.

Uber and Lyft rides, by contrast, are notable for two reasons: no cash ever changes hands, and passengers are not anonymous. These important differences remove major incentives for violent assaults and furthermore ensure that any Uber or Lyft passenger who commits a crime during a ride will be easier to apprehend.

When a customer opens an Uber or Lyft account, she enters her credit card information and the credit card details are linked to the customer’s account. Uber and Lyft transactions are made automatically at the end of trips; no cash is needed to pay fares.

The introduction of electronic payment mechanisms has a proven track record of reducing crime. In a March 2014 working pa-

“Uber and Lyft rides, by contrast, are notable for two reasons: no cash ever changes hands, and passengers are not anonymous.”

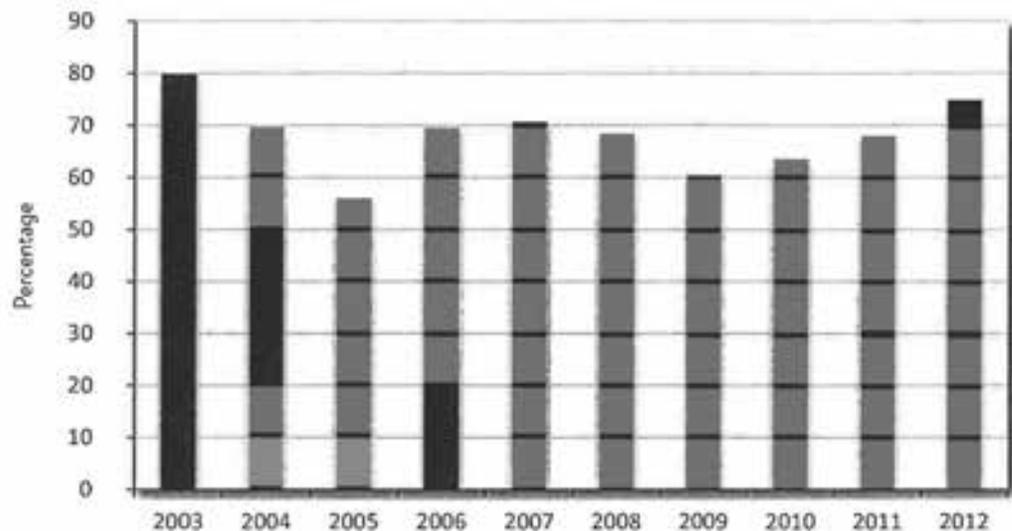
**Figure 1**  
Taxi Driver and Chauffeur Fatal Occupational Injury Rate vs. Total Fatal Occupational Injury Rate



Source: Census of Fatal Occupational Injuries, Bureau of Labor Statistics.

“Experiences such as Nuzzi’s highlight the fact that Uber’s platform can allow for drivers to exhibit unacceptable and disturbing behavior.”

Figure 2  
Percentage of Taxi Service Work-Related Deaths That Are Homicides



Source: Census of Fatal Occupational Injuries, Bureau of Labor Statistics.

per for the National Bureau of Economic Research, researchers examined the effect of delivering welfare payments via debit card instead of paper checks in Missouri as part of the Electronic Benefit Transfer (EBT) program. The pilot programs began in mid 1997. According to the researchers’ estimates “the overall crime rate decreased by 9.8 percent in response to the EBT.”<sup>8</sup>

It is increasingly common for taxis to accept credit cards, and it can be reasonably assumed that if this trend continues the number of taxi drivers who are the victims of violent crime will decrease. However, even if it were the case that every taxi accepted credit cards, the drivers would still not have the significant safety advantage Uber and Lyft drivers enjoy knowing the identity of their passengers.

### PASSENGERS’ PRIVACY CONCERNS

While it is the case that rideshare drivers enjoy an advantage over taxi drivers in knowing some of their passengers’ personal information, this feature has raised privacy concerns. In March 2014 Olivia Nuzzi, a reporter for *The Daily Beast*, wrote that at the end of an

Uber ride the driver showed her a photo he had taken of her before the ride began.<sup>9</sup> This driver emailed Nuzzi and *The Daily Beast* after Uber deactivated him. Nuzzi also reported that another Uber driver in New York City had contacted one of her friends via Facebook.<sup>10</sup> The driver asked the friend whether Nuzzi was single. Uber representatives have claimed that its drivers are required to record passengers’ first and last names on a trip record in order to comply with New York City’s Taxi and Limousine Commission (TLC) regulations.<sup>11</sup> However, the TLC denies that such personal information has ever been required when reporting trip data.<sup>12</sup>

Experiences such as Nuzzi’s highlight the fact that Uber’s platform can allow for drivers to exhibit unacceptable and disturbing behavior. However, Uber and Lyft passengers rate drivers at the end of trips, which allows for quick feedback from customers. The ability rideshare passengers have to report a driver’s behavior quickly via a rating system (as Nuzzi did) is an improvement over many of the processes in place for reporting bad taxi drivers.

Privacy worries relating to Uber concern not only the company allowing drivers to ac-

cess the names of passengers, but also its tracking of users' locations. In September 2014 venture capitalist Peter Sims wrote about how someone he barely knew was able to track his location while he was in an Uber SUV in New York City by looking at a screen that was on display at Uber's Chicago launch party.<sup>13</sup> The screen showed the real-time locations of New York City "known people" using Uber.

In November 2014 Uber announced that it was investigating Josh Mohrer, an Uber New York executive, after he reportedly told a *BuzzFeed* reporter that he had been "tracking" her during her Uber ride to Uber's New York headquarters.<sup>14</sup> The reporter never gave Mohrer permission to track her location. Uber claimed that Mohrer's use of its "God View" tool, which allows corporate employees to view the location of Uber vehicles and those requesting rides, was in violation of Uber's privacy policy.<sup>15</sup> In the wake of this news, Uber announced that it would be improving its privacy policy with help from the law firm Hogan Lovells.<sup>16</sup> Uber also disciplined Mohrer following its investigation.<sup>17</sup>

News of how Uber and some Uber drivers use passengers' data has been unsettling. That Uber is working on improving its privacy policy is a welcome development, but it remains to be seen whether the company will learn from its past mistakes and implement changes that will adequately address legitimate privacy concerns. What is clear is that Uber, like other rideshare companies, has an enormous financial incentive to do the right thing. Unlike traditional taxi companies that often enjoy a legally protected monopoly, rideshare companies face plenty of competition. Accordingly, if they don't meet their customers' reasonable expectations of privacy, they will pay for their failure in the marketplace.

## SCREENING DRIVERS

Rideshare drivers can pose other risks to passengers besides violating their privacy and stalking them. They can be rude or even violent, and they can be dangerous behind the

wheel. Indeed, with Uber and Lyft's growing popularity has come a steady trickle of reports of their drivers behaving badly. Are ridesharing passengers taking their lives into their hands with poorly vetted and potentially dangerous drivers?

In July 2014 a man accused an Uber driver in Washington, D.C., of kidnapping him and his colleagues and speeding away from a taxi inspector before coming to a stop on an exit ramp. Uber deactivated the driver.<sup>18</sup>

In June 2014 an UberX driver in San Francisco who already had a drug-related charge and conviction was charged with two misdemeanor battery counts after allegedly assaulting a passenger in November 2013. One of the battery counts was related to a fight with an UberX passenger. Uber deactivated the driver, and an Uber spokesman said that the company would leave the matter to the criminal justice system.<sup>19</sup>

In January 2014 footage emerged of what appears to be a Lyft driver in San Francisco punching a pedestrian in November 2013.<sup>20</sup> The driver claimed that he was not working for Lyft at the time of the incident. Similarly, after an UberX driver hit and killed a 6-year-old girl in San Francisco on New Year's Eve in 2014, his attorneys claimed that he was between fares at the time of the incident.<sup>21</sup> Uber likewise claimed that he was not working for Uber at the time of the accident.<sup>22</sup>

It is inevitable that, among a large and growing group of rideshare drivers, some of them will turn out to be bad apples. Traditional taxi drivers sometimes have run-ins with the law as well. The operative question is: Are Uber and Lyft taking proper precautions to protect their passengers' safety? Are they screening their drivers adequately?

Uber requires that an applicant driver have none of the following on his or her record over the past seven years: hit and runs, fatal accidents, reckless driving, violent crimes, sexual offenses, gun-related violations, resisting or evading arrest, driving without insurance, or "DUI or other drug-related violations or severe infractions."<sup>23</sup>

“The operative question is: Are Uber and Lyft taking proper precautions to protect their passengers' safety?”

“Uber’s and Lyft’s background check requirements are stricter than the screening requirements for many American taxi drivers.”

Lyft requires that no driver have a DUI or drug-related violation or an “extreme” infraction (such as a hit and run or felony) on record in the past seven years.<sup>24</sup> Lyft also requires that applicants have no more than three moving violations and no major violations (driving on a suspended license, driving 21+ mph over the speed limit) in the past three years. Any applicant with a record of violent crimes, felonies, sexual offenses, theft, property damage, or drug-related offenses in the past seven years of address history is prohibited from being a Lyft driver.<sup>25</sup>

These requirements are often more strict than those imposed on taxi drivers in some of America’s most populous cities.

In Chicago a successful chauffeur license applicant cannot have been found guilty of a “forcible felony”<sup>26</sup> or have been discharged for serving a sentence imposed for a “forcible felony” for five years before the application.<sup>27</sup> Nor can the applicant have been on parole or under another noncustodial supervision related to a forcible felony within five years. The five-year requirement applies not only to forcible felonies but also to a range of other crimes including sexual abuse and drunk driving.<sup>28</sup>

Taxi cab driver applicants in Philadelphia cannot have been convicted of a felony in the five years prior to the application.<sup>29</sup> In San Jose, the chief of police or the Appeals Hearing Board may reject a taxicab driver permit applicant who within five years of the application has committed an act of violence, dishonesty, or fraud.<sup>30</sup>

San Diego regulations state a for-hire driver’s identification card shall not be issued to anyone who has been released from prison after serving time for a violent crime or theft in the five years before the application.<sup>31</sup>

Thus, Uber’s and Lyft’s background check requirements are stricter than the screening requirements for many American taxi drivers. It is the national norm for there to be a five-year window for felonies in the taxi industry.<sup>32</sup>

When it comes to driving while intoxicated, Uber and Lyft are also stricter than their traditional competitors in some of America’s

most populous cities. Here again, both Uber and Lyft look at the past seven years in screening rideshare driver applicants for DUI convictions. Any convictions during that period are disqualifying.

According to the Philadelphia Parking Authority, “A [taxi and limousine] Driver’s Certificate shall not be issued to an individual who has been convicted of DUI within the past three (3) years.”<sup>33</sup> San Diego regulations state that a for-hire vehicle driver’s identification card will not be issued to any applicant who was convicted of drunk driving five years before the processing of the application.<sup>34</sup>

The Dallas City Code states that a taxi driver’s license will not be issued to an applicant “convicted of, or discharged by probation or deferred adjudication for, driving while intoxicated” within the past 12 months or more than once in the past five years.<sup>35</sup>

San Jose’s Municipal Code states that the chief of police or the Appeals Hearing Board may reject a taxicab driver’s permit application if the applicant “has been convicted of reckless driving or driving under the influence of any drug or intoxicating liquor, regardless of whether the incident resulted in bodily injury or death” in the five years before the application.<sup>36</sup>

In Los Angeles, a taxi driver permit applicant not considered a previously permitted driver cannot obtain a permit “if her last three to five years Department of Motor Vehicles printout indicates” she has a conviction of driving under the influence of alcohol or drugs (not resulting in injury) in the five years prior to the application.<sup>37</sup>

Uber and Lyft’s stated criteria regarding applicant drivers’ backgrounds thus compare favorably with the standards applied to taxi drivers in some of the country’s biggest cities. But do Uber and Lyft really follow through in applying these criteria effectively? After all, both rideshare companies allow would-be drivers to apply to use their service remotely and do not conduct fingerprint scans. By contrast, fingerprint scans are employed in background checks on taxi driver applicants in cit-

ies such as New York, Los Angeles, Chicago, and San Jose. Some have argued that Uber and Lyft's failure to conduct fingerprint scans means that their background checks are not as rigorous as those carried out by many taxi companies.

Uber and Lyft employ two outside firms—Hirease and SterlingBackcheck, respectively—to conduct background checks on their driver applicants. These firms look through publically available records (such as county court documents) and sex offender registries to gather information on a rideshare applicant. Uber and Lyft's decisions on allowing drivers to use their services are based on the information provided by Hirease and SterlingBackcheck.

In February 2014 Uber announced that it was expanding its background check requirements to include not only a Multi-State Criminal Database check but also federal and county checks in order to pick up on county data not reported to the Multi-State Criminal Database.

SterlingBackcheck examines data from arresting agencies and other sources, such as Departments of Corrections and the Administrative Office of the United States Courts, which have made information available to consumer reporting agencies. SterlingBackcheck also checks a Lyft driver applicant's record based on the address history for the last seven years using both federal court and county court data. This means that the search may go back well in excess of seven years if the applicant lived at the first address a long time.

Some have faulted Uber and Lyft for not including fingerprint scans as part of their background checks. However, fingerprint databases do not contain a full case history of the individual being investigated, and in some instances an FBI fingerprint check may unfairly prevent a qualified taxicab driver applicant from being approved. The FBI fingerprint database relies on reporting from police departments, and other local sources, as well as other federal departments and is not a complete collection of fingerprints in the United States.

Critics of the FBI fingerprint database point to its incomplete or inaccurate information. In July 2013 the National Employment Law Project (NELP) released a study on the FBI's employment background checks and found that "FBI records are routinely flawed." Also, while law enforcement agencies are diligent when it comes to adding fingerprint data of arrested or detained persons to the federal data, they are "far less vigilant about submitting the follow-up information on the disposition or final outcome of the arrest."

This lack of vigilance is significant because, as the NELP study goes on to point out, "About one-third of felony arrests never lead to a conviction. Furthermore, of those initially charged with a felony offense and later convicted, nearly 30 percent were convicted of a different offense than the one for which they were originally charged, often a lesser misdemeanor conviction. In addition to cases where individuals are initially overcharged and later convicted of lesser offenses, other cases are overturned on appeal, expunged, or otherwise resolved in favor of the worker without ever being reflected on the FBI rap sheet."<sup>38</sup>

A case could be made that it is worth having Uber, Lyft, and taxi companies rely on an overly cautious background screening process which does not accurately reflect dropped charges or convictions of lesser offenses. However, both rideshare companies and taxi companies ought to use a background check system that allows for qualified and safe drivers to work. The FBI fingerprint check allows for otherwise qualified driver applicants to be potentially unfairly declined because of flaws in the FBI's record keeping.

Indeed, lawmakers and regulators who have written rideshare regulations have demonstrated that they do not think fingerprints should be necessary for rideshare background checks. Colorado's SB 125, the first piece of statewide legislation to recognize the legality of ridesharing, does not require Lyft and Uber rideshare driver applicants to submit fingerprints as part of the background check.<sup>39</sup> Nor do the regulations governing ridesharing driv-

“The FBI fingerprint check allows for otherwise qualified driver applicants to be potentially unfairly declined because of flaws in the FBI's record keeping.”

“Uber and Lyft’s current reliance on other records for vetting their driver applicants seems defensible.”

er background checks in California require that applicants submit fingerprints. Instead, the California regulations require a background check “based on the applicant’s name and social security number.”<sup>40</sup>

It is understandable that both Uber and Lyft would oppose mandatory fingerprint checks because such a requirement would make their driver sign-up process considerably more burdensome. However, if future legislation related to ridesharing does impose a fingerprint requirement for background checks, it would not be surprising if Uber and Lyft accepted the requirement as a long-term compromise. Nevertheless, given the problems with the FBI’s fingerprint database, Uber and Lyft’s current reliance on other records for vetting their driver applicants seems defensible.

Uber and Lyft both have criteria for background checks that are stricter than the requirements for taxi driver applicants in many American jurisdictions. It cannot be reasonably claimed that an UberX or Lyft driver who has been cleared through a thorough background check is more of a danger to passengers than a taxi driver in most of America’s most populous cities.

## VEHICLE INSPECTIONS

Bad drivers are not the only source of safety risk for ridesharing passengers and innocent third parties. Old, poorly maintained vehicles can also pose dangers. Critics of ridesharing argue that Uber’s and Lyft’s cars are not subject to the same rigorous safety inspections as conventional taxis—and, therefore, that they are less safe.

It is true that frequent taxicab safety inspections are commonplace in big cities. In Los Angeles, regulations state that taxis must be inspected by the Los Angeles Department of Transportation on an annual basis.<sup>41</sup> In New York City, yellow taxis must be inspected three times a year, boro taxis twice a year, and black cars, limos, and liveries once a year.<sup>42</sup> In Philadelphia, regulations require taxis to be inspected twice a year.<sup>43</sup> When a Chicago taxicab is

inspected depends on the age of the vehicle. If a Chicago taxi is less than two years old it must be inspected annually, while older taxis must be inspected semiannually.<sup>44</sup> Washington, D.C., taxicabs are, like Chicago cabs older than 2 years, subject to semiannual inspections.<sup>45</sup> San Jose and San Diego taxis are inspected annually.<sup>46</sup>

Taxis in some of America’s most populous cities are thus inspected far more often than many personal cars. According to the American Automobile Association, only 17 U.S. states require that private vehicles undergo a periodic safety inspection.<sup>47</sup> Among those states that do not require periodic safety inspections are some of the most populous ones, including California, Florida, New Jersey, and Ohio.

Uber, for its part, does not require regular vehicle inspections (that is, in addition to any inspections that may be mandatory for all vehicles in a given state). However, Uber does review photos of vehicles before a rideshare driver applicant is approved.<sup>48</sup> Moreover, Uber requires that all cars using its app be 2004 model year or newer.<sup>49</sup> Lyft does require that a driver applicant’s car undergo an in-person inspection before she can use the app to pick up passengers. In addition, Lyft requires its cars to be no older than the 2000 model year.<sup>50</sup>

Uber and Lyft may rely less on periodic, centralized inspection systems than some of their competitors in the taxi industry; but they make more intensive use of continuous, decentralized inspections—by their passengers. Uber and Lyft enable and encourage passengers to rate their drivers and their vehicles after every ride. Complaints about substandard vehicles can result in a driver being discontinued.

Does the failure of Uber and Lyft to require regular inspections of all their vehicles constitute a significant lapse in safety standards? The available evidence says no. Although periodic safety inspections, like chicken soup, can’t hurt, there is little evidence that they help either. The findings of studies over the years have been mixed, but more recent academic studies conclude that state inspection programs do not result in measurable improvements in road safety. For example, Marc Poi-

tras of the University of Dayton and Daniel Sutter of Troy University, coauthors of a 2002 paper, found that their results “lend support to existing studies that find inspection ineffective in reducing roadway casualties.”<sup>51</sup>

It is worth noting in this regard that the clear policy trend in recent years has been to move away from mandatory periodic safety inspections for private vehicles. Back in 1975, 31 states and the District of Columbia required regular inspections; now only 17 states do.<sup>52</sup> The District scrapped regular mandatory inspections in 2009, a move that reportedly saved the nation’s capital \$400,000 a year. The D.C. city council stated that there was no data suggesting that the inspections saved lives.<sup>53</sup>

Notwithstanding the above, both the new Colorado statute and California regulations now require annual inspections for ridesharing vehicles. As other states adopt their own laws and rules pertaining to ridesharing, they may well follow Colorado and California’s example and impose similar requirements. Uber and Lyft have been content to acquiesce in such mandates in exchange for rules that recognize the basic legality of ridesharing. From their perspective, the added cost may well be worth paying. From the perspective of public safety, however, little will be gained if regular mandatory inspections of ridesharing vehicles become the nationwide norm.

## INSURANCE

One of the most commonly raised safety concerns about ridesharing relates to insurance. The problem is that peer-to-peer ridesharing occupies a no-man’s-land that falls between the traditionally distinct domains of personal and commercial insurance. Full-time professional drivers are generally covered by commercial insurance for any accidents that occur while driving on company business. The rest of us, meanwhile, obtain policies to cover the risks that attend our own “amateur” driving.

Rideshare drivers do not fit comfortably into this traditional framework. Many ride-

share drivers provide rides on a part-time basis and do not have commercial insurance—which typically is much more expensive than personal liability policies.<sup>54</sup> The drivers’ personal policies, however, by and large expressly exclude from coverage any injuries or damage caused when a driver is carrying passengers for a fee. This state of affairs raises the troubling possibility that the new ridesharing industry is imposing risks—on drivers, passengers, and third parties—that are not adequately insured.

Lurking behind these concerns about insurance are unresolved legal questions about who exactly is liable when a ridesharing vehicle is involved in an accident. Uber and Lyft, for their part, have staked out legal positions denying liability for accidents that occur in the use of their services. They argue that, like dating sites, they are merely facilitating matches between drivers and passengers and thus they bear no legal responsibility for injuries or property damage caused by drivers. It remains to be seen whether or to what extent this denial of liability will hold up in court. Indeed, the assignment of liability may shift over the course of a rideshare driver’s day. When the Uber or Lyft app is turned off, it seems clear enough that the driver is not engaged in providing transportation services and thus that rideshare companies should bear no responsibility in the event of an accident. When the driver is actually carrying passengers, the case is strongest that rideshare companies are liable. But what about when the app is turned on but the driver has not yet accepted a ride request from a new passenger? Is the driver engaged in commercial activity at that point or not? Who should be liable for accidents that occur in those circumstances?

For the time being at least, Uber and Lyft have resolved these difficulties by purchasing insurance to cover accidents involving their drivers. From the time a driver accepts a request for a car until that passenger is dropped off, both companies now offer \$1 million worth of primary coverage for death, injury, and damages when the rideshare driver is at fault. They also offer \$1 million in coverage for

“The problem is that peer-to-peer ridesharing occupies a no-man’s-land that falls between the traditionally distinct domains of personal and commercial insurance.”

“The insurance coverage provided by Uber and Lyft compares favorably with insurance requirements for taxis in major cities.”

death, injury, and damages suffered by either rideshare drivers or passengers when the other party is at fault and is either uninsured or lacks adequate coverage. In addition, provided the driver maintains personal comprehensive and collision insurance, the companies provide contingent comprehensive and collision insurance to cover damage to the driver's vehicle up to \$50,000. For Uber this coverage comes with a \$1,000 deductible, while for Lyft the deductible is \$2,500.<sup>55</sup>

Uber and Lyft also provide limited coverage when a driver has the app turned on but has not yet accepted a fare. Specifically, both of the companies' policies provide contingent coverage for death and injury up to \$50,000 per person and \$100,000 per accident, and up to \$25,000 for physical damage. This coverage applies only if the driver's personal auto insurance policy doesn't provide coverage.

The insurance coverage provided by Uber and Lyft compares favorably with insurance requirements for taxis in major cities. In New York City and Los Angeles, for example, taxis are required to carry driver liability insurance that covers up to \$100,000 per individual or \$300,000 per incident—well below the \$1 million per incident cap that applies to Uber and Lyft vehicles. In Washington, D.C., taxi driver liability only has to be covered up to \$25,000 per individual and \$50,000 per incident.<sup>56</sup> Philadelphia's taxis are only required to carry \$35,000 in liability insurance.<sup>57</sup> In Chicago, the taxi driver liability insurance coverage has to be covered up to a combined single limit of \$350,000 per incident.<sup>58</sup> Another city with a combined single limit is San Diego, which requires “not less than \$1,000,000 per occurrence, combined single limit for bodily injury and property damage.”<sup>59</sup>

Uber's and Lyft's current policies are also generally consistent with new regulatory requirements imposed by recent state-level legislation. This year Colorado and California passed legislation relating to ridesharing insurance. Both Colorado's SB 125 and California's AB 2293 set different requirements for (1) the period when a driver's app is turned

on but no ride request has been accepted and (2) the period between when a ride request is accepted and the passenger is discharged. For the latter period, the states require \$1 million in primary coverage for driver liability, just as Uber's and Lyft's policies currently provide. For the former period, the states require coverage of \$50,000 for death and injury per individual, \$100,000 for death and injury per incident, and \$30,000 for property damage. These requirements match Uber's and Lyft's current policies except that (1) the laws require primary coverage for the period when a driver has a rideshare app open but does not have a passenger in the car, whereas Uber and Lyft for now offer contingent coverage that kicks in only if the driver's personal policy fails to apply<sup>60</sup> and (2) the laws require \$30,000 in coverage for property damage, as opposed to the \$25,000 in coverage now supplied under Uber and Lyft's policies. The laws' requirements go into effect on January 15, 2015, in the case of Colorado and on July 1, 2015 for California.<sup>61</sup>

Although Uber and Lyft have now largely resolved the issue of adequate insurance for risks associated with ridesharing, it is entirely possible that the insurance industry will eventually develop new products that supplement drivers' personal auto policies with coverage for ridesharing activities. Along these lines, Lyft announced in May 2014 that it was collaborating with MetLife Auto & Home to come up with individual policies for its drivers. Of course, given that the insurance industry is among the most heavily regulated in the country, it would not be surprising if considerable time elapses before new insurance products hit the market. And it could turn out that it is more efficient for rideshare companies like Uber and Lyft to continue purchasing insurance as at present than for drivers to insure themselves for their ridesharing activities.

## CONCLUSION

The rapid growth of ridesharing provided by Uber, Lyft, and other companies dem-

onstrates that consumers are far from fully satisfied with existing taxi service. The heavily regulated taxi industry, frequently subject to onerous restrictions and simultaneously shielded from competition, all too often provides shoddy and unreliable service at inflated prices. So it is more than a little ironic when that industry and its supporters attack ridesharing in the name of concern for consumer safety and welfare. But it should not come as a surprise, as government restrictions on who can legally provide a given service are usually justified in the name of consumer protection—even though such justifications are frequently threadbare, and the real effect of such regulations is to protect incumbent producers rather than consumers.<sup>62</sup>

Nevertheless, the emergence of a new industry that puts people into strangers' cars does give rise to legitimate safety concerns. Furthermore, ridesharing's business model of matching consumers with independent service providers raises novel legal issues regarding whether and to what extent rideshare companies are legally liable for the actions of the drivers that use their apps. Finally, ridesharing's dependence on nonprofessional part-time drivers confounds the traditional distinction in the heavily regulated insurance industry between commercial and personal insurance.

Notwithstanding these legitimate concerns and questions, the good news is that scare stories about ridesharing's safety and insurance risks are wildly overblown. Indeed, ridesharing's cash-free transactions and self-identified customers substantially mitigate one of the worst risks associated with traditional taxis: the risk of violent crime. Meanwhile, Uber's and Lyft's screening of drivers is comparable and in some ways superior to screening of taxi drivers, and Uber's and Lyft's auto insurance policies offer better coverage than that provided for taxis in some major U.S. cities.

There will be many real and substantive issues to sort out as the rideshare industry continues to develop. In particular, heavily regulated taxi drivers have a valid point when they complain that they have to compete on an un-

level playing field with less regulated rideshare companies. But the appropriate response to this problem is to rationalize and modernize the outdated and heavy-handed restrictions on taxis—not to extend those restrictions to ridesharing.<sup>63</sup> Meanwhile, if rideshare companies continue to grow, there is a risk that they will start flexing their new political muscle to protect their own market position and block rival newcomers. As far as the future of ridesharing is concerned, the biggest risks to consumer welfare come not from safety issues but from politics.

## NOTES

1. Many other new companies are offering variations on the services provided by Uber and Lyft. Sidecar offers peer-to-peer ridesharing through its app but allows drivers to set their own prices. Wingz provides ridesharing specifically for trips to the airport. Summon offers an app that matches customers with either taxis or peer drivers. FlyWheel and Curb offer apps to allow consumers to arrange rides on their phones with existing taxi and limousine services. NuRide, CarPooling.com, and Carma facilitate carpooling in which drivers are not paid, while RelayRides, FlightCar, and GetAround offer "car sharing" in which car owners rent their vehicles to other drivers. See R. J. Lehmann, "Blurred Lines: Insurance Challenges in the Ride-Sharing Market," R Street Policy Study no. 28, October 2014, <http://www.rstreet.org/policy-study/blurred-lines-insurance-challenges-in-the-ride-sharing-market/>. For the sake of analytical simplicity, the focus of this paper is on Uber and Lyft, the current leading providers of peer-to-peer ridesharing.

2. Evelyn M. Rusli and Douglas MacMillan, "Uber Gets an Uber-Valuation," *Wall Street Journal*, June 6, 2014, <http://online.wsj.com/articles/uber-gets-uber-valuation-of-18-2-billion-1402073876>.

3. See Jason Nolte, "Safety Worries Make Uber, Lyft Fair Game for Taxi Watchdogs," *The Street*, October 14, 2014, <http://www.thestreet.com/story/12904217/1/safety-worries-make-uber-lyft>.

“As far as the future of ridesharing is concerned, the biggest risks to consumer welfare come not from safety issues but from politics.”

- fair-game-for-taxi-watchdogs.html. The "Who's Driving You?" initiative is funded by the Taxicab, Limousine & Paratransit Association, a trade association representing 1,100 taxicab companies. See Catherine Ho, "Taxicab Group Ups Fight against Ridesharing," *Washington Post*, March 30, 2014, [http://www.washingtonpost.com/business/capitalbusiness/taxi-group-ups-fight-against-ridesharing/2014/03/28/CO027b84-b525-11e3-b899-20667de76985\\_story.html](http://www.washingtonpost.com/business/capitalbusiness/taxi-group-ups-fight-against-ridesharing/2014/03/28/CO027b84-b525-11e3-b899-20667de76985_story.html).
4. Data from the Bureau of Labor Statistics' Census of Fatal Occupational Injuries (<http://www.bls.gov/iif/oshcfoi.htm#2012>).
5. Data from the Bureau of Labor Statistics' Census of Fatal Occupational Injuries.
6. "Less Coin to Purloin," *Economist*, April 5, 2014, <http://www.economist.com/news/finance-and-economics/21600149-cashless-economy-leads-safer-society-less-coin-purloin>.
7. Kristin Klobberdanz, "Taxi Drivers: Years of Living Dangerously," *HealthDay*, March 11, 2014, <http://consumer.healthday.com/encyclopedia/work-and-health-41/occupational-health-news-507/taxi-drivers-years-of-living-dangerously-646377.html>.
8. Richard Wright et al., "Less Cash, Less Crime: Evidence from the Electronic Benefit Transfer Program," The National Bureau of Economic Research Working Paper no. 19996, March 2014.
9. Olivia Nuzzi, "Uber's Biggest Problem Isn't Surge Pricing. What If It's Sexual Harassment by Drivers?" *The Daily Beast*, March 28, 2014, <http://www.thedailybeast.com/articles/2014/03/28/uber-s-biggest-problem-isn-t-surge-pricing-what-if-it-s-sexual-harassment-by-drivers.html>.
10. Ibid.
11. According to the Uber representative who spoke to Nuzzi, "The New York City and Limousine commission, along with the vast majority of jurisdictions across the country, do require first and last names on what is commonly called a waybill or trip record." Polly Mosendz, "Uber Drivers Have Privacy Problems Too," *Newsweek*, November 19, 2014, <http://www.newsweek.com/uber-taxi-e-hailing-riding-app-travis-kalanick-emil-michael-josh-mohrer-uber-285642>.
12. Author correspondence with New York City's Taxi and Limousine Commission (TLC) official. The Uber representative cited in Nuzzi's article was asked by the author to clarify which TLC regulation requires Uber to record passengers' first and last names. The author received no response.
13. Peter Sims, "Can We Trust Uber," *Huffington Post*, September 30, 2014, [http://www.huffingtonpost.com/peter-sims/can-we-trust-uber\\_b\\_5892668.html](http://www.huffingtonpost.com/peter-sims/can-we-trust-uber_b_5892668.html).
14. Johana Bhuiyan and Charlie Warzel, "God View: Uber Investigates Its Top New York Executive for Privacy Violations," *BuzzFeed*, November 18, 2014, <http://www.buzzfeed.com/johanabhuiyan/uber-is-investigating-its-top-new-york-executive-for-privacy>.
15. Ibid.
16. Natalia Montalvo, "Strengthening Our Privacy Practices," Uber blog, November 20, 2014, <http://blog.uber.com/privacy-practices>.
17. Johana Bhuiyan, "Uber NYC General Manager Faced 'Disciplinary Actions' for Privacy Violations," *BuzzFeed*, November 28, 2014, <http://www.buzzfeed.com/johanabhuiyan/uber-nyc-general-manger-faced-disciplinary-actions-for-privacy>.
18. Julie Zauzmer and Lori Aratani, "Man Visiting D.C. Says Uber Driver Took Him on Wild Ride," *Washington Post*, July 9, 2014, <http://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/07/09/man-visiting-d-c-says-uber-driver-took-him-on-wild-ride/>.
19. Ellen Huet, "Uber Driver with Felony Conviction Charged with Battery for Allegedly Hitting Passenger," *Forbes*, June 3, 2014, <http://www>

forbes.com/sites/ellenhuett/2014/06/03/uber-driver-with-felony-conviction-charged-with-battery-for-allegedly-hitting-passenger/.

20. NBC Bay Area Investigative Unit reported on the footage, which can be viewed at <http://www.nbcbayarea.com/investigations/Exclusive-Video-Lyft-Driver-Allegedly-Attacks-Pedestrian-240026921.html>.

21. Chris Welch, "After Lawsuit over Young Girl's Death, Uber Expands Driver Insurance Coverage," *The Verge*, March 14, 2014, <http://www.theverge.com/2014/3/14/5508568/uber-expands-driver-insurance-coverage-after-girls-death>; and Kale Williams and Kurtis Alexander, "Uber Sued over Girl's Death in S.F.," *San Francisco Chronicle*, January 28, 2014, <http://www.sfgate.com/bayarea/article/Uber-sued-over-girl-s-death-in-S-F-5178921.php>.

22. *Ibid.*

23. Uber blog, <http://blog.uber.com/driverscreening>.

24. Lyft website, <https://www.lyft.com/safety>.

25. A seven-year "address history" refers to a history of the available records for the jurisdictions the applicant has lived in for the last seven years.

26. "Forcible felony" means treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual" (720 ILCS 5/2-8).

27. Chicago Code § 9-104-030 2 (F).

28. *Ibid.*: "any crime involving moral turpitude, or

for the illegal sale or possession of any controlled substance, indecent solicitation of a child, criminal sexual abuse or operating a motor vehicle while under the influence of alcohol or narcotic drugs."

29. Philadelphia Parking Authority Taxicab and Limousine Regulations: "An applicant shall not have been convicted of a felony in the past five years in any jurisdiction," <http://philapark.org/wp-content/uploads/2011/01/TLR-Regulations.pdf>.

30. San Jose Municipal Code Title 6, Chap. 6.64.500 M: "within five (5) years prior to the date of application, has done any act involving violence, dishonesty or fraud with the intent to substantially injure another, or substantially benefit the applicant or another."

31. San Diego MTS Ordinance 11, Section 1.12, g (2): "No for-hire vehicle driver's identification card shall be issued or renewed to" someone "who has been convicted of a felony involving a crime of force or violence against any person, or the theft of property, unless five (5) years have elapsed since his or her discharge from a penal institution or satisfactory completion of probation for such conviction during which period of time his or her record is good."

32. Alfred LaGasse, CEO of the Taxicab, Limousine & Paratransit Association, cited in Tim Potter, "About 1 in 10 Wichita Cab Drivers Has a Felony Record," *Wichita Eagle*, March 8, 2014, <http://www.kansas.com/news/local/crime/article1136560.html>.

33. Philadelphia Parking Authority <http://philapark.org/wp-content/uploads/2011/01/TLR-Regulations.pdf>.

34. San Diego Metropolitan Transit System Ordinance 11: "Any person who, within the five (5) years immediately preceding the processing of the application, has been convicted of or held by any final administrative determination to have been in violation of any statute, ordinance, or regulation reasonably and rationally related to the for-hire vehicle industry or any similar business operation

which would have authorized the suspension or revocation of the driver's identification card in accordance with Section 1.14 of this Ordinance." Section 1.14 of the ordinance includes "reckless driving or driving while under the influence of intoxicating liquors and/or narcotics."

35. Dallas City Code, Volume II, Chap. 45-3.2, 8 (A)-(B).

36. San Jose Municipal Code Title 6, Chap. 6.64.500.J.

37. Los Angeles Taxicab Rules and Regulations of the Board of Taxicab Commissioners, Section 600, Rule 615R.

38. Madeline Neighly and Maurice Emsellem, "Wanted: Accurate FBI Background Checks for Employment," *The National Employment Law Project*, June 2013.

39. Andy Vuong, "Colorado First to Authorize Lyft and Uber's Ridesharing Services," *Denver Post*, June 5, 2014, [http://www.denverpost.com/business/ci\\_25907057/colorado-first-authorize-lyft-and-ubers-ridesharing-services?source=infinite](http://www.denverpost.com/business/ci_25907057/colorado-first-authorize-lyft-and-ubers-ridesharing-services?source=infinite); Kim Lyons, "Ride-Share Companies Lyft and Uber May Get Boost in Harrisburg," *Pittsburgh Post-Gazette*, September 14, 2014, <http://www.post-gazette.com/business/2014/09/14/Ride-share-companies-may-get-boost-in-Harrisburg/stories/201409140060>.

40. California Public Utilities Commission's Overview of Limousine and Transportation Network Company Regulations: [http://www.cpuc.ca.gov/NR/rdonlyres/208D6DD5-F4A3-4A66-8B7C-65CDB0F4265E/0/TNCLimoRegulation\\_v1.pdf](http://www.cpuc.ca.gov/NR/rdonlyres/208D6DD5-F4A3-4A66-8B7C-65CDB0F4265E/0/TNCLimoRegulation_v1.pdf).

41. "All vehicles shall be inspected by the Department on a yearly basis. Each taxicab operator shall assure that after reasonable notice to operator all appointments for annual vehicle inspections with the Department are kept. Cancellations by either party shall be upon a minimum of one business days notice, unless circumstances prevent

otherwise." Taxicab Rules and Regulations of the Board of Taxicab Commissioners, City of Los Angeles, [http://ladot.lacity.org/stellent/groups/departments/@ladot\\_contributor/documents/contributor\\_web\\_content/lacityp\\_029021.pdf](http://ladot.lacity.org/stellent/groups/departments/@ladot_contributor/documents/contributor_web_content/lacityp_029021.pdf).

42. New York City Tax and Limosine Commission, "Taxicab Factbook," [http://www.nyc.gov/html/tlc/downloads/pdf/2014\\_taxicab\\_fact\\_book.pdf](http://www.nyc.gov/html/tlc/downloads/pdf/2014_taxicab_fact_book.pdf).

43. "All vehicles are required to be inspected by the Authority twice annually at approximately six-month intervals." The Philadelphia Parking Authority Taxicab and Limousine Regulations, <http://philapark.org/wp-content/uploads/2011/01/TLD-Regulations.pdf>.

44. City of Chicago Department of Business Affairs and Consumer Protection, <http://www.cityofchicago.org/content/dam/city/depts/bacp/publicvehicleinfo/medallionowners/newtaxilaws07242014.pdf>.

45. Title 31-608.1 of Washington, D.C., Municipal Regulations, <http://dcregs.dc.gov/Gateway/FinalAdoptionHome.aspx?RuleVersionID=3972361>.

46. San Diego County Code of Regulatory Ordinances Title 2, Division 1, Chapter 3, SEC 21.305 (b); and City Auditor report to the San Jose City Council, May 2013. "Taxi Service and Regulation in San Jose: An Opportunity to Reevaluate City Priorities and Oversight," <http://www.sanjoseca.gov/DocumentCenter/View/17513>.

47. The states requiring regular safety inspections are Delaware, Hawaii, Louisiana, Maine, Massachusetts, Mississippi, Missouri, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, Texas, Utah, Vermont, Virginia, and West Virginia. See AAA, <http://drivinglaws.aaa.com/laws/safety-inspection/>.

48. See Karyn Polewaczyk, "UberX, Where (Almost) Anyone Can Be A Livery Driver," *Boston.com*, April 28, 2014, <http://www.boston.com/business/2014/04/28/want-make-extra-week-con>

sider-driving-with-uberx/RcL02ubh6U964AQeh9QUM/story.html; and Jon Brooks, "What UberX Drivers Are Saying About Their Training and Safety Issues," KQED, February 20, 2014, <http://www.kqed.org/news/2014/01/30/lyft-uberx-driver-safety>.

49. Information based on author's communications with Uber spokespersons.

50. Lyft website, <https://www.lyft.com/safety>.

51. Marc Poitras, Daniel Sutter, "Policy Ineffectiveness or Offsetting Behavior? An Analysis of Vehicle Safety Inspections," *Southern Economic Journal* 68, no. 4 (April 2002): 922–34. See also David Merrell, Marc Poitras, and Daniel Sutter, "The Effectiveness of Vehicle Safety Inspections: An Analysis Using Panel Data," *Southern Economic Journal* 65, no. 3 (January 1999): 571–83; Marc Poitras and Daniel Sutter, "The Political Economy of Auto Safety Inspections," *Public Choice* 113, no. 3–4 (December 2002): 367–87.

52. See "State Periodic Motor Vehicle Inspections: What You Need to Know," AutoInc., September 2014, <http://www.autoinc.org/state-periodic-motor-vehicle-inspections/>.

53. Sharon Silke Carty, "D.C. Junks Car Safety Inspections: Will Others, Too?" *USA Today*, December 10, 2009, [http://usatoday30.usatoday.com/money/autos/2009-12-10-inspections10\\_CV\\_N.htm](http://usatoday30.usatoday.com/money/autos/2009-12-10-inspections10_CV_N.htm).

54. According to a recent report by the R Street Institute, commercial auto insurance can cost as much as \$8,000 to \$10,000 a year. The average annual cost of personal insurance, meanwhile, was only \$797 in 2011. See Lehmann.

55. See Nairi Hourdajian, "Eliminating Ridesharing Insurance Ambiguity," Uber blog, March 14, 2014, <http://blog.uber.com/uberXridesharinginsurance>; <https://www.lyft.com/#/safety>.

56. See Daniel M. Rothschild, "Ridesharing, Insurance and Regulation," R Street Institute blog, April 10, 2014, <http://www.rstreet.org/2014/04/10/ridesharing-insurance-regulation/>; Los Angeles Municipal Code SEC. 71.14/.

57. Pennsylvania Code § 32.11 (b).

58. Municipal Code of Chicago §9-112-330 (a)(1).

59. San Diego County Code of Regulatory Ordinances Title 2, Division 1, Chapter 3, SEC. 21.311 (b).

60. Both California's AB2293 and Colorado's SB 125 allow for rideshare drivers to maintain a primary ridesharing auto insurance policy for this time period if such a product is available.

61. California's AB2293, [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB2293](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2293); Colorado's SB 125, <http://legis.colorado.com/CO/text/SB125/id/1022212/Colorado-2014-SB125-Enrolled.pdf>.

62. See, e.g., Morris M. Kleiner, "Occupational Licensing: Protecting the Public Interest or Protectionism?" University of Minnesota Policy Paper no. 2011-009, July 2011; Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law* (Washington: Cato Institute, 2010).

63. See Andrew Moylan et al., "Ridescore 2014: Hired Driver Rules in U.S. Cities," R Street Policy Study no. 29, November 2014.

## RELATED PUBLICATIONS FROM THE CATO INSTITUTE

- Policy Implications of Autonomous Vehicles by Randal O'Toole, Cato Institute Policy Analysis no. 758 (September 18, 2014)
- Ending Congestion by Refinancing Highways by Randal O'Toole, Cato Institute Policy Analysis no. 695 (May 15, 2012)
- Public Attitudes toward Federalism: The Public's Preference for Renewed Federalism by John Samples and Emily McClintock Ekins, Cato Institute Policy Analysis no. 759 (September 23, 2014)
- Amateur-to-Amateur: The Rise of a New Creative Culture by Gregory Lastowka and Dan Hunter, Cato Institute Policy Analysis no. 567 (April 26, 2006)
- A Rational Response to the Privacy "Crisis" by Larry Downes, Cato Institute Policy Analysis no. 716 (January 7, 2013)

## RECENT STUDIES IN THE CATO INSTITUTE POLICY ANALYSIS SERIES

766. The Illusion of Chaos: Why Ungoverned Spaces Aren't Ungoverned, and Why That Matters by Jennifer Keister (December 9, 2014)
765. An Innovative Approach to Land Registration in the Developing World: Using Technology to Bypass the Bureaucracy by Peter F. Schaefer and Clayton Schaefer (December 3, 2014)
764. The Federal Emergency Management Agency: Floods, Failures, and Federalism by Chris Edwards (November 18, 2014)
763. Will Nonmarket Economy Methodology Go Quietly into the Night? U.S. Antidumping Policy toward China after 2016 by K. William Watson (October 28, 2014)
762. SSDI Reform: Promoting Gainful Employment while Preserving Economic Security by Jagadeesh Gokhale (October 22, 2014)
761. The War on Poverty Turns 50: Are We Winning Yet? by Michael Tanner and Charles Hughes (October 20, 2014)
760. The Evidence on Universal Preschool: Are Benefits Worth the Cost? by David J. Armor (October 15, 2014)



Published by the Cato Institute, Policy Analysis is a regular series evaluating government policies and offering proposals for reform. Nothing in Policy Analysis should be construed as necessarily reflecting the views of the Cato Institute or as an attempt to aid or hinder the passage of any bill before Congress. Contact the Cato Institute for reprint permission. All policy studies can be viewed online at [www.cato.org](http://www.cato.org). Additional printed copies of Cato Institute Policy Analysis are \$6.00 each (\$3.00 each for five or more). To order, please email [catustore@cato.org](mailto:catustore@cato.org).



## **Myths and Myth Busters about Background Screening and Fingerprinting**

### **Myth: The FBI Database is a Complete Database of All Criminal Records**

**Myth Buster:** For a record to be located and housed with the FBI's Interstate Identification System (also known as "III") it must have a fingerprint associated with it. Unfortunately, fingerprints aren't associated with all criminal records indexed at county or state repositories. Common identifiers are Name and Date of Birth, and more frequently in the last few decades have SSNs been listed. To complicate matters, while all states currently participate in submitting records to the III, it must be noted that criminal record reporting is extremely irregular across counties and states. Even further, not all state criminal records or fingerprints meet the FBI's standards for inclusion in the III, and not all state records are submitted to the FBI.

### **Myth: The FBI Database Contains Complete Information that is Actionable for a Prospective Employer**

**Myth Buster:** While the III is still the largest comprehensive collected source of criminal record information, its information is incomplete. For example, the record details shared along with the fingerprints can vary. In a June 2006 report from the Attorney General, titled "The Attorney General's Report on Criminal History Background Checks," it was noted that only 50 percent of III arrest records contained final dispositions.

### **Myth: The FBI Database Gives Accurate Real-Time Criminal Search Results**

**Myth Buster:** Records including final dispositions are recorded and updated at the primary source: county courthouses; therefore, any type of repository, no matter how aggressively updated, contains inherent lags and inaccuracies. According to data from the 2005 study, "A Review and Evaluation of the NCIC," the average number of days for repositories to receive and process information: Arrest Information = 24 days, Court Disposition = 46 days, Prison Admission = 31 Days.

### **Myth: To Catch a Thief You Need a Fingerprint**

**Myth Buster:** Background screeners have a variety of tools at their disposal in the search for criminal histories beyond fingerprints. For example, background screeners match criminal records to applicants with a combination of identifiers, including SSN, DOB, and past addresses. Because there is no complete database of criminals' biometric identifiers, looking at other secondary identifiers is necessary to fully reveal an individual's history, if any, with the criminal justice system. A search based on fingerprints alone will not yield a full criminal history, despite its national scope.



**Myth: Employers Have No Other Viable and Conclusive Options for Understanding Applicant Criminal History**

**Myth Buster:** Background Screeners are highly regulated at both the state and federal level. Background screening companies are defined as consumer reporting agencies (CRAs) under the federal Fair Credit Reporting Act (FCRA) as interpreted and enforced by the Federal Trade Commission (FTC). Employers relying on background checks must obtain permission to do so, by way of a clear disclosure along with the individual's consent before requesting a report. Each CRA must maintain "reasonable procedures" to assure "maximum possible accuracy" of the information contained in a consumer report, which includes always performing current searches and taking steps to ensure the accuracy of the information received and reported to employers. Screening companies are also regulated at the state level as many states have their own version of the FCRA which may impose additional requirements. Lastly, the National Association of Professional Background Screeners has an established accreditation program to create and exceed best practices for background screening, which can often exceed federal and state expectations.

**Myth: Fingerprint-based Searches are Widely Accepted**

**Myth Buster:** Some states have requested recommendations for criminal background check practices from in-state entities, while some have shared mixed reviews of the federal background check pilot program involving fingerprint based searches.

Louisiana House Resolution No. 69 directed the Louisiana State Law Institute (LSLI) to "...study and make recommendations for the revisions of laws regarding criminal background checks for individuals who provide personal care or other health-related services to adults." LSLI was asked to work in conjunction with a number of state entities including the Department of Health, Nursing Home Association, and State Police and numerous others deemed appropriate. While the proposed revisions mandated use of fingerprinting for state and FBI-based searches, the LSLI's final report recommended no revision in existing law.

Additionally, after the state of Wisconsin's participation in the federal background check pilot program, they opted to return solely to their existing Wisconsin Caregiver name-based background check process. In "Evaluation of the Background Check Pilot Program" by Abt Associates Inc., it is noted that there was "...some disagreement about whether the marginal benefits of a fingerprint-based check were worth the extra costs." Other deterring factors for the pilot program included the variations in completion times, with 25% taking 33 or more days to complete, and the logistical issues faced with fingerprinting locations and hours.

# Growing use of FBI screens raises concerns over accuracy, racial bias

By Ylan Q. Mui July 29, 2013

Employers are increasingly turning to the FBI's criminal databases to screen job applicants, sparking concerns about the accuracy of the agency's information and the potential for racial discrimination.

Many of the FBI's records list only arrests and not the outcomes of those cases, such as convictions. Consumer groups say that missing information often results in job applicants who are wrongfully rejected. A lawsuit filed against the Commerce Department by minorities alleges that the use of incomplete databases means that African Americans and Hispanics are denied work in disproportionate numbers.

The FBI's background checks "might be considered the gold standard, but these records are a mess," said Madeline Neighly, staff lawyer at the National Employment Law Project.

NELP is slated to release a report Tuesday showing that the FBI processed nearly 17 million employment background checks last year — six times more than it did a decade ago. The advocacy group estimates that as many as 600,000 of those reports contain incomplete or inaccurate information.

In a statement, the FBI said it receives its data from state records agencies, and states are responsible for keeping the information updated.

Background checks can serve as important safety precautions, helping to ensure that sex offenders do not get hired at day-care centers, for example. The FBI emphasized that the agency is not involved in hiring decisions, but the number of industries that use its data to screen workers skyrocketed after the 2001 terrorist attacks. Because of new regulations, port workers, truck drivers and even mortgage processors must now undergo FBI background checks, turning the agency's rap sheets into a virtual gateway to millions of jobs.

The issue has gained traction on Capitol Hill amid the tepid economic recovery and the tight job market. Rep. Robert C. "Bobby" Scott (D-Va.) is planning to introduce a bill this week that would require the FBI to track down updated information within 10 days for employment screenings. A similar measure sponsored by Rep. Keith Ellison (D-Minn.) would apply specifically to background checks for federal jobs.

"Finding a job in this economy is already hard enough," Ellison said. "No one should lose the chance to work because of an inaccurate background check."

Detroit resident Raquel Vanderpool lost her position as a nurse's aide in 2009 after an FBI screening turned up outdated criminal information.

Vanderpool had pleaded guilty to a drug offense in 2003, and the judge had promised that the case would be dismissed if she served a year of probation, according to a suit she filed to regain her work license. But her file in the FBI's database was never updated.

With the country in the depths of the recession, she was unable to find another job. She eventually lost her home to foreclosure and battled depression.

"I felt like I had lost everything and there wasn't anyone out there that could help me, or would listen to me," she said.

---

She was finally able to clear her record this spring with the help of a lawyer from

Michigan's Legal Aid clinic, four years after she lost her job.

"It's been quite a rough road leading up to fighting this case," Vanderpool said. "It's caused us quite a bit of damage that it's going to take us years to really recover from."

The FBI's databases are the largest repository of criminal information in the country. Records are linked to fingerprints, as well as names, reducing the chances of an incorrect match.

Employers can request an FBI background check only when authorized by state or federal laws and regulations. Many industries require potential employees to be screened by the FBI before they can receive work licenses.

But the FBI databases were not intended to be comprehensive. Instead, they function as a sort of index composed of arrests; the outcomes of those cases often are not reflected in the FBI's records. A 2006 U.S. attorney general's report estimated that half of the FBI's arrest records did not include disposition information.

A spokesman for the FBI's Criminal Justice Information Services, which handles the databases, did not provide a more current estimate. However, in a statement, the agency said that it relies on the states to provide its records and keep them current.

The design "decentralizes the criminal history responsibility by making the states, rather than the FBI, primarily responsible for record maintenance and dissemination," it said.

At the state level, many of the records are incomplete. A report by the Justice Department in 2010, the most recent available, found that in about half the states, as many as two in five records were missing final outcomes. Twenty-seven states reported a backlog of disposition data. Transmitting the information from the courts to state records agencies could take less than a day in Delaware to 555 days in Kansas.

Updating the records of those who fall through the cracks can be confusing and cumbersome. FBI regulations say that employers and licensing agencies should give applicants time to challenge and correct their records, either by contacting the FBI or the jurisdiction that collected the data. But applicants are not always given a copy of their report or told why they were disqualified. Often, the burden is on them to prove an error was made.

The NELP report highlighted the Transportation Security Administration's move to require FBI screenings for port workers in 2007. Since then, more than 120,000 applications were initially disqualified because of a background check, according to TSA statistics. Just over half of them filed for waivers or appeals to prove they were eligible — and 94 percent of them were successful.

Meanwhile, about a quarter of the 4 million applications to work on the 2010 Census were put on hold after the Commerce Department ran FBI background checks, according to a lawsuit filed against the agency. Applicants had 30 days to prove the FBI's information was incorrect — but the alleged infractions were not reported to them.

Among the hundreds of thousands of rejected candidates was Precious Daniels of Detroit, who was arrested in 2009 during a peaceful protest and had her charges dropped, according to the suit. Vivian Kargbo of Boston was supposed to have her records sealed after two charges from a juvenile arrest in 1996 were dismissed. Scotty Desphy of Philadelphia thought these charges from her arrest 28 years ago were expunged after she served a year of probation, but they remained on her FBI rap sheet.

"It was a dramatic screen of basically anybody with any interaction with the criminal justice system," said Adam Klein, a partner at law firm Outten & Golden, which is handling the case. "It included the craziest things."

---

The suit alleges that the Census Bureau's FBI screening process resulted in a

disproportionate number of rejections for applications from blacks and Hispanics. These minorities are arrested in higher numbers, which civil rights activists attribute partly to racial profiling.

Forty-one percent of the census applicants who showed up in the FBI's criminal databases were black and 20 percent were Hispanic. If certified for class-action status, the suit would cover about 850,000 people, making it the largest discrimination suit in history.

The Commerce Department declined to comment.

The NELP report called for a more "robust" appeals process that would require employers to inform applicants why they were disqualified and give them at least 60 days to dispute any errors. It said that the FBI should provide regular reports to Congress on its background checks and any effect on minorities.

"People lose their jobs. They lose their homes. They have to go on public benefits to feed their kids," Neighly said of the inaccurate reports. "It is so damaging."

Related:

[Two companies accused of discrimination in hiring](#)

---

Ylan Q. Mui is a financial reporter at The Washington Post covering the Federal Reserve and the economy.

---

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION

FBI IDENTIFICATION

BECAUSE ADDITIONAL  
SHOULD BE REQUESTED

FOLLOWING

UNDER PRO  
REGULATIONS (C  
ENTITIES AUTHO  
RECORDS MUST  
WILL BE USED  
IDENTIFICATION  
FOR PURPOSES  
DEPARTMENT,  
IN THE RECORD  
IDENTIFICATION  
EFFICIENT THE  
INFORMATION  
OFFICIALS AND  
INFORMATION  
REASONABLE  
O SO, AND  
OR WHICH  
DETERMINED  
IN THE FBI  
IS ADVISED  
BY FORTH

WHEN EXP  
DIRECTLY

NAME

EX PA  
V

IRTH  
ALIP

DATES  
1 AU  
1 NU

NO OF PAGE

# WANTED

## Accurate FBI Background Checks for Employment

REWARD:  
GOOD JOBS

FOUND

FOUND

COPIATED ON

STATE POLICE  
IDENTIFICATION

PUBLIC OFFICER

RECORD

COPY

FINE

RECEIVED :  
P-CENTRAL

05/201

Madeline Neighly | Maurice Emsellem  
The National Employment Law Project  
July 2013

---

## **Authors**

Melodie Mulhaly and Maurice Amstutz

## **About the National Employment Law Project**

The National Employment Law Project is a nonpartisan, 501(c)(3) nonprofit organization that conducts research and advocates on issues affecting low wage and unemployed workers. In partnership with grassroots and national allies, NELP promotes policies and programs to improve hard-earned workplace rights and help unemployed workers regain their economic footing.

Through its Second Chance Fairness Project, NELP promotes the employment rights of people with criminal records. We seek to ensure fairer and more accurate criminal background checks and to reduce unnecessary and unfair barriers to employment.

For more information, please visit [www.nelp.org](http://www.nelp.org)

This report was made possible by generous support of our Second Chance Fairness Project funders, including The Open Society Foundations, the Public Welfare Foundation, and the Rosenberg Foundation.

## **Acknowledgements**

Miriam Aukerman, ACLA of Michigan; Sharon Dietrich, Community Legal Services of Philadelphia; Eliza Hersh, East Bay Community Law Center; Lisa Bailey and Patricia Wirth, Center for Community Alternatives; Rachel Venderpool.

The authors are grateful for the valuable expertise of our NELP colleagues Claire McKenna, Michelle Navidad Rodriguez, Christie Owens, and Norman Eng.

---

---

# Table of Contents

---

I Executive Summary.....	1
II The Evolution of FBI Criminal Background Checks for Employment.....	5
III Dramatic Increase in Background Checks for Employment and Licensing Purposes.....	8
IV One in Two FBI Records is Flawed, Penalizing the Job Search of More Than Half a Million Workers a Year.....	9
V The FBI and the States Fail to Comply with Clear Federal Mandates.....	11
VI The Prejudicial Impact on Workers, Employers and Overburdened Government Agencies.....	14
VII Workers of Color are Especially Disadvantaged by the Faulty FBI Records System.....	15
VIII The Serious Limitations of the Process of Correcting FBI Records.....	18
IX Leading Case Studies of the Damage Caused by Faulty FBI Records.....	21
1. Port Workers Received No Assistance from TSA in Correcting FBI Records.....	21
2. The Office of Personnel Management is Tracking Down Missing FBI Records that Never Make Their Way Back Into the FBI System.....	23
3. California Tracks Down Problem FBI Records to Ensure Fair Access to Jobs and Occupational Licenses.....	24
X Where There's a Will, There's a Way: FBI Records are Cleaned Up Under the Brady Program of Federal Gun Checks.....	25
XI Recommendations to Improve the Integrity of the FBI Criminal Background Check Process.....	28
1. Enact Federal Legislation Requiring the FBI to Obtain Missing Disposition Information Prior to Sending Background Checks for Employment and Licensing Purposes.....	28
2. Require the FBI to Check the Brady Files for Missing Information and Accept Updated Records from Federal and State Agencies.....	29
3. Ensure that All Federal and State Employment and Licensing Background Checks that Require FBI Records Provide an Automatic Right to a Copy of the Rap Sheet and Robust Appeals Process.....	29
4. Hold the FBI Accountable for Enforcing the Current Law Regulating Criminal Background Checks for Employment and Licensing, and Require Regular Reporting and Monitoring of the Impact of the Current System.....	30
XII Conclusion.....	31
Appendix A: Multiple Arrests Reported on FBI Background Check with No Disposition Information.....	32
Appendix B: Non-Serious Offense Reported on FBI Background Check in Violation of Federal Regulation.....	36
Appendix C: TWIC Letter of Initial Disqualification Explains What Information on FBI Report is Potentially Disqualifying.....	39
Endnotes.....	41

---

# I Executive Summary

---

At a time when millions of America's workers continue to struggle to find work in the aftermath of the Great Recession, many face an additional barrier—faulty records released by the FBI for use in employment and licensing decisions.

Although considered the gold standard of criminal background checks, the FBI records routinely fail to report important information on the outcome of arrests, information that is often beneficial to workers subject to these reports. Given the massive proliferation of FBI background checks for employment—roughly 17 million were conducted last year—these inaccuracies have a devastating impact on workers, especially workers of color who are disproportionately impacted by the criminal justice system. There is a solution to this problem that would immediately result in less job-loss and financial hardship: the FBI must ensure that records are accurate and complete prior to being released for employment and licensing decisions.

Emblematic of workers facing this additional burden is Raquel Vanderpool, a mother of two who lost the job she loved as a nurse assistant—a job she'd held for eight years—when the FBI erroneously reported that Ms. Vanderpool was convicted of a crime. In fact, the charge had been dismissed and sealed six years earlier.

Ms. Vanderpool, the other workers highlighted in this report, and the unknown thousands of others like them, do not pose a security or safety threat but nonetheless lose out on employment for one reason only: the background check produced by the FBI is inaccurate or missing critical information. As millions of workers struggle to navigate a still-challenging job market, the FBI must avoid creating wrongful barriers that cause unnecessary job loss and financial harm. Now is the time to ensure that criminal background checks with the imprimatur of the FBI are accurate and complete.

## Key Findings

- The use of FBI background checks for employment is rapidly increasing. Roughly 17 million FBI background checks were conducted for employment and licensing purposes in 2012, which is six times the number conducted a decade ago.
- Despite clear federal mandates that require the background reports to be complete and accurate, 50 percent of the FBI's records fail to include information on the final disposition of the case. That missing information is frequently beneficial to job-seekers. For example, one-third of felony arrests do not result in conviction and many others are reduced to misdemeanors.
- NBD estimates that 4 million workers a year are subjected to FBI background checks that include faulty or incomplete information, and 60,000 of those workers may be prevented in their job search when the FBI reports do not include up-to-date and accurate information that would benefit them.
- African Americans are especially disadvantaged by the faulty records because people of color are consistently arrested at rates greater than their representation on the general population, and large numbers of those arrests never lead to conviction. For example, African Americans were more than four times as likely as whites to appear on inaccurate FBI records in the federal post-worker security clearance program.
- If completed on a contract to background checks for employment, the FBI searches for missing disposition information when a person seeks to purchase a gun, and the extra effort tracks down nearly two-thirds of the missing information in just three days.

---

In 1924, the first federal database of criminal history record information was created to assist with criminal justice investigations, prosecutions, and sentencing. The initial database contained 810,000 fingerprint records. Since that time, both the database content and its usage have greatly expanded. Today, the FBI maintains criminal history records on more than 75 million individuals, and rap sheets are used for both criminal and noncriminal justice purposes, including employment background checks.

As early as 1971, a federal judge noted that the database, which began modestly enough, had grown "out of effective control," overwhelmed by the "increasing availability of fingerprints, technological developments, and the enormous increase in population."<sup>2</sup> Even then, the enormous demands placed on the system and lack of processes to ensure accuracy led to "arrest record material [that was] incomplete and hence often inaccurate."<sup>3</sup> The problem is pervasive and persists.

As this report makes clear, the system is broken. While law enforcement agencies diligently fingerprint detained and arrested individuals and submit those records to the FBI, the information on the final outcome of the case routinely fails to be reported to the FBI. In fact, a majority of the U.S. population live in states where more than 30 percent of the arrest records in the state criminal records repository do not include information on the final outcome of the case. Because the FBI relies on the states to submit updated records, the result is that the FBI records often lack the final disposition information. Unfortunately, it is workers, those who have the least power to deal with the problem, who are being forced to shoulder this burden.

While there are multiple fault areas in need of reforms, this report focuses on finding the best solution to this problem nationally and, specifically, what the FBI must do to ensure records sent under its seal are accurate and complete.

It is the FBI background report that determines whether these workers can move forward in obtaining the license or employment they seek. The FBI is more

than a mere receptacle of information; the imprimatur of the FBI marks the records as authoritative and trustworthy. The FBI must bear the responsibility to ensure accuracy given that the records are official federal documents. In fact, the bureau already has a system in place to ensure accuracy of records for firearms sales. The same process by which the FBI updates records that lack disposition information to ensure timely and appropriate sales of firearms could easily be replicated to ensure timely and appropriate employment of America's workers.

## **The crisis of incomplete and inaccurate FBI background checks for employment impacts millions of workers, yet it has evaded public scrutiny**

As detailed in this report, the FBI background check crisis has grown and evaded public scrutiny for too long. Since the September 11th terrorist attacks, the number of FBI background checks for employment and licensing has surged. In Fiscal Year 2012, the FBI issued approximately 17 million rap sheets for employment and licensing screening purposes, over six times more than in 2002.

When FBI background checks were first authorized for employment purposes during the Cold War, the authorization was limited to federal government workers. Today, FBI background checks are authorized for occupations ranging from port workers and truck drivers to health care workers and school employees; even janitors and food service workers employed by federal contractors are now subject to FBI background searches.

FBI criminal background checks for employment and licensing are considered the gold standard because they include criminal history information from all states and, because they are fingerprint-based, they are far less vulnerable to mistaken identification. In reality,

---

however, the records themselves do not live up to this reputation. They are fraught with limitations that undermine access to employment for many thousands of workers and arbitrarily restrict the pool of qualified job candidates available to the employer community.

Of special concern, in 2006 the U.S. Attorney General revealed that roughly 50 percent of the records are incomplete and fail to provide information on the final outcome of an arrest. There have been numerous attempts to improve the accuracy of the records. Because data is not made publicly available on the percentage of records missing disposition information in the FBI database, there is no way to evaluate the effectiveness of these efforts. When used as an employment screening tool, flawed records prevent qualified applicants from getting jobs.

## **People of color are especially disadvantaged by the faulty FBI background checks**

People of color are especially disadvantaged by faulty FBI records. African Americans are 14 percent of the U.S. population but account for 28 percent of the nation's arrests. That means that the FBI's failure to report final disposition information after an arrest, often including dismissals and other exculpatory information, limits employment opportunities for a larger share of African Americans than their white counterparts, resulting in a racially discriminatory impact.

In one of the largest background check initiatives post-9/11, the Transportation Security Administration ("TSA") screened two million workers for clearance to work at U.S. ports. Of those who subsequently appealed the denial of a security clearance, African-American port workers challenged the accuracy of their FBI records more than four times as often as white port workers.

Roughly one in four U.S. adults has an arrest or conviction record. We estimate that as many as 600,000

workers annually are disadvantaged in the job market because of the divergence between the FBI's reporting and the actual final conclusion of their cases.

## **Workers, employers, and overburdened governmental agencies bear the burden of correcting background checks produced by the FBI**

The persistence of faulty records released by the FBI imposes costs on workers, employers, and other public entities. A worker denied employment or an occupational license because of an incomplete or inaccurate criminal background check must shoulder the burden of contesting a denial of employment, reviewing the criminal record, and tracking down the missing disposition information or challenging the inclusion of misinformation, no matter how old or inaccessible the record—often without wages or work during this process. Employers are denied prompt access to qualified workers, especially in industries with ongoing labor shortages like trucking and healthcare.

In addition, federal, state, and local agencies responsible for screening workers for licensing and employment positions must devote significant time and taxpayer dollars to tracking down and processing missing information. For example, TSA had to process more than 54,000 appeals challenging inaccurate and incomplete FBI records from workers seeking clearance to work at U.S. ports and more than 43,000 appeals by truck drivers who haul hazardous materials. The U.S. Office of Personnel Management, which processed more than two million FBI background checks for federal government and contractor positions in 2011, has also spent considerable time and resources on completing and correcting FBI records. Yet, the FBI does not recognize or accept the updated information provided by these agencies—thus ensuring the persistence of inaccuracies in its database.

---

## **There is a tried and true solution to ensure completeness and accuracy before the FBI records are released**

Fortunately, there is a simple and effective solution to the serious problems with the FBI database: clean up the records *before* they are sent to the agencies that rely on them to make hiring and licensing decisions. Indeed, the FBI already has the capacity to update and correct criminal background checks. In implementing the background check provisions under the Brady Handgun Violence Prevention Act ("Brady Act"), the FBI has cleaned up two-thirds of faulty records within just three days of requests, by contacting the appropriate federal, state, and local agencies to obtain the missing information.

Implementing a similarly effective system for employment- and licensing-related criminal background checks, along with the reforms suggested below, will ensure that job seekers are treated more fairly; that employers have a fuller pool of candidates, increasing the likelihood they can access the best and most qualified workers in a timely fashion; that other public agencies are not required to spend limited resources in tracking down information to update

records; and that the greater accuracy and accountability of the system will boost public confidence in the integrity of the FBI criminal background check process.

As detailed below, we recommend the following policies to reform the system and hold the FBI accountable for the records that bear its seal:

- Enact federal legislation requiring the FBI to obtain missing disposition information before releasing background checks for employment and licensing purposes.
- Require the FBI to check the files created under the Brady Act for missing information and accept updated records from the federal and state agencies that make suitability determinations.
- Ensure that all federal and state employment background checks that require FBI records provide an automatic right to a copy of the rap sheet and a robust appeals process.
- Hold the FBI accountable for enforcing the current law regulating criminal background checks for employment and licensing, and require regular reporting monitoring the impact of the current system.

---

## II The Evolution of FBI Criminal Background Checks for Employment

---

FBI rap sheets<sup>3</sup> are considered the gold standard of criminal background checks for employment because they include criminal history information from the federal government and all states,<sup>4</sup> and they are far less vulnerable to mistaken identification. In reality, however, the records themselves do not live up to this reputation, as roughly 50 percent of the FBI records are incomplete or inaccurate.<sup>5</sup>

With nearly 17 million FBI background checks processed for employment and licensing purposes in 2012,<sup>6</sup> the potential impact these inaccurate and incomplete records have on America's workers is enormous. As this report documents, the FBI criminal background checks used for employment and licensing decisions<sup>7</sup> are fraught with limitations that seriously undermine access to employment for thousands of workers and arbitrarily restrict the pool of qualified job candidates available to the employer community.

**1954: Background checks for federal employees:** FBI criminal background checks for employment began in 1954 with Executive Order 10450, which authorized access to FBI criminal history information for employment investigations of all civilian officers and employees of the federal government.<sup>8</sup> Neither the substance nor structure of the FBI rap sheets was adapted to meet this purpose, even though FBI rap sheets were not originally intended for employment screening. All contact with the criminal justice system reported by state or federal law enforcement authorities is conspicuously displayed on the FBI rap sheets produced for employment purposes—even charges that were dismissed or for which the individual was found not guilty.

To illustrate the problem, Appendix A provides an example of an FBI background report that includes multiple arrest entries and no disposition information. The rap sheet, released for employment purposes in 2011, shows six separate arrest entries. The individual was convicted only once in his life: for a set of assault and related charges arising from an arrest on May 28, 1982. He was arrested several other times, but the charges were always dismissed or he was found not guilty.

**Incremental expansion of background checks:** Incrementally, the FBI then began providing criminal history information for certain licensing and employment purposes beyond federal employment, starting with background checks of workers employed by banking and other financial institutions.<sup>9</sup> Federal law never specifically authorized this decision to expand access to FBI background checks for other noncriminal justice purposes. When the practice was challenged in 1977, a federal court found that there was no legal authority for the FBI to disseminate these records for noncriminal justice purposes outside of federal government hiring.<sup>10</sup>

**1971–72: Congress acts to restore some limits:** In response, Congress passed two laws that year to expand access to the FBI records beyond the federal hiring process. First, the Department of Justice

---

Appropriation Act of 1972 permitted the exchange of FBI records with officials of federally chartered or insured banking institutions.<sup>12</sup> Second, a law was enacted allowing access to the FBI's rap sheets only for the limited purpose of "employment and licensing if authorized by State statute and approved by the Attorney General."<sup>13</sup> Significantly, Public Law 92-544 does not authorize private employers to access the FBI rap sheets, but reserves that right for government agencies that conduct the background investigations. To this day, except in extremely limited situations authorized by specific federal laws, private screening companies and private employers may not directly access the FBI's rap sheets.<sup>14</sup> Public Law 92-544 continues to provide the basic framework for access to FBI criminal background checks for employment.

For decades thereafter, the legal structure regulating federal background checks for employment remained largely unchanged, although the pace of new occupational screening laws enacted by Congress and the states accelerated. Congress and the Executive Branch have imposed federal criminal background checks on a range of industries and occupations, and the states have enacted an ever increasing number of laws permitting or requiring employment background checks. Even before the September 11th terrorist attacks, federal laws permitted access to FBI criminal history records for a number of positions, ranging from child care workers,<sup>15</sup> employees of nursing facilities or home health care agencies,<sup>16</sup> to atomic energy workers.<sup>17</sup>

**1998: Creation of Compact Council:** In 1998, the National Crime Prevention and Privacy Compact Act ("compact") was enacted to facilitate the exchange of criminal history information between states for noncriminal justice purposes.<sup>18</sup> To date, 30 states have signed the compact and 11 states have signed memoranda of understanding.<sup>19</sup> Importantly, while not all states are members of the compact, all states participate in the Interstate Identification Index.<sup>20</sup>

**9/11 terror attacks prompt White House action to expand background checks:** In response to the 9/11 attacks, the Executive Branch expanded FBI background checks for any federal contract worker who has more than "intermittent" access to federally controlled properties.<sup>21</sup> This 2004 Presidential directive (Homeland Security Presidential Directive 12, known as HSPD-12) covers a much larger workforce than Executive Order 10450, which encompassed all employees of the federal government. In contrast, HSPD-12 applies to federal contract workers employed at a federal facility and requires FBI background checks for a broad range of non-safety-sensitive positions, such as the large number of contract workers who perform landscaping, janitorial, and food service functions on federally controlled facilities.

The effect of HSPD-12 was devastating for many workers employed by private companies with federal contracts. Individuals who had worked for years without incident were abruptly subject to a new regime of intensive background checks, often without any basic information about the process or their rights to challenge a negative determination issued by the government.

In 2006, for example, shortly after HSPD-12 was implemented, two women who had each worked for decades in the cafeteria of a federal building in Pittsburgh were deemed "unsuitable" for employment based on their FBI background checks.<sup>22</sup> One woman had a 1997 shoplifting conviction that was supposed to have been expunged. The other woman had never been arrested, but the Department of Homeland Security ("DHS") attributed a criminal record to her because it used an incorrect social security number to run the search. Without any explanation of their rights, the two women were summarily escorted from the building and told they were prohibited from working on the grounds, resulting in immediate pay loss.

The workers attempted unsuccessfully to contact DHS to challenge the results of the background investigation. They then reached out to their

---

Congressman, Mike Doyle, for help. Congressman Doyle's office contacted DHS, which refused to provide information on the appeal process that applied to workers seeking to challenge the agency's determination. It was not until the Congressman himself contacted DHS for an explanation that the workers were reinstated in their previous positions.<sup>27</sup> To this day, DHS has never clarified for the public what protections, if any, apply to federal contract workers seeking to challenge a background check determination based on the FBI's rap sheets.

**Congress promotes expansion of background checks:**

Also in response to the 2001 terrorist attacks, Congress enacted a number of new laws requiring FBI background checks for workers employed in occupations considered vulnerable to a terrorism security threat. The PATRIOT Act, the first major piece of federal legislation responding to the 9/11 attacks, included a new regime of federal background checks for truck drivers who haul hazardous materials, covering approximately one million truck drivers around the nation.<sup>28</sup> Then, in 2002, Congress passed the Maritime Transportation Security Act, which imposed FBI background checks on two million port workers to screen for "terrorism security risks."<sup>29</sup> In addition, Congress allowed access to the FBI rap sheets to investigate the background of private security guards.<sup>30</sup>

Over the 60 year period since the FBI records were first authorized for use for employment screening, a large number of federal laws regulating workers across a spectrum of safety- and security-sensitive positions have required FBI background checks. In addition to those discussed above, federal laws regulate workers who have "responsibility for the safety and well-being of children, the elderly, or individuals with disabilities,"<sup>31</sup> people who volunteer with certain youth-focused organizations,<sup>32</sup> people who work in public and private schools,<sup>33</sup> and people working in the financial industry,<sup>34</sup> among others.<sup>35</sup> Most recently, in response to the mortgage crisis, Congress also authorized FBI background checks of most of the nation's workers who process mortgages.<sup>36</sup>

Beyond the federal background checks, state laws mandate FBI background checks for a wide variety of positions, from nursing and caregiver positions to workers licensed to handle hazardous materials.<sup>37</sup> The states have enacted at least 1,600 statutes under the authority of Public Law 92-544.<sup>38</sup> The American Bar Association is now in the process of cataloguing all state laws that impose collateral consequences on people with criminal records, including those that authorize access to FBI records.

---

At least 1,600 state laws  
mandate FBI background  
checks.

---

## III Dramatic Increase in Background Checks for Employment and Licensing Purposes

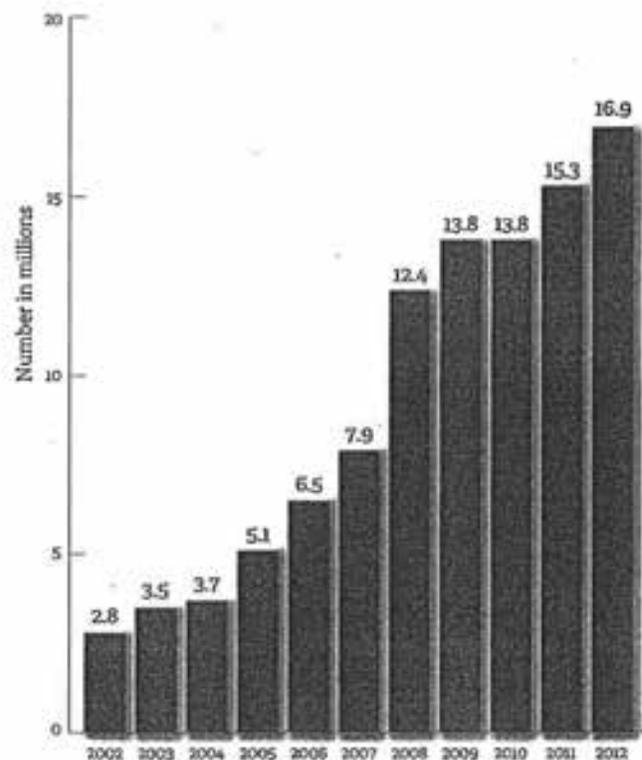
---

In Fiscal Year 2012, the FBI released roughly 17 million rap sheets for employment background checks. This is more than six times the number of FBI background checks conducted for employment and licensing purposes in 2002.<sup>34</sup>

The number of FBI criminal background checks performed for employment purposes has increased significantly in less than a decade. See Figure 1. In the past five years, from 2008 through 2012, the FBI has conducted an average of 14.4 million fingerprint-based criminal background checks for employment yearly. This is a dramatic increase from the five preceding years, 2003 to 2007, when an average of 5.3 million fingerprint-based criminal background checks for employment were performed yearly.<sup>35</sup>

Data are not available to isolate the specific sources of the increased volume in FBI rap sheets. We know, however, that the port worker background check program conducted by the Transportation Security Administration reached its peak in 2008 to 2009, and ultimately screened more than 2.2 million workers for clearance to work in secured areas of the nation's ports.<sup>36</sup>

**Figure 1. Rapid Growth of FBI Background Checks for Employment and Licensing Purposes**



---

6 times as many FBI background checks were conducted in 2012 as were conducted in 2002.

---

---

## IV One in Two FBI Records is Flawed, Penalizing the Job Search of More Than Half a Million Workers a Year

---

Despite their reputation as the most comprehensive background check available, the FBI records are routinely flawed, which seriously undermines the integrity of the criminal background check process. The most troubling deficiency with the FBI records is the fact that the rap sheet often reports the initial arrest but then fails to include any information on the final outcome of the case.

Law enforcement agencies are diligent about fingerprinting and charging individuals who are arrested or even merely detained, and then adding this information to state and federal criminal records systems. Unfortunately, agencies are far less vigilant about submitting the follow-up information on the disposition or final outcome of the arrest.

This is not an isolated deficiency in the FBI's system, affecting only a small number of workers. In fact, the most recently available public data indicates there is a one in two chance that arrest information in the FBI's database will fail to include any indication of the disposition of the case. As reported in 2006 by the U.S. Attorney General, the FBI's Interstate Identification Index system, from which the background reports are created, is still missing final disposition information

for approximately 50 percent of its records.<sup>37</sup> While the Attorney General identified the lack of disposition information as a serious issue, the situation shows no meaningful signs of improvement.

The failure to update records to reflect the outcome of a case following the report of an arrest is hardly inconsequential. About one-third of felony arrests never lead to a conviction.<sup>38</sup> Furthermore, of those initially charged with a felony offense and later convicted, nearly 30 percent were convicted of a different offense than the one for which they were originally charged, often a lesser misdemeanor conviction.<sup>39</sup> In addition to cases where individuals are initially overcharged and later convicted of lesser offenses, other cases are overturned on appeal, expunged, or otherwise resolved in favor of the worker without ever being reflected on the FBI rap sheet.

Thus, when the outcome of arrests are not indicated on the FBI rap sheets, there is a real chance the missing information is actually helpful to the workers and could significantly improve their employment prospects. Given the large numbers of people arrested each year—including more than 12 million arrests in 2011 alone<sup>40</sup>—there are likely hundreds of thousands of

---

50% of FBI records are  
missing final disposition  
information.

---

## About 1/3 of felony arrests do not result in conviction.

---

people whose FBI records report a serious arrest without noting that the charges were ultimately dismissed, overturned on appeal, reduced, or even expunged.

While the limited data provided by the FBI makes it difficult to arrive at hard numbers,<sup>48</sup> we estimate that more than half a million workers a year may be severely prejudiced in their employment search by the flaws in the FBI's criminal records system. This estimate derives from several assumptions. First, we start with the number of FBI checks for employment conducted each year, which averaged 14.4 million per year over the past five years.<sup>49</sup> Next, relying on earlier analyses in which we found that one in four adults in the U.S. has a criminal record,<sup>49</sup> we assume that roughly 3.6 million (25 percent) of the workers subjected to an FBI background check will have a criminal record. If about half of those background checks are inaccurate or incomplete—as the latest publicly available information suggests—then roughly 1.8 million workers are potentially disadvantaged by the gaps in the FBI's records. Finally, if one-third of these workers have an arrest that was ultimately dismissed,

---

More than 600,000 workers a year are potentially harmed in their job search when the FBI background check fails to include accurate and complete information of benefit to them.

---

overturned on appeal, or reduced to a lesser charged, then more than 600,000 workers a year were potentially prejudiced in a job search as a result of the FBI's failure to report accurate and complete information.

There is no shortage of examples of routine errors within the FBI rap sheets. The experiences of Randy D. and William E. illustrate the impact that faulty FBI records with incomplete criminal history information have on workers and their families.

### Old Arrests Reported Without Dispositions

Randy D. of Chicago was hired for employment as a security guard when his FBI rap sheet revealed a 15-year old misdemeanor for disorderly conduct. Not only that the charge had been dismissed, but he worked without prosecution or conviction. Mr. D. would have also been expunged. Despite his 10 years of experience in security, Mr. D. lost an important job opportunity based on an old and minor arrest later corrected, but nevertheless appeared as an open disposition on his FBI rap sheet.

William E. of S. Utah lost his port security clearance from the Transportation Security Administration (TSA) because he had no conviction. Mr. E. believed he would have no difficulty passing the background check. Nonetheless, Mr. E. received a denial from TSA because of an arrest during his crime-free 15 years. Mr. E. provided TSA with documentation verifying that he had never been convicted and had charges ultimately been tried in the case. However, due to the faulty FBI record, Mr. E. was out of work for more than four months while TSA considered his appeal. Although his two-month household income was low, the suspension of forced an employment that put the family's safety at

---

## V The FBI and the States Fail to Comply with Clear Federal Mandates

---

The serious reporting gaps documented above exist despite clear federal mandates that the records produced by the FBI be accurate and up to date. Specifically, federal regulations state that “[d]ispositions should be submitted [to the FBI] by criminal justice agencies within 120 days after the disposition has occurred.”<sup>45</sup> More generally, the regulation requires that the “information on individuals is kept complete, accurate and current so that all such records shall contain to the maximum extent feasible disposition of all arrests data included therein.”<sup>46</sup>

The state and local criminal justice agencies bear plenty of blame for failing to report on the outcome of arrests in a timely fashion to the FBI. But, in the end, the FBI must be held accountable for ensuring the information it reports is accurate and complete, as the law requires.

In fact, the FBI has been taken to task by a federal appeals court for failing to provide updated and accurate records. Although the case dates back to 1974, the admonition of the federal court still holds true today: “The FBI cannot take the position that it is a mere passive recipient of records received from others, when it in fact energizes those records by maintaining a system of criminal files and disseminating the criminal records widely, acting in effect as a step-up transformer that puts into the system a capacity for both good and

harm.”<sup>47</sup> The court noted also that the “disabilities flowing from a record of arrest have been well documented” and were particularly significant when employment and licensure decisions are at issue.<sup>48</sup>

In addition to the federal requirement to provide updated records to the FBI within 120 days, states are required to maintain complete records at the central state criminal records repository. Federal regulation requires the state repository to include the final outcome of the case within 90 days after the disposition has occurred.<sup>49</sup>

While missing disposition information is a problem that plagues the entire records system, workers with criminal records in some states are disproportionately disadvantaged. A 2010 survey of state criminal history repositories details the percent of arrests in the state systems that have not been updated to reflect the outcome of the case. The survey includes information on the percentage of final dispositions recorded for all arrests, all arrests within the past five years, and all felony arrests.<sup>50</sup>

---

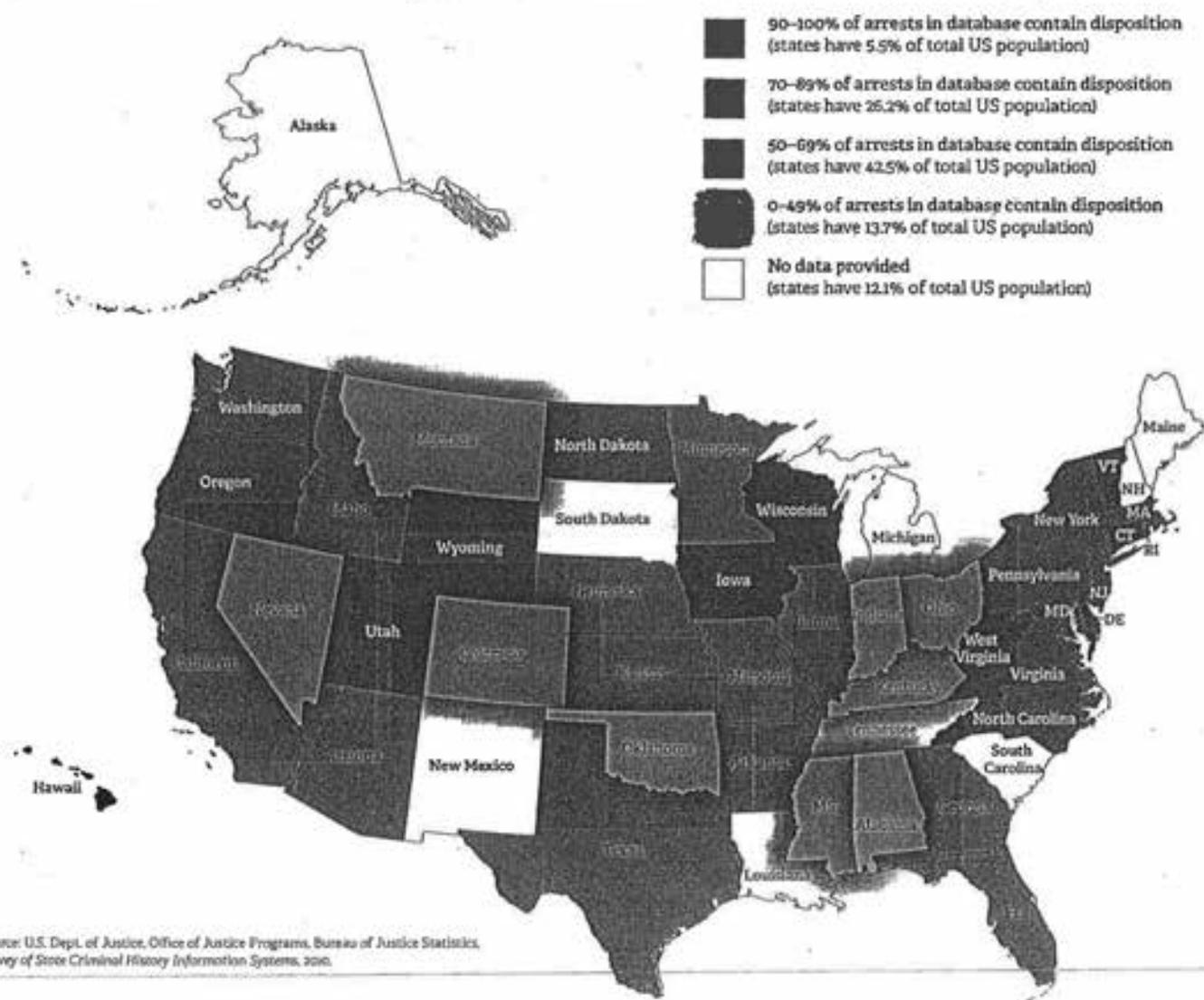
The FBI must be accountable for ensuring the information it reports is accurate and complete.

As reflected in Figure 2, more than half the states that provide data report that 30 percent or more of the arrests in their criminal records systems do not include information on the final disposition of the case. Nine states—Alabama, Colorado, Indiana, Kentucky, Mississippi, Montana, Nevada, Ohio, and Oklahoma—report that more than half of the arrests in their systems are incomplete. Only seven states—Connecticut, Delaware, Hawaii, Iowa, Vermont, Wisconsin, and West Virginia, comprising less than six percent of the total U.S. population—have disposition

information for more than 90 percent of all arrests. Notably, only two states—Connecticut and Delaware—have dispositions for more than 90 percent of arrests for each of the three categories surveyed (arrests within the past five years, felony arrests, and all arrests included in the database).<sup>24</sup>

Importantly, the FBI has long recognized the need for increased accuracy in the reporting of disposition information, although the agency continues to insist that the problem can be resolved at the state level.<sup>25</sup> All

**Figure 2. State Criminal Records Repositories Are Missing Disposition Information**



Source: U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2010*.

---

states participate in the Interstate Identification Index whereby they submit criminal records information to the FBI, in return for which they have the benefit of accessing a system with criminal history information from all other states.

Despite several rounds of federal funding, which provided hundreds of millions of dollars to the states specifically for the purpose of perfecting the FBI databases,<sup>35</sup> and two separate task forces charged with improving the flow of disposition information,<sup>36</sup> the problem—and negative ramifications—of missing disposition information persists. While the FBI has the ability to perfect records provided for purchases of firearms or certain dangerous chemical agents and toxins,<sup>37</sup> the agency has so far refused to do so for employment and licensing background checks.

The U.S. Attorney General's office has recognized, however, that providing inaccurate and incomplete records harms workers being screened for employment or licensing, and that, "notwithstanding disclaimers to the contrary, [users of such records] erroneously view the fingerprint-based record from a government repository as always current and reliable."<sup>38</sup> It is specifically because of the FBI's imprimatur that these records, inaccurate and incomplete as they often are, can have such a devastating effect on workers, and why it is the responsibility of the FBI to ensure that complete and accurate records are provided before the rap sheets are released to a screening entity.

---

"[N]otwithstanding disclaimers to the contrary, [users of FBI background checks] erroneously view the fingerprint-based record from a government repository as always current and reliable."

-U.S. Attorney General's Report on  
Criminal History Background Checks,  
June 2006

---

## VI The Prejudicial Impact on Workers, Employers and Overburdened Government Agencies

---

For thousands of job seekers struggling to find work in today's economy, as well as employers and the government agencies charged with making suitability determinations based on the FBI's records, navigating these flawed FBI background checks is quite burdensome.

In most cases, the federal or state screening agency that receives the incomplete FBI record notifies the job seeker that he or she must provide the missing information or else will be rejected from consideration. While some agencies provide detailed information on the specific evidence the worker must submit for consideration, others give little to no guidance. And in either case, the onus is on the worker to find the missing information, which could be decades old, in order to be deemed eligible for employment or licensing. In many cases, workers are unable to navigate the complex criminal records systems and cannot provide the required evidence at all, or are unable to do so quickly enough to remain under consideration for the position. In today's competitive job market, even a limited delay in the hiring process can exclude an applicant from consideration for an available job opening.

For example, Precious Daniels was denied a temporary position with the Census Bureau based on an arrest for disorderly conduct even though the charges had been dismissed.<sup>37</sup> In 2009, Ms. Daniels had been arrested for blocking a doorway during a peaceful protest against Blue Cross Blue Shield of Michigan to pressure the company not to pay lobbyists to weaken healthcare coverage. When she appeared in court following her arrest, the disorderly conduct charge was dismissed. A

year later, when Ms. Daniels was denied a temporary position with the 2010 Census because of her criminal history, she was certain that the denial was in error and that the Census Bureau had confused her record with another person's. After contacting the Census Bureau, she was informed that she was indeed ineligible for employment unless she could provide official documentation within 30 days about the disorderly conduct case that had been dismissed. In the end, as a result of the delay, Ms. Daniels was not considered fairly for a position with Census and was not hired.

The faulty FBI records also have a detrimental impact on employers who are often denied timely access to qualified workers, unnecessarily compounding the difficulty of filling jobs in industries such as trucking or healthcare, where there are still significant labor shortages and requirements for federal background checks.<sup>38</sup> In addition, as described in more detail below (section IX), the federal, state, and local agencies responsible for screening workers for licensing and employment positions ultimately bear the burden of dealing with inadequate FBI records. For example, the Transportation Security Administration had to process more than 54,000 appeals challenging faulty FBI records from workers seeking clearance to work in the ports<sup>39</sup> and more than 43,000 appeals by truck drivers who haul hazardous materials.<sup>40</sup>

---

## VII Workers of Color are Especially Disadvantaged by the Faulty FBI Records System

---

While the flawed FBI records affect all demographic groups, the impact is especially harsh for communities of color, where much larger percentages of workers have had interactions with the criminal justice system.

As the U.S. Equal Employment Opportunity Commission ("EEOC") recently reaffirmed, "criminal record exclusions have a disparate impact based on race and national origin."<sup>66</sup> As such, use of an individual's criminal history information by an employer may violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964.<sup>67</sup> To comply with the law, employers must ensure that disqualifying criminal records are "job related" and "consistent with business necessity."<sup>68</sup>

In general, employers must take into account three factors when assessing whether a criminal records exclusion is job related and consistent with business necessity: (1) the nature and gravity of the offense or conduct; (2) the time elapsed since the offense or conduct and/or completion of the sentence; and (3) the nature of the job held or sought.<sup>69</sup> Once the employer has developed a targeted screen using the above-listed factors, it must usually then provide an individualized assessment opportunity for people excluded by the targeted screen.

Of special importance to this discussion, the fact of an arrest does not establish that criminal conduct has occurred, and "an exclusion based on an arrest, in itself, is not job related and consistent with business necessity."<sup>70</sup> Employers are responsible for ensuring that workers are not being denied employment simply because of an arrest record. Given these requirements,

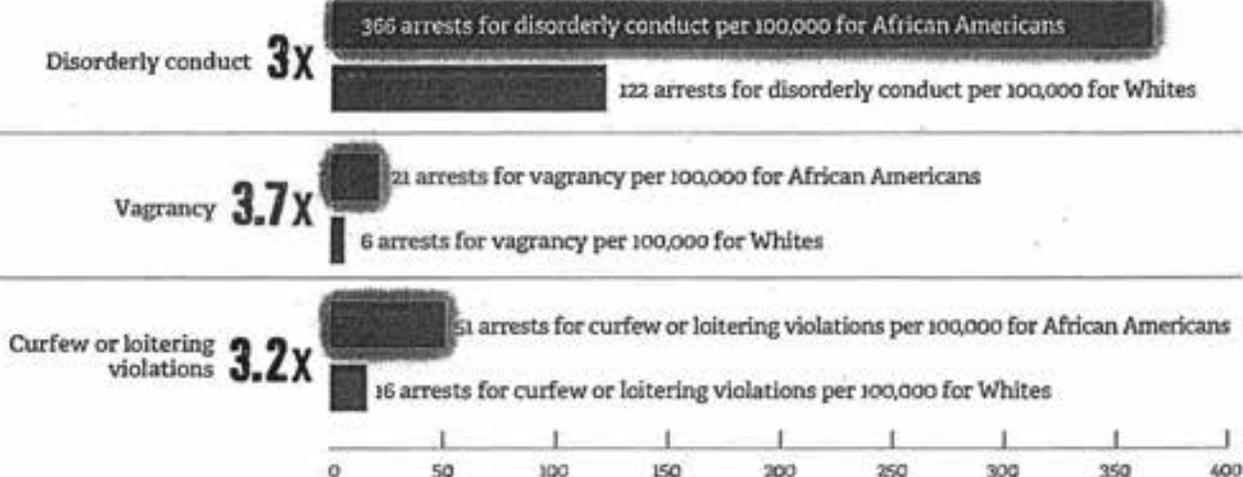
it is vital that employers have access to accurate criminal history information.

As demonstrated in Figure 3, African Americans are consistently arrested at rates greater than their representation in the general population, and whites are consistently underrepresented. African Americans represent more than 28 percent of arrests<sup>71</sup> but only 14 percent of the U.S. population.<sup>72</sup> In contrast, whites account for more than 75 percent of the U.S. population<sup>73</sup> but only 69 percent of those arrested.<sup>74</sup> The disparities are even greater for the most minor offenses, including disorderly conduct (34 percent of arrests in 2011 were of African Americans and 63 percent were of whites), vagrancy (39 percent of arrests in 2011 were of African Americans and 58 percent were of whites), and curfew and loitering violations (36 percent of arrests in 2011 were of African Americans and 61 percent were of whites).<sup>75</sup>

Even arrests for misdemeanors and very minor offenses can have serious repercussions for workers. Although prohibited by federal regulation, the FBI frequently reports such "non-serious" offenses on criminal records produced for employment purposes. The current regulation states: "Criminal history record information maintained in the [databases used to supply criminal history information for employment purposes] shall include serious and/or significant adult and juvenile offenses."<sup>76</sup> The database "excludes arrests and court actions concerning nonserious offenses."<sup>77</sup>

**Figure 3. African Americans Are More Likely to Be Arrested for Low-Level Offenses than Whites**

African Americans are **2.3x** more likely to be arrested than Whites  
 6,400 arrests per 100,000 for African Americans  
 2,800 arrests per 100,000 for Whites



In 2006, the FBI proposed eliminating this critical protection—one of the only substantive restrictions on what the FBI rap sheets may report for employment purposes. The FBI offered a very limited rationale for doing so, noting only that states have the discretion to decide what information to send and the FBI merely reports the information provided to it.<sup>79</sup> To date, the proposed rule to eliminate the restriction on reporting non-serious offenses has not been finalized. In reality, however, the FBI has routinely reported non-serious offenses on employment background checks for years and continues to do so today despite letters from Congress and interested groups calling on the FBI to stop this practice.<sup>74</sup>

Given their higher rate of arrest, even for minor offenses, workers of color are disproportionately disadvantaged by the deficient FBI records. Although the FBI does not generate data on the racial breakdown of incomplete rap sheets,<sup>75</sup> NELP compiled such data in representing more than 500 port workers in the Transportation Security Administration's background check process, and the results are striking. African Americans were more than four times as likely as whites to need to appeal a decision denying them

clearance to work at the nation's ports solely because of a faulty FBI record.<sup>76</sup>

Specifically, African Americans account for approximately 14 percent of the port workers—equal to the general population—but represented more than 40 percent of the appeals filed by NELP because of incomplete or inaccurate information reported on FBI background checks.<sup>77</sup> In contrast, white workers make up approximately 63 percent of the port worker population but only 24 percent of the appeals filed with TSA.<sup>78</sup> Since large numbers of port workers did not appeal the initial disqualification letter, there may be thousands of additional workers who were eligible for security clearance but had faulty FBI records that cost them this opportunity to work.<sup>79</sup> For the workers who did appeal, the overwhelming majority were successful (as described in section IX.1).

Importantly, however, merely needing to rely on the appeal process disadvantaged workers and caused financial hardship for many. In large part because of the need to file appeals, African-American port workers were also out of work for longer than their white counterparts.<sup>80</sup>

---

"I couldn't believe I got fired for this. It was humiliating. I was really nervous applying for other jobs because I thought the same thing would happen. I couldn't believe that one mistake would jeopardize my career and my financial security nine years later."

—Sophia Hoffmann

---

#### Sophia Hoffmann's Minor Infraction Unfairly Reported by the FBI Despite Federal Regulation to the Contrary

Sophia Hoffmann was fired from her position working with developmentally disabled adults in 2001 because of a minor, one-year-old infraction that was improperly reported on her FBI background checks.

Having a college degree and a history of working with people with disabilities, Ms. Hoffmann was an excellent candidate for the job. In fact, she was hired while living in a different state. After moving and beginning work in her new position, Ms. Hoffmann was required to undergo an FBI background check—something she thought would be no problem.

Unfortunately, in 2001, Ms. Hoffmann had been stopped in a parking garage by her two college classmates for an evening. Stressed out and frustrated by the delay, Ms. Hoffmann became irritated and engaged in a verbal argument with the police officer. She was eventually charged and pled no contest to an infraction and was fined \$200. Ms. Hoffmann has no other criminal or law enforcement records, consisting of a felony of misdemeanor offense. Despite clear regulations to the contrary, Ms. Hoffmann's FBI record included the non-existent offense with the citation "Criminal—FBI" (App. 2/1/13).

After being fired because of the improper reporting of a non-existent offense by the FBI, Ms. Hoffmann was without work for roughly a year, which was both financially and emotionally challenging as she was afraid of further job loss. Eventually, Ms. Hoffmann had to return to her home state. She has since worked with a local nonprofit to remove the non-existent offense from her record and is completing an advanced degree in her field.

Despite the humiliation she felt when she was fired because of a minor, one-year-old infraction, Ms. Hoffmann had decided to provide her services to the community throughout her career.

---

## VIII The Serious Limitations of the Process of Correcting FBI Records

---

Federal regulations require officials who make employment or licensing decisions based on FBI rap sheets to provide job seekers an opportunity to complete or challenge the accuracy of the information contained in the record.<sup>82</sup> In addition, individuals may request a copy of their FBI record at any time to review the accuracy of the criminal history information.<sup>83</sup> Unfortunately, there is considerable divergence between policy and reality for workers harmed by inaccurate and incomplete FBI records.

Despite the clear language of the regulation, workers frequently lose out on job opportunities because of an incomplete or inaccurate FBI background check. Some workers report not being informed by the hiring agency that the reason for their ineligibility was the information reported by the FBI, or not being given information on their right to request a copy of the report or contest the information it contains. Other workers are unable to understand or comply with the notice they do receive. While such a provision is important given the large number of missing dispositions in the FBI database, the regulation alone is not enough to protect workers with inaccurate and incomplete records.

Correcting incomplete and inaccurate FBI records is even more challenging because workers rarely receive a copy of the FBI or state rap sheet used to make suitability determinations, even though they have often paid for the record as part of the employment or licensing screening process. Thus, workers may receive notice that they have been deemed unsuitable for a position or employment license based on their criminal history, but have no further information as to the offense on their record resulting in the disqualification, unless and until they are able to independently access the FBI record. In other situations, the worker is told

that there is record of an arrest without a corresponding conviction on the FBI criminal record that will prevent the agency from processing the employment or licensing application until the individual provides final disposition information from the arresting agency, sentencing court, or FBI. These two situations can be particularly challenging for workers whose offenses are old or minor, or who have never been convicted and thus are completely unprepared for the rejection.

When a faulty FBI record stands between the worker and the government agency that is responsible for certifying suitability for employment, job seekers are frequently unable to navigate the complex maze to correct the record and therefore lose out on job opportunities through no fault of their own. Because many criminal justice records are not readily available, individuals often have to travel directly to the sentencing court or arresting agency to obtain proof of the final disposition—which may mean traveling to a courthouse or law enforcement agency in a different county or even state. If an arrest did not result in actual charges, there is likely no court record available. In that instance, the individual must “prove a negative” and obtain paperwork verifying that no official action was taken after the initial arrest.

Even more challenging, for individuals with very old arrests and convictions, the necessary information may not be readily available as law enforcement agencies and courts have switched from paper to computerized records. If a record is available by paper document only, individuals may have to wait for a search of the archives. In some instances, documents relating to non-conviction activities are destroyed after a specified time period. When that happens, the most an individual may be able to obtain is a letter certifying that no information exists.

Given these barriers and the lack of resources to assist the many workers dealing with faulty records, only a small number of people ever petition the FBI to clean up their records, despite the process set forth in the regulations. In contrast, when a procedure to appeal faulty records is structured within the employment or licensing process—as in the port worker security program—many more individuals will take advantage of the process. Unfortunately, most employment and licensing screens do not include such a transparent procedure for challenging inaccurate and incomplete FBI records.

In 2010, the last year for which we have all of the following data, FBI rap sheets were issued for more than 13.8 million individuals seeking employment or licensing,<sup>64</sup> and approximately 23.7 million rap sheets were produced for all noncriminal justice purposes,<sup>65</sup> including immigration clearances, adoptions, and other background check mandates. That same year, however, a mere 1,306 individuals petitioned the FBI to modify or correct their records (Figure 5).<sup>66</sup> Of those requests, 784 records, or 60 percent, were actually modified or corrected by the FBI.<sup>67</sup> Unfortunately, the information provided by the FBI does not specify what “modifications” were made—correcting inaccurate information, updating missing disposition information, or other changes to the record.<sup>68</sup> Again, it is important to note that these figures are individuals who contacted the FBI specifically to challenge the information included on their record; the data does not capture workers who challenged the information contained on their FBI criminal record through another government agency’s process.

**Figure 5. Requests to Modify Inaccurate & Incomplete FBI Records**

**784** records modified by FBI out of **1,306** requests

Faulty records for employment and licensing screens impose huge costs on job seekers and workers. Even those who eventually correct their record nonetheless suffer economically from lost opportunities. Ms. Vanderpool’s experience, described below, provides an example of a young woman whose FBI record inappropriately reported a dismissed and sealed youthful record as a conviction, which cost her a job.

Clearly, the current process, which puts the entire burden on the worker to both petition the FBI for a copy of the record and then seek a correction of that record, is wholly inadequate for workers seeking employment and licensing eligibility. Indeed, it provides another compelling justification for why the FBI must ensure the accuracy and completeness of the records prior to release, before the damage is done.

While federal policy includes a process to correct the FBI records, and the FBI records themselves include a disclaimer that the license or employment should not be denied “until the applicant has been afforded a reasonable time to correct or complete the information,” in reality many workers are not provided such an opportunity. Furthermore, workers are not automatically provided a copy of their rap sheet when they are notified that an offense on their FBI criminal history is considered disqualifying. As explained in detail in section IX.3, at least one state—California—has recognized how these faulty records disadvantage workers and taken steps to improve the process. California requires a copy of the record be provided to the worker and that the FBI records are accurate and complete prior to releasing the background report for employment. Most states, however, have not taken similar steps to ensure accuracy and protect the rights of workers.

---

"I lost four years. I lost everything—including my confidence. I'm just now able to contribute again and support my family but I could have been so much farther in my career. I was studying and getting my licenses and that all stopped. I have to work my way up from the beginning again." —Raquel Vanderpool

---

#### Raquel Vanderpool's Dismissed and Sealed Record Reported by the FBI as a Conviction

Raquel Vanderpool is a 45-year-old female mother of two who provides caregiving and nursing services to the elderly. Ms. Vanderpool began her career in high school for K&S, Inc. in 1981. Unfortunately, in 2002, when she was 26 years old, Ms. Vanderpool made a health care error that would eventually cost her the job. In 2002, to improve her financial standing, she changed the name on a prescription for painkillers she had received for a toothache. The impact of this single youthful mistake would have severe consequences on the rest of her life.

At the time of her error, Ms. Vanderpool was already working for K&S, Inc. Because of her honesty, commitment, and hard work, she was able to advance to other roles with the trust of her employer and excel in her field. Unfortunately, when a change in the law required Ms. Vanderpool to get an FBI background check, the report accurately reported her prior offense as a conviction. Although Ms. Vanderpool had been processed under a diversionary program for youthful offenders—her charges dismissed and therefore sealed—the FBI background check accurately showed the offense as a conviction. Had any employer wanted to hire her, but the state law prohibited it from doing so, even though the record was inaccurate. By the time Ms. Vanderpool was able to clear her record and challenge the prohibitive state law, her certification had lapsed and she was unable to return to the pharmaceutical employer she had successfully served for nine years.

Due to the inaccurate record, Ms. Vanderpool was not employed for roughly four years and her family suffered economically. Ms. Vanderpool was forced to apply for unemployment benefits and rely on food assistance to feed her children. The family lost shelter and even their home. After a foreclosure, Ms. Vanderpool has been unable to afford classes to be recertified as a certified nursing assistant (CNA). As a highly qualified and dedicated nurse, Ms. Vanderpool was eventually able to find work in 2017.

---

## IX Leading Case Studies of the Damage Caused by Faulty FBI Records

---

Incomplete and inaccurate FBI records are not a theoretical problem. It is a very real problem that impacts both workers and employers and creates government inefficiency and waste. The following discussion provides prominent examples of the negative consequences that are direct results of the severe limitations of the FBI criminal records system.

### 1. Port Workers Received No Assistance from TSA in Correcting FBI Records

The port worker background check program implemented by the Transportation Security Administration (TSA) vividly illustrates the challenges workers face when confronted by faulty FBI records. Workers burdened with locating missing disposition information are often unable to correct the record quickly enough to avoid losing out on opportunities and suffering economic hardship.

Shortly after the September 11th terrorist attacks, Congress imposed significant new federal background checks on the more than two million workers with access to the nation's ports. After many delays, the Transportation Worker Identity Credential (TWIC) program began in earnest in 2008. By April 2009, all workers (including longshoremen, truckers, and many others) were required to have undergone an FBI background check conducted by TSA in order to access the ports and keep their jobs. It is important to note that the vast majority of workers applying for a TWIC card had been safely and effectively working at the ports prior to implementation of this program—some for years, if not decades.

While the TWIC program includes several helpful worker protections, it also highlights the problem of

inaccurate and incomplete FBI records for employment and licensing purposes, and the very real economic detriment to workers who receive no assistance in correcting those records. The TWIC program is also an example of governmental waste and inefficiencies, as tens of thousands of inaccurate and incomplete FBI records were challenged but the corrected information was not subsequently updated in the FBI database.

The worker protections incorporated into the TWIC program are models in many respects. First, the program specifies the convictions warranting denial of a TWIC. Importantly, applicants may be denied a TWIC for felony convictions only; misdemeanors are not disqualifying.<sup>90</sup> Second, the program includes a waiver process allowing workers to detail their post-conviction rehabilitation to prove they do not pose a threat to the security of the port, thereby waiving the disqualification.<sup>91</sup>

Finally, and most important to this discussion, the TWIC process includes a clear multistep avenue to challenge an inaccurate or incomplete FBI record. The individual is notified of the specific disqualifying offense on the FBI record and the information required to challenge the record and appeal the disqualification. (Refer to Appendix C for an example of an initial disqualification letter sent by TSA to an applicant with a four-year-old arrest on his FBI rap sheet that failed to include a disposition.)

After receiving notice of the initial determination, the individual has 60 days to present official documentation to TSA before the disqualification becomes final, and additional time may be easily requested. Although TSA does not track down the missing information on its own, applicants are clearly told what specific offense is at issue and what documentation must be provided to appeal a denial of security clearance. Importantly, TWIC applicants are not automatically disqualified by TSA upon receipt of the FBI record but instead provided adequate time to correct the record. The TWIC program allows applicants to appeal initial disqualifications if they can verify that the information included on the FBI background check on which the decision was based is inaccurate.<sup>97</sup> Unfortunately, however, obtaining correct information and submitting it to TSA for review remains the responsibility of the workers. Many of them, like Russ F., faced severe challenges in complying with the process.

In the routine case of an FBI record that is limited to arrest information and missing the corresponding disposition, felony offense arrests are still considered disqualifying by TSA unless the individual can provide updated court records showing the offense was dismissed, reduced to a misdemeanor, or otherwise resolved in the worker's favor.<sup>98</sup> Thus, although the federal law only authorizes TSA to disqualify workers due to a felony conviction or being under want, warrant, or indictment for a disqualifying felony,<sup>99</sup> because of the flawed FBI records, the entire burden effectively shifts to the worker to demonstrate that the arrest did not result in a felony conviction. In other words, TSA effectively presumes the arrest led to a conviction or is still outstanding unless the worker can prove otherwise.

In the end, despite its serious limitations, the TWIC program contained some of the most valuable worker protections of any employment or licensing background check requirement, which helped tens of thousands of workers obtain or retain good quality jobs at the nation's ports. According to TSA, more than 100,000 port workers have received initial disqualification letters from the agency because they were determined to be potentially ineligible to obtain a TWIC card based on their FBI criminal background check. More than half of those workers who received an initial disqualification subsequently applied for either a waiver or an appeal.<sup>96</sup>

The severity of the faulty records problem is clear from the fact that a whopping 96 percent of all port workers who challenged the accuracy of their FBI records with TSA were successful, and the numbers were substantial. Specifically, from October 2007 through May 2013, 54,271 workers requested appeals. Of those, 52,299 were successful in verifying that they are eligible to obtain a TWIC, and were thus able to continue or begin working on the ports.<sup>97</sup> Unfortunately, many more workers may be eligible for an appeal but were unable to navigate the TWIC system, either because they did not understand the process or because they were unable to locate the documentation necessary to submit an appeal.<sup>98</sup>

As a result of the TWIC appeal process, TSA has received missing disposition data from more than 50,000 workers, some of whom may have had multiple arrests that lacked dispositions. The agency spent substantial time, money, and effort processing these appeals, necessitated almost exclusively by faulty FBI records. Unfortunately, there is no indication that the

#### Russ F. Struggled to Prove Arrest Did Not Lead to Charge or Conviction

As a result of the case, one of NEA's clients was faced with proving the nonexistence of a record. Russ F. had worked at the Philadelphia port for six years and wanted to keep working to help support his daughter's education and son-in-law after the latter's tragic death from brain disease. Mr. F. applied to TSA for a TWIC, but by mistake he needed to continue or appeal his pass. Unfortunately, Mr. F. was denied a TWIC based on an arrest dating back to 1979 that still had an open disposition on his FBI record. Mr. F. had to take time off from work on several occasions to visit various public defender offices and courts to obtain sufficient proof that charges were never filed against him and that he was never prosecuted or convicted for this offense. It took more than two months for Mr. F. to win his appeal of the objection and receive the TWIC card he needed to keep his job.

---

96% of port workers who challenged the accuracy of their FBI records and were successful.

---

updated records in TSA's possession were added to the FBI's database system. Indeed, according to the FBI, the bureau "does not receive updated disposition information from the Transportation Security Administration."<sup>99</sup> As such, all of those tens of thousands of FBI records continue to be incomplete or inaccurate. A similar problem exists with updated records from the U.S. Office of Personnel Management, as discussed below.

## **2. The Office of Personnel Management Is Tracking Down Missing FBI Records that Never Make Their Way Back Into the FBI System**

While each federal agency has significant discretion over its hiring and firing decisions, the U.S. Office of Personnel Management ("OPM") sets broad policy regulating the federal workforce, including hiring procedures, and conducts background investigations for prospective employees and security clearances across the federal government. Federal hiring is regulated by the "suitability" standards issued by OPM.<sup>100</sup>

Although individual federal agencies may conduct their own background investigations for some positions,<sup>101</sup> OPM conducts more than 90 percent of background investigations required for federal employment,<sup>102</sup> including criminal background checks based on the FBI's rap sheets.<sup>103</sup> In Fiscal Year 2011, OPM submitted more than two million fingerprint-based background checks to the FBI.<sup>104</sup> Approximately 10 percent of the individuals subject to an FBI background check had a criminal history.<sup>105</sup>

During the course of its background investigation, OPM collects criminal history information from the

FBI, state, local, tribal, and other federal law enforcement agencies.<sup>106</sup> If the criminal history record is missing pertinent information, such as disposition of a relevant arrest, OPM investigators attempt to find the missing disposition information. OPM does not maintain statistics documenting the volume of information it collects because of incomplete FBI records,<sup>107</sup> but based on the TSA experience, it is reasonable to assume that filling the gaps in FBI records is a significant drain on OPM resources.

After OPM completes its investigation, it provides the results to the federal agency that requested the background check, and gives the applicant an opportunity to contest erroneous criminal history information.

Despite OPM's efforts to share the corrected information with the FBI,<sup>108</sup> which would promote efficiency and conserve federal resources, the FBI appears to have rebuffed the overture. In 2010, OPM revised its policies to clarify that the agency could release dispositions collected by OPM investigators to the FBI's criminal records system, thus allowing the FBI to update and correct its database.<sup>109</sup> OPM began sending records to the FBI on January 31, 2011. However, in response to Congressional inquiries, the FBI subsequently stated that it does "not receive updated disposition information from the Office of Personnel Management."<sup>110</sup> Thus, while OPM is submitting information to the FBI to perfect rap sheets, the FBI is either simply not receiving that information or not incorporating any information it does receive into its database. Either way, hundreds of thousands of records are potentially left uncorrected.

---

In FY 2011, OPM submitted more than 2 million fingerprint-based background checks to the FBI.

---

As a result of the FBI's position, the missing disposition information does not appear to be reflected in the FBI database, meaning that any future report sent from the FBI will continue to be incomplete or inaccurate. In turn, if the worker who was the subject of the initial report applies for another position that requires an FBI background check, the agency performing the second background check may also then spend its limited time and taxpayer dollars on obtaining the missing information. Because the FBI does not incorporate OPM updates into its database, this governmental inefficiency may be replicated multiple times for applicants applying for numerous federal positions or other employment or licensing opportunities that require FBI background checks.

### **3. California Tracks Down Problem FBI Records to Ensure Fair Access to Jobs and Occupational Licenses**

In Fiscal Year 2011/12, California exceeded one million FBI criminal background checks for employment and licensing purposes, thus representing a considerable share of the nearly 17 million rap sheets generated by the FBI for employment screening.<sup>33</sup> California laws mandating FBI background checks cover a range of occupations, with the highest volume of FBI background checks produced for school employees, social services workers, private security guards, healthcare workers, and law enforcement personnel.<sup>34</sup>

California lawmakers and state officials have taken their responsibility seriously to ensure that the large numbers of FBI checks conducted for employment and licensing purposes are up to date and that workers have the information they need to verify accuracy. While the California state repository only has dispositions for 57 percent of all arrests (Figure 2), the California Department of Justice ("DOJ") timely ensures the completeness and accuracy of records that are requested for employment and licensing decisions.

First, with a new law that took effect in January 2013, California is now the only state in the nation that requires every entity that conducts a criminal

background check under the mandate of a state or local occupational or licensing law to automatically provide the subject of the background check with a copy of his or her state and federal rap sheet whenever the agency makes a negative decision based on the record.<sup>35</sup> Like the federal and state consumer protection laws that regulate private criminal background checks, the new California law was intended to allow workers to verify the accuracy of the criminal history information and promptly challenge a negative determination without having to first request a copy of the record.

Second, and most importantly, California's law requires the state DOJ to "make a genuine effort to determine the disposition of the arrest" prior to releasing state and federal criminal history information in many employment situations.<sup>36</sup> The DOJ policy also mandates that the department make a "genuine effort" to determine dispositions of arrests when releasing criminal background check information for all employment or licensing purposes.<sup>37</sup> Thus, when there is a missing record from another state reflected in the FBI rap sheet, the California DOJ contacts the arresting agency from out of state, as well as the district attorney, and/or the court as necessary to determine the outcome of the arrest.<sup>38</sup> We are not aware of any other state that has a similar policy.

As a result, like OPM, California spends considerable resources on contacting other states to update the arrest information listed on the FBI rap sheet. The information obtained by the California DOJ is updated in the state's criminal records system if it corresponds to a California criminal record, and all of the updated disposition information is sent to the FBI weekly. Also, like OPM, California's state officials have tried to ensure that the missing FBI rap sheet information that the state tracks down actually makes its way into the FBI's system. But according to a California DOJ official, "[t]here is no one-to-one process to validate that the FBI update[s] what the [California] DOJ sent."<sup>39</sup> Thus, while the state DOJ reports any updates and corrections it finds to the FBI, the state officials are unaware of whether the FBI subsequently corrects its record.

---

## X Where There's a Will, There's a Way: FBI Records Are Cleaned Up Under the Brady Program of Federal Gun Checks

---

The preceding discussion has focused on the vast and growing reliance on FBI criminal background checks for employment and licensing purposes, the serious flaws in the system, and the substantial negative effects that faulty records have on employment prospects for thousands of individuals, as well as employers and public agencies. The good news is there are workable solutions to fix this broken system.

Fortunately, a successful and well-established federal program is already in place to clean up the FBI records—the federal program for firearm background checks established by the Brady Handgun Violence Prevention Act of 1993 (“Brady Act”). Currently, the FBI only screens records and searches for missing disposition information in two situations: (1) background checks performed on prospective firearms purchasers; and (2) background checks performed on persons seeking to purchase certain dangerous chemical agents and toxins.<sup>148</sup> The FBI’s large-scale program regulating prospective firearms purchases is described in depth below. It provides a proven, workable template for creating a similar program for background checks of prospective workers.

The Brady Act, which faced intense scrutiny during recent Congressional gun control debates, mandates criminal history background checks for any person seeking to purchase a firearm from a dealer (“licensee”). To comply with the Brady Act, the FBI established the National Instant Criminal Background Check System (“NICS”) to process criminal background checks instantly.<sup>149</sup> Among other restrictions, the Brady Act

prohibits the transfer of firearms to persons under indictment for, or who have been convicted of, a crime punishable by imprisonment for a term exceeding one year, who are fugitives from justice, or who have been convicted of a misdemeanor crime of domestic violence.<sup>150</sup>

As required by the Brady Act, an individual who applies to purchase a firearm from a licensee is subject to a NICS check. Nearly instantaneously, the licensee receives a response from NICS. The licensee is told that the sale may proceed, may not proceed, or is delayed pending further review of the gun purchaser’s record.<sup>151</sup> If a firearm applicant’s FBI record contains arrest information but no disposition for a potentially disqualifying misdemeanor domestic violence or felony offense, the licensee is informed that the purchase is “delayed” and the FBI has three business days in which to track down the missing disposition(s).<sup>152</sup> If the FBI does not locate the information within three business days to verify the purchaser’s disqualification, the licensee is permitted to sell the gun. If the NICS check provides information that an applicant is ineligible to purchase a firearm, the applicant may request the

---

reasons for the determination, and the reasons must be provided in writing within five business days after the date of the request.<sup>123</sup>

According to the FBI, the NICS section conducted more than 6.8 million Brady Act background checks in 2011.<sup>124</sup> Of those, approximately eight percent (or more than 500,000 records) required the FBI to search for additional information.<sup>125</sup> In 2010, the FBI sent out an average of 4.27 requests for information to other law enforcement agencies, courts, and other entities for each delayed firearm application transaction.<sup>126</sup> The requests for information included requests for disposition information on misdemeanor domestic violence and felony arrests, as well as updates regarding protection orders, mental health evaluations, and other information.<sup>127</sup>

The FBI estimates the cost of tracking down the incomplete records totaled \$6.9 million in 2010, utilizing nearly 400 NICS section employees.<sup>128</sup> Assuming eight percent of the six million background checks conducted by the NICS section in 2010<sup>129</sup> required a search for additional information (480,000 searches), the cost per record is only \$14.38. In addition, given that the FBI's total budget for Fiscal Year 2010 was approximately \$8 billion,<sup>130</sup> the \$6.9 million spent by the NICS section to correct the records was less than one percent of the bureau's total budget for the year.

---

The FBI is able to find disposition information within 3 days in 65% of all firearm background checks that are missing such information.

---

Thus, there is a clear and established procedure to clean up the FBI's criminal records, which has proven extremely effective. Indeed, according to the Attorney General's 2006 report, the FBI is "able to find missing arrest dispositions within three business days in approximately 65 percent of all transactions that are delayed because of a missing disposition. This leaves approximately two percent of all NICS transactions processed by the FBI missing a disposition at the end [of] three business days."<sup>131</sup>

The FBI has adopted a special system to keep track of the information that it locates as a result of the Brady checks, so that it can access the disposition information when needed for future firearms purchases. Notably, 782,000 dispositions have been obtained by NICS section employees and posted to criminal history records since the program began.<sup>132</sup> However, if the FBI determines that the information obtained by the NICS section employees is for any reason not eligible for inclusion in the FBI criminal history record, the information is nonetheless entered into a special database (the "disposition document file" or "DDF") that can then be accessed for future NICS investigations.<sup>133</sup> As of 2011, the DDF contained more than one million documents obtained primarily through previous NICS searches.<sup>134</sup>

The FBI's ability to obtain a significant amount of missing disposition information within three business days and access that information in the future yields important conclusions. The FBI's use of a similar process to inquire into missing dispositions on FBI background checks for employment would benefit a large number of the estimated 600,000 workers potentially prejudiced each year because of faulty FBI records that fail to include beneficial information; correcting 65 percent of these records would benefit roughly 390,000 workers.<sup>135</sup> This number would likely increase if the FBI were given a somewhat longer time frame to search for disposition information. In addition, the FBI's difficulty in obtaining disposition information on some records underscores the challenges faced by individuals seeking to find obscure records to prove their eligibility for employment.

---

Finally, the DDF is a valuable resource that could be further supplemented with information provided by the Transportation Security Administration, the Office of Personnel Management, and other agencies, as well as accessed by the FBI in the process of providing FBI rap sheets for employment and licensing purposes.

There are, of course, differences between background checks conducted for firearms purchases and those conducted for employment. Although nearly seven million background checks were conducted for firearms purchases in 2011, more than double that number were conducted for employment and licensing purposes. While requiring the FBI to clean up records used for employment and licensing purposes represents a significant increase, the FBI collects a fee for each FBI record released for employment purposes. A reasonable fee increase could offset the cost of extending the Brady process to employment and licensing checks.

In addition, not all convictions are disqualifying for gun purchasing purposes, although a large number are, including all felony convictions. As a result, the FBI does not inquire into all missing dispositions, only those that may prohibit a person from purchasing a firearm.<sup>138</sup> In the employment and licensing context, the list of potentially disqualifying offenses may be more expansive, and the FBI is not in a position to tailor each background check to each job. However, clear parameters could apply to limit the volume and scope of corrections necessary for records created for employment and licensing purposes. Most importantly, the FBI could limit its inquiries to open arrests that date back more than a year and serious offenses that are more likely to create a safety or security concern for most employers.

---

# XI Recommendations to Improve the Integrity of the FBI Criminal Background Check Process

---

The FBI's faulty database is a national problem that requires a federal solution. While states must work to provide more up-to-date information to the FBI, the FBI itself has a responsibility to ensure that the records it produces for employment and licensing are accurate. Millions of workers, employers, and public agencies responsible for conducting background checks are left to deal with the fallout from inaccurate and incomplete FBI records. The FBI is best positioned to correct this situation, with the help of Congress and the Executive Branch.

## **1. Enact Federal Legislation Requiring the FBI to Obtain Missing Disposition Information Prior to Sending Background Checks for Employment and Licensing Purposes**

Just as the FBI tracks down incomplete and missing disposition information when conducting background checks pursuant to the Brady Act, so too should the bureau be required to find missing disposition information when conducting background checks for employment.

Congress should enact a bill modeled on H.R. 5300, introduced in the 111th Congress by Congressman Bobby Scott, the ranking minority member of the House Judiciary Committee, and several Republican co-sponsors. H.R. 5300, the Fairness and Accuracy in Employment Background Checks Act, would have expanded the process that now applies to Brady checks to FBI background checks for employment. As *The New York Times* editorialized in endorsing the bill, "No one should be denied a job because the government's information is wrong."<sup>37</sup>

The bill provided the FBI with 10 business days to find missing disposition information before releasing a criminal background check for employment or licensing purposes. It also codified FBI regulations in place since the 1970s that provide that non-serious juvenile and adult offenses should not be reported on FBI criminal background checks for employment.

In addition to tracking down the gaps in FBI rap sheets produced for employment purposes, the bill incorporated important consumer protections that

---

"No one should be denied a job because the government's information is wrong."

-NY Times Editorial, "Check it Again",  
May 2010

---

apply to private criminal background checks under the federal Fair Credit Reporting Act ("FCRA").<sup>198</sup> For example, the bill ensured that individuals subject to employment and licensing background checks received a copy of the FBI report in order to verify and challenge the accuracy of the information. The new reforms were financed by authorizing the FBI to increase the fee now charged to entities that request FBI rap sheets for employment.

## **2. Require the FBI to Check the Brady Files for Missing Information and Accept Updated Records from Federal and State Agencies**

The FBI can also take several key steps on its own to increase accuracy, without new federal legislation.

First, it should work to reduce governmental inefficiency by creating processes to accept missing disposition information from multiple sources. Currently, other federal agencies expend energy and resources to find or collect missing disposition information. The FBI should accept disposition information from the Office of Personnel Management, the Transportation Security Administration, the State of California Department of Justice, and other agencies that find or collect missing disposition information.

At a minimum, the FBI should add other agencies' information to the special disposition document file of updated records tracked down by the Brady firearms unit, if it is unable to directly supplement the other FBI databases. And, before the FBI releases a rap sheet with missing disposition information in response to an employment or licensing inquiry, the FBI should check the disposition document file to obtain missing dispositions, and report its findings in order to limit the resulting gaps in the records.

## **3. Ensure that All Federal and State Employment and Licensing Background Checks that Require FBI Records Provide an Automatic Right to a Copy of the Rap Sheet and Robust Appeals Process**

Even the most aggressive efforts to clean up the faulty FBI criminal records system will never be foolproof; back-up measures to ensure accuracy will always be necessary. Fortunately, there are helpful model policies that provide necessary worker protections at both the federal and state levels.

First, every person subject to an FBI criminal background check should automatically receive a copy of the rap sheet along with any negative suitability determination by a screening agency. This will permit workers to efficiently and effectively challenge the accuracy of the information if necessary. Federal consumer protection laws provide these protections to individuals subject to commercial background checks, and the protections should be extended to workers subject to FBI background checks. California is leading the way with a new state law that requires all state and local agencies that conduct state and federal background checks to automatically provide a copy of the rap sheet to the individual when the agency issues a negative determination.

In addition, all government agencies that access FBI records for employment screening purposes should have a robust appeals process. A robust appeals process includes a clear notice listing the specific disqualifying offenses identified by the screening agency, an adequate window of time (at least 60 days) during which the individual has an opportunity to produce corrective information before the agency's determination is made final, and detailed instructions on what documentation is necessary to challenge the record. The TWIC program provides the best example of a strong appeals process that can benefit tens of thousands of workers and significantly reduce the discriminatory impact of faulty FBI records.

---

Building on the initiative of the U.S. Attorney General's Interagency Reentry Council, the federal government should take the lead in adopting these critical worker protections across all federal agencies. The federal government must set an example for the private and public sectors to protect qualified workers who, through no fault of their own, are penalized by the faulty FBI criminal records system.

#### **4. Hold the FBI Accountable for Enforcing the Current Law Regulating Criminal Background Checks for Employment and Licensing, and Require Regular Reporting and Monitoring of the Impact of the Current System**

The Obama Administration and Congress should hold the FBI accountable for strict compliance with its current regulations on criminal background checks for employment and close monitoring of the impact of the current system on workers, employers, and governmental agencies.

Specifically, the FBI should demand strict enforcement with the requirement that dispositions be reported within 120 days, that all records be complete, accurate, and current, and that the FBI refrain from reporting non-serious offenses on the rap sheets, regardless of whether such information is provided by the states.

In addition, the FBI should maintain and report detailed data to Congress and the public on its background checks for employment to evaluate their impact on people of color and ensure greater transparency and accountability. Specifically, the FBI should regularly report data indicating: (1) the number or percentage of incomplete and inaccurate FBI rap sheets issued for employment and licensing purposes; (2) the race and ethnicity of workers who have incomplete or inaccurate data released by the FBI for employment purposes; (3) the volume of the FBI background checks produced for employment purposes, including a breakdown of the specific federal or state agencies that request such information; (4) the

number of rap sheets released that include specified non-serious offenses, such as loitering and disorderly conduct; (5) the specific costs associated with tracking down missing disposition information under the Brady gun check program; and (6) the number of individual requests to correct the FBI records and the specific modifications and corrections adopted by the FBI. A slight increase in the fees assessed for background checks would cover the costs associated with this monitoring and report.

---

## XII Conclusion

---

America's workers need access to good jobs. When the federal government provides information that determines applicants' eligibility for such jobs, it has a responsibility to ensure that the information is accurate and up to date. By doing so, the government can avoid creating unnecessary barriers to employment and ensure that employers and agencies have the information they need to meet public safety concerns while preserving job opportunities for qualified workers. Inaccurate and incomplete records deny workers the ability to support themselves and their

families and do not provide the information needed for appropriate hiring and licensing decisions. The massive increase in the use of FBI records for employment and licensing decisions brings greater responsibility for the completeness and accuracy of those records. The FBI is failing to meet this responsibility, and America's workers—and those unable to work because of faulty records—are paying the price for that failure.

# Appendix A

Multiple Arrests Reported on FBI Background Check with No Disposition Information

## Rap Sheet

Registration ID:	[REDACTED]	Applicant Name (L, F M):	[REDACTED]
SSN:	[REDACTED]	Agency Name:	[REDACTED]
TCN:	[REDACTED]	Type:	SRE
FBI Response Date:	[REDACTED]	FBI Response Content:	I

### Rapsheet

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
CLARKSBURG, WV 26306

[REDACTED]

[REDACTED]

THE FBI IDENTIFIED YOUR TEN-PRINT SUBMISSION WHICH CONTAINED THE FOLLOWING DESCRIPTORS:

NAME [REDACTED]  
DATE ARRESTED/FINGERPRINTED [REDACTED]

SEX RACE BIRTH DATE HEIGHT WEIGHT EYES HAIR  
M B [REDACTED] 504 152 BROWN BLACK

STATE ID BIRTH PLACE  
PENNSYLVANIA

CITIZENSHIP  
UNITED STATES

OTHER BIRTH SOCIAL  
DATES SCARS-MARKS-TATTOOS SECURITY MISC NUMBERS

NONE NONE [REDACTED] NONE

ALIAS NAME(S)  
NONE

END OF COVER SHEET

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
CLARKSBURG, WV 26306

BECAUSE ADDITIONS OR DELETIONS MAY BE MADE AT ANY TIME, A NEW COPY SHOULD BE REQUESTED WHEN NEEDED FOR SUBSEQUENT USE.

THIS RECORD IS SUBJECT TO THE FOLLOWING USE AND DISSEMINATION RESTRICTIONS

UNDER PROVISIONS SET FORTH IN TITLE 28, CODE OF FEDERAL REGULATIONS (CFR), SECTION 50.12, BOTH GOVERNMENTAL AND NONGOVERNMENTAL ENTITIES AUTHORIZED TO SUBMIT FINGERPRINTS AND RECEIVE FBI IDENTIFICATION RECORDS MUST NOTIFY THE INDIVIDUALS FINGERPRINTED THAT THE FINGERPRINTS WILL BE USED TO CHECK THE CRIMINAL HISTORY RECORDS OF THE FBI. IDENTIFICATION RECORDS OBTAINED FROM THE FBI MAY BE USED SOLELY FOR THE PURPOSE REQUESTED AND MAY NOT BE DISSEMINATED OUTSIDE THE RECEIVING DEPARTMENT, RELATED AGENCY OR OTHER AUTHORIZED ENTITY. IF THE INFORMATION ON THE RECORD IS USED TO DISQUALIFY AN APPLICANT, THE OFFICIAL MAKING THE DETERMINATION OF SUITABILITY FOR LICENSING OR EMPLOYMENT SHALL PROVIDE THE APPLICANT THE OPPORTUNITY TO COMPLETE, OR CHALLENGE THE ACCURACY OF, THE INFORMATION CONTAINED IN THE FBI IDENTIFICATION RECORD. THE DECIDING OFFICIAL SHOULD NOT DENY THE LICENSE OR EMPLOYMENT BASED ON THE INFORMATION IN THE RECORD UNTIL THE APPLICANT HAS BEEN AFFORDED A REASONABLE TIME TO CORRECT OR COMPLETE THE INFORMATION, OR HAS DECLINED TO DO SO. AN INDIVIDUAL SHOULD BE PRESUMED NOT GUILTY OF ANY CHARGE/ARREST FOR WHICH THERE IS NO FINAL DISPOSITION STATED ON THE RECORD OR OTHERWISE DETERMINED. IF THE APPLICANT WISHES TO CORRECT THE RECORD AS IT APPEARS IN THE FBI'S CJIS DIVISION RECORDS SYSTEM, THE APPLICANT SHOULD BE ADVISED THAT THE PROCEDURES TO CHANGE, CORRECT OR UPDATE THE RECORD ARE SET FORTH IN TITLE 28, CFR, SECTION 16.34.

- FBI IDENTIFICATION RECORD -

WHEN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT FURNISHED THE DATA TO THE FBI.

NAME FBI NO. DATE REQUESTED

SEX RACE BIRTH DATE HEIGHT WEIGHT EYES HAIR  
M B ██████████ 504 135 BRO BLK

BIRTH PLACE  
PENNSYLVANIA

FINGERPRINT CLASS PATTERN CLASS CITIZENSHIP  
15 15 14 CO CO RS RS UC WU WU LS LS LS WU WU UNITED STATES  
15 15 13 FC CI WU

END OF PART 1 - PART 2 TO FOLLOW

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
CLARKSBURG, WV 26306

PART 2

- FBI IDENTIFICATION RECORD - FBI NO [REDACTED]

1-ARRESTED OR RECEIVED 1978/09/21  
AGENCY-PD-RECORDS AND IDENT PHILADELPHIA (PAPEP0000)  
AGENCY CASE [REDACTED]  
CHARGE 1-VIOLATION UNIFORM FIREARM ACT  
CHARGE 2-POSSESSION INSTRUMENT OF CRIME  
CHARGE 3-PROHIBITED OFFENSIVE WEAPON

2-ARRESTED OR RECEIVED 1982/05/28  
AGENCY-PD-RECORDS AND IDENT PHILADELPHIA (PAPEP0000)  
AGENCY CASE [REDACTED]  
CHARGE 1-BURGLARY  
CHARGE 2-ROBBERY  
CHARGE 3-CRIMINAL TRESPASSING  
CHARGE 4-CRIMINAL ATTEMPT  
CHARGE 5-THEFT  
CHARGE 6-CRIMINAL CONSPIRACY  
CHARGE 7-VIOLATION PA UNIFORM FIREARM ACT  
CHARGE 8-POSS INSTRU CRIME-GUN  
CHARGE 9-PROH OFF WEAP  
CHARGE 10-AGGR ASSAULT  
CHARGE 11-SIMPLE ASLT

3-ARRESTED OR RECEIVED 1993/04/02 SID- [REDACTED]  
AGENCY-PD-RECORDS AND IDENT PHILADELPHIA (PAPEP0000)  
AGENCY CASE [REDACTED] NAME USED [REDACTED]  
CHARGE 1-TERA THREATS

4-ARRESTED OR RECEIVED 1994/11/19 SID- PA [REDACTED]  
AGENCY-PD-RECORDS AND IDENT PHILADELPHIA (PAPEP0000)  
AGENCY CASE [REDACTED] NAME USED [REDACTED]  
CHARGE 1-SIM ASS  
CHARGE 2-REAP

5-ARRESTED OR RECEIVED 2005/05/23 SID- PA [REDACTED]  
AGENCY-PD-RECORDS AND IDENT PHILADELPHIA (PAPEP0000)  
AGENCY CASE [REDACTED] NAME USED [REDACTED]

1978 arrest -  
individual  
found not  
guilty

1993 arrest -  
charge  
dismissed

1994 arrest -  
individual  
found not  
guilty

2005 arrest -  
charges  
dismissed

1982 arrest - individual  
found guilty of criminal  
conspiracy; possessing  
instruments of crimes;  
possessing instruments  
of crime weapons;  
aggravated assault;  
simple assault; burglary;  
attempt theft by  
unlawful taking or  
dispositio and robbery

CHARGE 1-THEFT BY UNLWF TAKING OR DISPO  
CHARGE 2-THEFT BY DECEPTION  
CHARGE 3-RECEIVING STOLEN PROPERTY  
CHARGE 4-COPYING; RBCORDING DEVICES  
CHARGE 5-TRADEMARK COUNTERFEITING

END OF PART 2 - PART 3 TO FOLLOW

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
CLARKSBURG, WV 26306

PART 3

- FBI IDENTIFICATION RECORD - FBI NO. [REDACTED]

ARRESTED OR RECEIVED 2009/04/22 SID: P/ [REDACTED]  
AGENCY-PD-RECORDS AND IDENT PHILADELPHIA (PA9990000)  
AGENCY CASE [REDACTED] NAME USED [REDACTED]  
CHARGE 1-SIMPLE ASSAULT  
CHARGE 2-RECKLESSLY ENDANGERING  
CHARGE 3-TERRORISTIC THREATS

RECORD UPDATED 2011/09/28

ALL ARREST ENTRIES CONTAINED IN THIS FBI RECORD ARE BASED ON  
FINGERPRINT COMPARISONS AND PERTAIN TO THE SAME INDIVIDUAL.

THE USE OF THIS RECORD IS REGULATED BY LAW. IT IS PROVIDED FOR OFFICIAL  
USE ONLY AND MAY BE USED ONLY FOR THE PURPOSE REQUESTED.

2009 arrest -  
individual  
found not  
guilty

# Appendix B

## Non-Serious Offense Reported on FBI Background Check in Violation of Federal Regulation

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
CLARKSBURG, WV 26306

ICN [REDACTED]

BECAUSE ADDITIONS OR DELETIONS MAY BE MADE AT ANY TIME, A NEW COPY SHOULD BE REQUESTED WHEN NEEDED FOR SUBSEQUENT USE.

THIS RECORD IS SUBJECT TO THE FOLLOWING USE AND DISSEMINATION RESTRICTIONS

**COPY**

UNDER PROVISIONS SET FORTH IN TITLE 28, CODE OF FEDERAL REGULATIONS (CFR), SECTION 50.12, BOTH GOVERNMENTAL AND NONGOVERNMENTAL ENTITIES AUTHORIZED TO SUBMIT FINGERPRINTS AND RECEIVE FBI IDENTIFICATION RECORDS MUST NOTIFY THE INDIVIDUALS FINGERPRINTED THAT THE FINGERPRINTS WILL BE USED TO CHECK THE CRIMINAL HISTORY RECORDS OF THE FBI. IDENTIFICATION RECORDS OBTAINED FROM THE FBI MAY BE USED SOLELY FOR THE PURPOSE REQUESTED AND MAY NOT BE DISSEMINATED OUTSIDE THE RECEIVING DEPARTMENT, RELATED AGENCY OR OTHER AUTHORIZED ENTITY. IF THE INFORMATION ON THE RECORD IS USED TO DISQUALIFY AN APPLICANT, THE OFFICIAL MAKING THE DETERMINATION OF SUITABILITY FOR LICENSING OR EMPLOYMENT SHALL PROVIDE THE APPLICANT THE OPPORTUNITY TO COMPLETE, OR CHALLENGE THE ACCURACY OF, THE INFORMATION CONTAINED IN THE FBI IDENTIFICATION RECORD. THE DECIDING OFFICIAL SHOULD NOT DENY THE LICENSE OR EMPLOYMENT BASED ON THE INFORMATION IN THE RECORD UNTIL THE APPLICANT HAS BEEN AFFORDED A REASONABLE TIME TO CORRECT OR COMPLETE THE INFORMATION, OR HAS DECLINED TO DO SO. AN INDIVIDUAL SHOULD BE PRESUMED NOT GUILTY OF ANY CHARGE/ARREST OR WHICH THERE IS NO FINAL DISPOSITION STATED ON THE RECORD OR OTHERWISE DETERMINED. IF THE APPLICANT WISHES TO CORRECT THE RECORD AS IT APPEARS IN THE FBI'S CJIS DIVISION RECORDS SYSTEM, THE APPLICANT SHOULD BE ADVISED THAT THE PROCEDURES TO CHANGE, CORRECT OR UPDATE THE RECORD ARE SET FORTH IN TITLE 28, CFR, SECTION 16.34.

- FBI IDENTIFICATION RECORD -

WHEN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT FURNISHED THE DATA TO THE FBI.

NAME	FBI NO.	DATE REQUESTED
[REDACTED]	[REDACTED]	[REDACTED]
SEX RACE BIRTH DATE HEIGHT WEIGHT EYES HAIR		
W [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]		
BIRTH PLACE		
CALIFORNIA		
PATTERN CLASS	CITIZENSHIP	
3 AU RS RS RS LS UC RS LS LS	UNITED STATES	
1 WU WU WU WU WU LS WU		

ID OF PART 1 - PART 2 TO FOLLOW

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
CLARKSBURG, WV 26306

[REDACTED]

ICN [REDACTED]

- FBI IDENTIFICATION RECORD - FBI NO- [REDACTED]

ARRESTED OR RECEIVED 2001/10/10 SID: [REDACTED]  
AGENCY-SHERIFF-CTRL ID BUR OAKLAND (CA [REDACTED])  
AGENCY CASE-010 [REDACTED]  
CHARGE 1-001 COUNTS OF OBSTRUCT PUBLIC OFFICER

COURT-MUNICIPAL COURT BERKELEY [REDACTED]  
CHARGE-415 PC-FIGHT NOISE OFFENSIVE WORDS  
SENTENCE-  
CONVICTED-FINE

2001 arrest - Sophia Hoffmann  
convicted of fight noise  
offensive words infraction

FINE

RECORD UPDATED 2010/03/05

**COPY**

ALL ARREST ENTRIES CONTAINED IN THIS FBI RECORD ARE BASED ON  
FINGERPRINT COMPARISONS AND PERTAIN TO THE SAME INDIVIDUAL.

THE USE OF THIS RECORD IS REGULATED BY LAW. IT IS PROVIDED FOR OFFICIAL  
USE ONLY AND MAY BE USED ONLY FOR THE PURPOSE REQUESTED.



**VERIFICATION OF RECORD**

Name: [REDACTED]  
 Case Number: [REDACTED]      Originating Court: [REDACTED]  
 Birthdate Information (spell the birth month, followed by the day, year): [REDACTED]  
 CORPUS Event Number (CEN): [REDACTED]  
 Date of Arrest: [REDACTED]      Date of Conviction: [REDACTED]  
 Charges: §1PC415 INTRAGTION  
 Disposition: CONVICTED-PLEAD NO CONTEST. SENTENCE: \$100 FINE.

- Defendant successfully completed all terms and conditions of probation on the date of \_\_\_\_\_
- As of this date, no charges have been filed by the District Attorney. No court file exists.
- Defendant is still on probation, but has completed the following conditions of their probation: \_\_\_\_\_
- Your request for information regarding the above incident is acknowledged. However, pursuant to Section 68152 of the Government Code of California, all of our criminal records that were filed and concluded prior to the year 2009, have been destroyed.
- After a search of the Criminal Index for the period beginning in November, 1973 to \_\_\_\_\_ 20\_\_\_\_, no conviction was found for the above-named person at any Superior Court of California, County of Alameda location. (For searches prior to the above mentioned time period, please contact the originating court.)

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on May 6, 2010 at Oakland, California.

By: [Signature] Deputy Clerk  
 Type Name: Debra Wade



# Appendix C

## TWIC Letter of Initial Disqualification Explains What Information on FBI Report is Potentially Disqualifying

U.S. Department of Homeland Security  
Arlington, VA 22202



Transportation  
Security  
Administration

April 27, 2009

[REDACTED]

**Re: Initial Determination of Your TWIC Application**

Dear [REDACTED]:

The Transportation Security Administration (TSA) has received your application for a Transportation Worker Identification Credential (TWIC). Based on the information you provided in your application and the results of various portions of the eligibility assessment, TSA has determined that you may not be eligible for a TWIC. This letter is not a final decision. Instructions for preparing a response to this letter are included. TSA must receive your response within 60 calendar days of the date of this letter, unless you request and TSA grants an extension of time to respond. If you do not provide a response to TSA within 60 calendar days from the date of this letter or request an extension, TSA's decision regarding your eligibility assessment will automatically become final and you will be disqualified from holding a TWIC.

### RESULTS OF TSA'S INITIAL ELIGIBILITY ASSESSMENT:

After conducting the assessment, TSA has made an initial decision that you may not be eligible for a TWIC. TSA has determined the following:

A review of your criminal history record shows that you were convicted of a potentially disqualifying criminal offense, as set forth in Title 49, Code of Federal Regulations (C.F.R.), 1572.103(a) and (b), Grand Theft of a Firearm, in [REDACTED], on or about [REDACTED] 2002. In addition, your criminal history record shows that you were arrested, indicted, or otherwise have open dispositions for potentially disqualifying criminal offenses, False Check Records or Criminals' Unauthorized Use of Access Account Information Obtaining Credit with False Identification and Assault with a Deadly Weapon in [REDACTED], on or about [REDACTED] 2005. If you believe that this information is not correct, you should provide TSA with all documentation or information that you believe TSA should consider in reviewing your application, such as written proof that you were found not guilty of these offenses, convicted of misdemeanor or non-disqualifying offenses, or the charges were dismissed. If you do not provide TSA with such information, it is unlikely that TSA will be able to approve your application.

You are disqualified from holding a TWIC if you were convicted of a disqualifying offense, as set forth in 49 C.F.R. 1572.103(b) (see enclosure), within the last seven years; or you were released from jail, prison, or other correctional institution after being sentenced for this offense within the last five years. In addition, as set forth in 49 C.F.R. 1572.103(d), when records indicate an arrest for a disqualifying offense without indicating a disposition, a TWIC applicant must clear the open disposition or be disqualified. If you were convicted of the above open criminal dispositions, you are disqualified from holding a TWIC if you were convicted within the last seven years; or you were released from jail, prison, or other correctional institution after being sentenced for these offenses within the last five years. If you were convicted of a permanently disqualifying offense, you are disqualified from holding a TWIC regardless of when you were convicted or released from jail, prison, or other correctional institution.

You have not yet been disqualified from holding a TWIC. This letter is an Initial Eligibility Assessment which notifies you of the decision made by TSA. The enclosure provided with this letter explains all options available to you when responding to TSA. You have the option to file an appeal or waiver, request a copy of the materials TSA used as the basis for making its initial decision, or request an extension of time so that you may gather additional materials for your response. This letter is issued in accordance with 49 C.F.R. 1515.5.

**INSTRUCTIONS TO SEND INFORMATION TO TSA**

The TSA TWIC Request Cover Sheet must be attached to the front of all documentation and information being submitted to TSA. This cover sheet can be found at the end of the enclosed attachment and includes your full name, mailing address, daytime telephone number, and case number. Please change any information on the cover sheet that is incorrect and indicate the type of request you are submitting to TSA by selecting the appropriate request option(s).

All correspondence must be mailed via U.S. Postal Service to the address below:

**Transportation Security Administration  
TSA TWIC Processing Center  
P.O. Box 8118  
Fredericksburg, VA 22404-8118**

Do not use any overnight mail service, other than the U.S. Postal Service (because other mail service cannot deliver to a P.O. Box). Use of the enclosed cover sheet and mailing correspondence to the above address is the fastest means of communicating with TSA.

You are not required to obtain an attorney. The enclosed attachment provides information on how to request releasable documents from TSA, submit an appeal or waiver request, and/or request an extension of time.

For your information, the TWIC program is a vital security measure to help ensure that individuals who pose a threat do not gain unescorted access to secure areas of the nation's maritime transportation system. TWIC was established by Congress through the Maritime Transportation Security Act of 2002 (MTSA) and is implemented by regulations administered by TSA and the U.S. Coast Guard. Applicable MTSA regulations regarding assessments may be found at 49 C.F.R. Parts 1515 and 1572, which are available on TSA's website, [www.tsa.gov](http://www.tsa.gov). A TWIC will not be issued if TSA determines that an individual does not meet the standards described in 49 C.F.R. 1572.5.

Again, this letter is intended to notify you that TSA requires more information in order to complete your application. TSA must receive your response within 60 calendar days of the date of this letter, unless you request and TSA grants an extension of time to respond. If you do not provide a response to TSA within 60 calendar days from the date of this letter or request an extension, TSA's decision regarding your eligibility will automatically become final and you will be disqualified from holding a TWIC. Please review the enclosure which provides detailed instructions on how to submit information to TSA. If you have any questions, please correspond in writing to the address provided.

Sincerely,



**Robert Freeman**  
Director, Adjudication Center  
Office of Transportation Threat  
Assessment and Credentialing

Enclosure

---

# Endnotes

---

- 1 *Menard v. Mitchell*, 328 F. Supp. 718, 727 (D.C. Cir. 1971).
- 2 *Id.*
- 3 The FBI's identification records, commonly referred to as rap sheets, an abbreviation for "record of arrest and prosecution," are a record of information taken from fingerprint submissions retained by the FBI. The record includes "the date of arrest or the date the individual was received by the agency submitting the fingerprints, the arrest charge(s), and the arrest disposition(s) if known." (emphasis added). U.S. Dept. of Justice, Federal Bureau of Investigation, *Guide for Obtaining Your Identification Record*, available at <http://www.fbi.gov/about-us/cjis/nics/general-information/cgbrochure>.
- 4 Throughout this report the terms "rap sheet", "background check", and "criminal history information" are used interchangeably.
- 5 Fingerprint-based FBI background checks for employment and licensing purposes use the Interstate Identification Index ("III") system to locate criminal history information. The III system is an index system of all persons arrested for felonies and serious misdemeanors under state or federal law. Fingerprints submitted for an employment background check are matched against the records maintained by the FBI and, if an entry of an arrest is located, the FBI will be "pointed" to the database that maintains the record. Most records are maintained by the FBI in the III database. However, 17 states—comprising less than 30 percent of the total U.S. population—have opted to become National Fingerprint File ("NFF") states (CO, FL, GA, HI, ID, KS, MD, MN, MO, MT, NC, NJ, OK, OR, TN, WV, WY). When an individual has a record in an NFF state, the state reports the initial arrest to the FBI but maintains record of all subsequent activity, including dispositions, in the state repository. 42 U.S.C. § 14611 et seq. See U.S. Dept. of Justice, Federal Bureau of Investigation, *The National Crime Prevention and Privacy Compact of 1998*, available at <http://www.fbi.gov/about-us/cjis/cc>. And see SEARCH, *Interstate Identification Index (III)*, available at <http://www.search.org/programs/policy/iii/>.
- 6 U.S. Dept. of Justice, Office of the Attorney General, *The Attorney General's Report on Criminal History Background Checks* (June 2006) at 3, available at [http://www.justice.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.justice.gov/olp/ag_bgchecks_report.pdf) [hereinafter *Attorney General's Report*].

The 2006 report is the latest information that is publicly available regarding the percent of arrest records in the FBI database missing disposition information. Neither the FBI nor the Attorney General have provided an updated statistic for the percent of arrest records

maintained in the Interstate Identification Index that lack final disposition information since the 2006 Attorney General's report.

In 2011, in response to a Congressional Inquiry by Senator Franken, the FBI reported that it "does not collect information regarding the number of criminal history record checks that contain incomplete state criminal history record information." The FBI further stated that it does not collect information responsive to Senator Franken's requests for information regarding incomplete FBI records for noncriminal justice purposes and employment and licensing purposes. U.S. Dept. of Justice, Office of Legislative Affairs, *Responses of the Federal Bureau of Investigation to Questions for the Record Arising from the March 30, 2011 Hearing Before the Senate Committee on the Judiciary Regarding FBI Oversight* (Dec. 6, 2011) at 8-9 [hereinafter *Questions for the Record*].

In June 2013, NELP submitted a Freedom of Information Act (FOIA) Request formally requesting the percent of arrest records missing disposition information in the III. In response, the FBI stated that the FOIA "does not require agencies to answer inquiries, create records, conduct research, or draw conclusions." Because the FBI does not maintain this statistic they were unable to provide it to NELP in response to the FOIA request. David M. Hardy, Section Chief, Record/Information Dissemination Section, Records Management Division, Federal Bureau of Investigation (July 1, 2013), letter to Madeline Neighly, Letter on file with NELP.

See U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2010*, available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/237753.pdf> (providing data on state criminal history repositories and percent of arrests in database that have final dispositions recorded) [hereinafter *State Survey*].

- 6 The FBI has provided data on the number of criminal background checks produced for noncriminal justice purposes from mid-Fiscal Year 2001 through Fiscal Year 2012. The chart produced by the FBI includes the number of rap sheets produced for state "miscellaneous applicant" and "user fee" submissions as well as "federal user fee" and "federal no charge" submissions. Because the "federal user fee" submissions number includes requests for non-employment purposes such as immigration, we have not included those numbers in our calculations. As such, the number of criminal background checks provided for employment and licensing purposes highlighted in this report—16.9 million for Fiscal Year 2012—likely underrepresents the total number produced for employment and licensing.

- Email correspondence. Stephen G. Fischer, Jr., Chief, Multimedia Productions, Federal Bureau of Investigation, Criminal Justice Information Services Division, "Re: FOIA Request" (June 5, 2013), email with attachment to Madeline Neighly. Email on file with NELP. Email correspondence. Stephen G. Fischer, Jr., Chief, Multimedia Productions, Federal Bureau of Investigation, Criminal Justice Information Services Division, "Re: FOIA Request" (June 6, 2013), email to Madeline Neighly. Email on file with NELP. (together, hereinafter Fischer emails).
- 7 For brevity, we will use the term "background checks for employment" throughout this report to denote background checks used for both employment and licensing purposes.
- 8 Exec. Order No. 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953).  
The Executive Order does allow the Office of Personnel Management, in its discretion, to authorize lesser investigations for per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside of the United States.
- 9 At least as early as 1950, if not before, persons convicted of a "criminal offense involving dishonesty or a breach of trust" were barred from employment at a federally insured bank. The law prohibiting employment did not, however, authorize access to the FBI records. Pub. L. No. 81-979, 64 Stat. 873 (Sept. 21, 1950).
- 10 See *Menard v. Mitchell*, 328 F. Supp. 718 (D.C. Cir. 1971).
- 11 Pub. L. No. 92-185 (15 Dec. 1971), available at <http://www.gpo.gov/fdsys/pkg/STATUTE-85/pdf/STATUTE-85-Pg642.pdf>.
- 12 *Id.*  
Public Law 92-185 was enacted in 1971. The following year, Public Law 92-544 was enacted, superseding Public Law 92-185, and is still in effect. See Pub. L. No. 92-544, 86 Stat. 1115 (Oct. 25, 1972).
- 13 Certain FBI-approved private companies, called "channelers," are permitted to assist with the expediting of criminal history information. Importantly, channelers are prohibited from processing requests for FBI rap sheets for use in employment and licensing decisions within the United States. U.S. Dept. of Justice, Federal Bureau of Investigation, *Criminal History Summary Checks: FBI-Approved Channelers*, available at <http://www.fbi.gov/about-us/cjis/criminal-history-summary-checks/fbi-approved-channelers>.  
In addition, federal regulation permits criminal justice agencies and agencies performing criminal justice dispatching functions, data processing, and information services to contract with private companies for access and dissemination of FBI records. 28 C.F.R. § 20.33(a)(7).
- 14 42 U.S.C. § 5119a.
- 15 28 U.S.C. § 534 (2002) Note (nursing and home health care industry).
- 16 In 1986, the Atomic Energy Act of 1954 was amended to require fingerprint background checks for all individuals permitted unescorted access to atomic energy facilities. 42 U.S.C. § 2069.
- 17 42 U.S.C. § 14631 et seq.
- 18 U.S. Dept. of Justice, Federal Bureau of Investigation, *Compact States and Territories as of April 10, 2013*, available at [http://www.fbi.gov/about-us/cjis/cc/quick-links-to-maps/122010\\_updated\\_map.pdf](http://www.fbi.gov/about-us/cjis/cc/quick-links-to-maps/122010_updated_map.pdf).
- 19 U.S. Dept. of Justice, Federal Bureau of Investigation, *Interstate Identification Index (III), National Fingerprint File (NFF)* (June 2, 2013), available at <http://www.fbi.gov/about-us/cjis/cc/quick-links-to-maps/IIImaps>.
- 20 Homeland Security Presidential Directive 12 ("HSPD-12") requires the development and implementation of a mandatory, government-wide standard form of identification for Federal employees and contractors. U.S. Dept. of Homeland Security, *Homeland Security President Directive 12: Policy for a Common Identification Standard for Federal Employees and Contractors* (Aug. 27, 2004), available at <https://www.dhs.gov/homeland-security-presidential-directive-12>.  
HSPD-12 urges agencies to receive National Agency Checks with Written Inquires ("NACI") prior to issuing the new credential, but permits issuance based on the FBI National Criminal History Check if the NACI is not received within five days. Credentials are required for all employees and contractors with more than intermittent access to federally controlled facilities, including federally owned buildings or leased spaces, grounds, and approaches, when any portion is covered by the Directive, federally controlled commercial spaces (even those shared with non-government tenants), government-owned contractor-operated facilities, and facilities under a management and operating contract. U.S. Executive Office of the President, *Memorandum for the Heads of All Departments and Agencies M-05-24* (Aug. 5, 2005), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-24.pdf>.
- 21 Press Release, Congressman Doyle, "Congressman Doyle Calls for Review of Homeland Screening Process," (Aug. 3, 2006).
- 22 Testimony of Maurice Emsellem, *Hearing Before the U.S. House of Representatives, Judiciary Committee, Subcommittee on Crime, Terrorism & Homeland Security* (Apr. 26, 2007) at 5, available at [http://nelp.3cdn.net/09844c01251e45bbf4\\_6gm6li9ld.pdf](http://nelp.3cdn.net/09844c01251e45bbf4_6gm6li9ld.pdf).  
See Paula Reed Ward, *Homeland Security Clears Cafeteria Workers After a Puzzling 2-Week Hiatus: Two Women Allowed Back on the Job Tuesday*, *Pittsburgh Post-Gazette* (July 18, 2006), available at <http://www.post-gazette.com/stories/local/uncategorized/homeland-security-clears-cafeteria-workers-after-puzzling-2-week-hiatus-442480/>.
- 23 *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct*

- Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).
- 24 46 U.S.C. § 70101 et seq.
- 25 28 U.S.C. § 534 Note (private security officer employment authorization act).
- 26 42 U.S.C. § 5119a(a)(1).
- 27 42 U.S.C. § 5119a Note (pilot program for national criminal history background checks and feasibility study).
- 28 42 U.S.C. § 16962.
- 29 12 U.S.C. § 1829, 15 U.S.C. § 78q.
- 30 The list of federal statutes authorizing fingerprint checks for noncriminal justice purposes, current to 2006, was published as Appendix 1 of *The Attorney General's Report on Criminal History Background Checks*. Attorney General's Report, *supra* note 5, at 137.
- 31 12 U.S.C. § 5104.
- 32 According to a 2010 U.S. Department of Justice survey, states require noncriminal justice fingerprint-based background checks for the following positions: nurses/elder caregivers (41 jurisdictions); daycare providers (44 jurisdictions); caregivers—residential facilities (40 jurisdictions); school teachers (50 jurisdictions); nonteaching school employees, including volunteers (43 jurisdictions); volunteers working with children (31 jurisdictions); prospective foster care parents (48 jurisdictions); prospective adoptive parents (49 jurisdictions); relative caregivers (22 jurisdictions); and hazardous materials licensees (22 jurisdictions). State Survey, *supra* note 5, at 10.
- 33 Email correspondence. Response from Stephen G. Fischer, Jr., Chief, Multimedia Productions, Federal Bureau of Investigation, Criminal Justice Information Services Division, to Linda Paul, WBEZ Radio (Aug. 2, 2012). Email on file with NELP.
- In addition, the National Child Protection Act/Volunteers for Children Act further allows state agencies to access FBI background checks without requiring a specific state statute. 42 U.S.C. § 519a.
- 34 Fischer emails, *supra* note 6.
- 35 *Id.*
- 36 U.S. Dept. of Homeland Security, *TWIC Dashboard* (May 2013).
- 37 Attorney General's Report, *supra* note 5, at 3.
- 38 A 2006 Bureau of Justice Statistics study of the nation's 75 largest counties, comprising 37 percent of the U.S. population, found that 32 percent of all felony arrests do not lead to conviction. Thomas Cohen and Tracy Kyckelhan, U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2006 (2010)* at 1, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluco6.pdf>.
- 39 Of the defendants charged with a felony offense and later convicted, 72 percent were convicted of the original felony while the remaining 28 percent were convicted of other felonies or misdemeanors. *Id.* at 10-11.
- 40 Nationwide, law enforcement personnel made an estimated 12,408,899 arrests in 2011. Importantly, because a person may be arrested multiple times during a year, the Uniform Crime Reporting arrest figures do not reflect the number of individuals who have been arrested but rather the number of times that persons are arrested, as reported by law enforcement agencies. U.S. Dept. of Justice, Federal Bureau of Investigation, *Uniform Crime Report, Crime in the United States 2011*, at table 29, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-29>.
- 41 See *supra* note 5.
- 42 Fischer emails, *supra* note 6.
- 43 See Michelle Natividad Rodriguez and Maurice Ermstlem, *65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment (2011)*, available at [http://www.nelp.org/page/-/SCLP/2011/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf).
- 44 Last names have been abbreviated to preserve anonymity.
- 45 28 C.F.R. § 20.37.
- 46 *Id.*
- 47 *Menard v. Saxbe*, 498 F.2d 1017, 1026 (D.C. Cir. 1974).
- 48 *Id.*
- In 1976, this same court noted that almost 70 percent of the FBI's criminal records contained at least one arrest without a final disposition. *Tartion v. Saxbe*, 407 F. Supp. 1083, 1084 (D.C. Cir. 1976).
- 49 28 C.F.R. § 20.21(a)(1).
- 50 State Survey, *supra* note 5, at Table 1.
- 51 *Id.*
- 52 See Attorney General's Report, *supra* note 5, at 9 (calling for a new commitment to improving the completeness of records held by the FBI and state record repositories, including an assessment of the funds necessary for such improvements).
- 53 Since 1995, more than \$562 million in direct awards and technical assistance has been granted to states and localities to assist with improving the quality, timeliness, and immediate accessibility of criminal history records, including disposition information, under the National Criminal History Improvement Program ("NCHIP"). U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *NCHIP Funding for 1995-2012*, available at <http://www.bjs.gov/index.cfm?ty=tp&tid=471#Funding>.

Recognizing the lack of updates and state criminal disposition records available through the National Instant Criminal Background Check System ("NICS") and the tragedy that can unfold when ineligible firearms purchasers are not accurately screened, Congress passed the NICS Improvement Amendments Act of 2007. The law authorized additional grants to state and Native American tribal governments that could be used for "supply[ing] accurate and timely information to the Attorney General concerning final dispositions of criminal records to databases accessed by NICS." 18 U.S.C. § 922 Note (NICS Improvement Amendments Act of 2007).

Recently, the Bureau of Justice Assistance awarded an 18-month grant worth \$3.5 million to the National Center for State Courts to fund the creation of a customizable toolkit for states to use to improve the reporting of criminal dispositions and arrest warrants from the courts to the state criminal history repositories. See *Warrant & Disposition Toolkit*, available at <http://www.wdntoolkit.org/>.

54 The FBI has an interagency task force dedicated to identifying problem areas in states' disposition reporting and methods to improve the systems, as well as a CJIS Advisory Policy Board Disposition Task Force. See Daniel D. Roberts, Assistant Director, Criminal Justice Information Services Division, F.B.I., *Letter to the Editor: Reliability of F.B.I. Data*, *New York Times* (June 7, 2012), available at <http://www.nytimes.com/2012/06/08/opinion/108fbi.html>. See also Powerpoint Presentation by Travis L. Olson, Disposition Initiative Manager, FBI CJIS Division, "CJIS Advisory Policy Board: Disposition Task Force" (2011 Winter), available at <http://www.search.org/files/pdf/OLSON.pdf>.

55 *Attorney General's Report*, *supra* note 5, at 105.

56 *Id.* at 100.

57 *Johnson v. Locke*, Case No. 10-cv-3105 (filed Aug. 5, 2010, S.D.N.Y.) First Amended Complaint at 23-25.

58 See Daniel J. Derksen and Ellen-Marie Whelan, *Closing the Health Care Workforce Gap: Refarming Federal Health Care Workforce Policies to Meet the Needs of the 21st Century* (Dec. 2009), available at [http://www.americanprogress.org/issues/2010/01/pdf/health\\_care\\_workforce.pdf](http://www.americanprogress.org/issues/2010/01/pdf/health_care_workforce.pdf); Anthony P. Carnevale, et al., *Healthcare* (June 2012), available at <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/Healthcare.FullReport.090712.pdf>; Annalyn Kurtz, *Truckers Face Big Labor Shortages*, *CNN Money* (June 13, 2013), available at <http://money.cnn.com/2013/06/13/news/economy/trucker-shortage/index.html>.

59 *TWIC Dashboard*, *supra* note 36.

60 Email correspondence, Cristin Finkel, Transportation Security Administration, Office of Security Policy & Industry Engagement, Maritime & Surface Credentialing, "Re: HME Dashboard" (June 11, 2013), email to Madeline Neighly. Email on file with NELP.

61 U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq., No. 925.002 (Apr. 25, 2012) at 10, available at [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf) [hereinafter *EEOC Guidance*].

62 42 U.S.C. § 2000e et seq.

63 See *EEOC Guidance*, *supra* note 61.

64 These three factors were first enumerated by the Eighth Circuit in a 1975 decision, *Green v. Mo. Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977). In its 2012 updated guidance on the use of arrest and conviction records in employment decisions, the EEOC reaffirmed the use of the Green factors and further explained possible factors to consider during the individualized assessment. See *EEOC Guidance*, *supra* note 61, at 10-20.

65 *EEOC Guidance*, *supra* note 61, at 13.

66 U.S. Dept. of Justice, Federal Bureau of Investigation, *Uniform Crime Report, Crime in the United States 2011*, at table 43A, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-43> [hereinafter *Uniform Crime Report*].

67 U.S. Census Bureau, *The Black Population: 2010* (Sept. 2011) at 3, available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

68 U.S. Census Bureau, *The White Population: 2010* (Sept. 2011) at 3, available at <http://www.census.gov/prod/cen2010/briefs/c2010br-05.pdf>.

69 *Uniform Crime Report*, *supra* note 66.

70 *Id.*

71 28 C.F.R. § 20.32(a).

72 28 C.F.R. § 20.32(b).

73 In September 2006, the FBI released notice of its proposal to amend part 20 of its regulations. The proposed amendment would authorize the reporting of all juvenile and adult non-serious offenses on FBI criminal background checks conducted for employment and licensing purposes. 71 Fed. Reg. 52302 (Sept. 5, 2006).

74 Congresswoman Maxine Waters and Congressman Bobby Scott, Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security, submitted a letter requesting a delay of the issuance of the proposed regulation in order to allow for Congressional oversight. Letter to Alberto Gonzalez, Attorney General, U.S. Dept. of Justice, from Maxine Waters and Robert "Bobby" Scott, Members of Congress (Mar. 23, 2007), letter on file with NELP.

In addition, joint comments in opposition were submitted by a dozen union and labor rights and civil rights organizations. American Civil Liberties Union, et al., *Joint Comments on Proposed Regulation Expanding FBI Rap Sheets to Include "Non-Serious" Offenses for*

- Employment and Licensing Purposes (Nov. 6, 2006), letter on file with NELP.
- 75 *Questions for the Record*, *supra* note 5, at 9.
- 76 See Maurice Emsellem et al., *A Scorecard on the Post-9/11 Port Worker Background Checks: Model Worker Protections Provide a Lifeline for People of Color, While Major TSA Delays Leave Thousands Jobless During the Recession* (July 2009), available at <http://www.nelp.org/page/-/SCLP/PortWorkerBackgroundChecks.pdf>.
- 77 *Id.* at 4.
- 78 *Id.*
- 79 As of May 19, 2013, initial disqualification letters have been sent to 120,224 TWIC applicants by TSA, but only 68,864 appeals and waivers have been requested. *TWIC Dashboard*, *supra* note 36.
- 80 Emsellem, *supra* note 76, at 4.
- 81 Name has been changed to protect the identity of the worker.
- 82 28 C.F.R. § 50.12(b).
- 83 5 U.S.C. § 552a(d).
- 84 Fischer emails, *supra* note 6.
- 85 *Questions for the Record*, *supra* note 5, at 8.
- 86 *Id.* at 10.
- 87 *Id.*
- 88 *Id.*
- 89 Ms. Vanderpool was successfully represented by the ACLU of Michigan in her claim against the Michigan Department of Licensing and Regulatory Affairs and the Michigan Department of Community Health. In addition, the ACLU of Michigan assisted Ms. Vanderpool in correcting her FBI record so that she would be able to again find work in her chosen field.
- 90 46 U.S.C. § 70105(c)(1).
- 91 49 C.F.R. § 1515.7.
- 92 49 C.F.R. § 1515.5.
- 93 49 C.F.R. § 1515.5(b)(1).
- 94 46 U.S.C. § 70105(c)(1)(C).
- 95 Client's last name has been abbreviated to preserve anonymity.
- 96 *TWIC Dashboard*, *supra* note 36.
- 97 *Id.*
- 98 TSA has sent 120,224 initial disqualification letters since the October 2007 inception of the TWIC program. *Id.*
- 99 *Questions for the Record*, *supra* note 5, at 17.
- 100 5 C.F.R. § 731.
- 101 Agencies may perform background checks for non-competitive service positions and competitive service positions for which an agency has assumed investigative responsibility by law or by agreement. Exec. Order No. 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953).
- 102 OPM Federal Investigative Services, *Requesting OPM Personnel Investigations* (April 2012) at 3, available at <http://www.opm.gov/investigations/requesting-investigation-copies/requesting-opm-personnel-investigations.pdf>.
- 103 On September 14, 2009, NELP submitted a Freedom of Information Act ("FOIA") request to OPM seeking information regarding criminal background check investigations undertaken by the federal government. NELP requested any information documenting the number of criminal background checks requested by each federal agency pursuant to 5 C.F.R. § 731 to which OPM replied that the agency "does not maintain records responsive to this request." OPM did provide information regarding criminal background check investigations performed by the agency between January 1, 2009 and October 31, 2009. Of the 1,135,816 investigations performed, 145,730 or approximately 13 percent produced a result on the FBI Identification Record. Correspondence, Timothy A. Forberger, Chief, FOI/PA Office, Office of Personnel Management (Mar. 4, 2012) to Maurice Emsellem. Letter on file with NELP.
- 104 Email correspondence, Robert Shriver, Deputy General Counsel for Policy, Office of Personnel Management, "Re: FBI Records" (May 21, 2012), email to Madeline Neighly. Email on file with NELP.
- 105 *Id.*
- 106 Federal, state, and local courts and agencies that perform the administration of criminal justice must make available criminal history record information regarding individuals under investigation by OPM for the purpose of determining eligibility for access to classified information, assignment or retention in sensitive national security duties, acceptance or retention in the armed forces, or appointment, retention, or assignment to a position of public trust or a critical or sensitive position while either employed by the Government or performing a Government contract. 5 U.S.C. § 9101.
- Executive Order 10450 requires a fingerprint-based FBI records check of all civilian officers and employees in any department or agency of the Government.
- 107 Shriver, *supra* note 104.
- 108 OPM is authorized to send the disposition information it uncovers to the FBI to correct or update arrest records under a Privacy Act routine use. See 5 U.S.C. § 552a(b)(3). National Crime Prevention and Privacy Compact Council, *Compact Council Meeting* (Nov. 14-15, 2012) at Topic #22, available at <http://www.fbi.gov/about-us/cjis/cc/library/compact-council-meeting-november-14-15-2012-minutes>.
- 109 Shriver, *supra* note 104.

- 
- 110 *Questions for the Record*, *supra* note 5, at 17.
- 111 Email correspondence. Julie Basco, Chief, Bureau of Criminal Information and Analysis, Cal. Dept. of Justice, "Re: Doto Question" Attachment (June 6, 2013), email to Madeline Neighly. Email on file with NELP.
- 112 From July 2011 through April 2012, the California Department of Justice processed more than one million FBI background checks for employment and licensing purposes, with the following occupational categories subject to the most screening: 157,151 for school employees and bus drivers; 145,364 for Department of Social Services; 61,221 for security-related positions; 59,913 for healthcare-related positions, 59,606 for law enforcement-related positions; and 51,765 for youth-related positions. *Id.*
- 113 Cal. Penal Code § 11105(t).
- 114 Cal. Penal Code § 11105(k)-(m).
- 115 Email correspondence. Julie Basco, Chief, Bureau of Criminal Information and Analysis, Cal. Dept. of Justice, "Re: Questions about CA and FBI rap sheets" (Mar. 19, 2012), email to Madeline Neighly. Email on file with NELP.
- 116 *Id.*
- 117 *Id.*
- 118 *Attorney General's Report*, *supra* note 5, at 105.
- 119 See U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Background Checks for Firearms Transfers, 2009* (Oct. 2010), available at <http://www.bjs.gov/content/pub/html/bcft/2009/bcft09st.pdf>.
- 120 18 U.S.C. § 922(d).
- 121 See Ronald J. Frandsen, *Enforcement of the Brady Act, 2008: Federal and state investigations and prosecutions of firearm applicants denied by a NICS check in 2008* (June 2010), available at <https://www.ncjrs.gov/pdffiles1/bjs/231052.pdf>.
- 122 18 U.S.C. § 922(t)(1)(B)(i); 28 C.F.R. § 25.6(c)(iv)(B).
- 123 National Instant Criminal Background Check System Act, 1993, Pub. L. No. 103-159, 107 Stat. 1541 (Nov. 30, 1993).
- 124 U.S. Dept. of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *National Instant Criminal Background Check System (NICS) Operations*, (2011) at 8, available at [http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011/at\\_download/file](http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011/at_download/file) [hereinafter *NICS Operations*].
- 125 *Id.* at 13.
- 126 *Questions for the Record*, *supra* note 5, at 13.
- 127 *Id.*
- 128 *Id.* at 14.
- 129 *NICS Operations*, *supra* note 124, at 8.
- 130 U.S. Dept. of Justice, Federal Bureau of Investigation, *Today's FBI: Facts and Figures 2010-2011*.
- 131 *Attorney General's Report*, *supra* note 5, at 108.
- 132 *NICS Operations*, *supra* note 124, at 19.
- 133 *Questions for the Record*, *supra* note 5, at 15.
- 134 *Id.*
- 135 As described in section IX, *supra*, we estimate that more than 600,000 workers a year are potentially prejudiced in their job search as a result of the lack of accurate and complete information reported by the FBI. If the FBI were able to obtain missing disposition information in 65 percent of those cases—as they are able to do during the Brady gun check investigation—390,000 of those 600,000 workers may be spared the negative impact of an incomplete or inaccurate record.
- 136 18 U.S.C. § 922(g).
- 137 Editorial, *Check it Again*, *New York Times* (May 26, 2010), available at <http://www.nytimes.com/2010/05/27/opinion/27thu3.html>.
- 138 15 U.S.C. § 1618 et seq.