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**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

R.12-12-011

**REPLY COMMENTS OF SAN FRANCISCO INTERNATIONAL AIRPORT
AND THE SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY
TO ASSIGNED COMMISSIONER'S RULING INVITING/INSTRUCTING
PARTY COMMENTS ON BACKGROUND CHECKS OF PROSPECTIVE
TRANSPORTATION NETWORK COMPANY DRIVERS**

Edward D. Reiskin
Director of Transportation
San Francisco Municipal Transportation Agency
One South Van Ness Avenue, 7th Floor
San Francisco, CA 94013
(415) 701-4720

Ivar C. Satero
Airport Director
San Francisco International Airport
International Terminal, 5th Floor
P.O. Box 8097
San Francisco, CA 94128
(650) 821-5006

I. INTRODUCTION

The City urges the Commission to require TNC drivers to undergo fingerprint-based criminal history background checks just as San Francisco taxi drivers do. Many parties supporting name-based criminal history background checks concede they are not 100% accurate. They are right. As we note in our Opening Comments, the commercial background investigation firm that Rasier-CA (“Uber”) uses failed to detect criminal histories of drivers who had disqualifying criminal histories, and so disqualified drivers nevertheless were approved by Uber to drive members of the public, including unaccompanied minors.¹ Many of the parties also point to flaws in the criminal history records maintained by the California Department of Justice (“CA DOJ”) and the Federal Bureau of Investigation (“FBI”). That is why we urge the Commission to adopt a hybrid solution, employing both fingerprint-based and name-based criminal history information.

II. SUMMARY OF COMMENTS

Multiple parties commented that name-based background checks are simply superior to the information maintained by the CA DOJ and the FBI, and that the data maintained by the CA DOJ and FBI was intended to help investigate criminal activity, not screen individuals for employment and licensing purposes. But name-based background investigations alone fail to adequately screen out individuals who have no business driving unsuspecting members of the public. We ask the Commission to consider the following points.

First, although parties such as Uber assert the commercial firm it relies on uses a “rigorous background check process that ensures public safety,” it failed to detect the disqualifying criminal histories of numerous drivers identified in the unfair business practices lawsuit filed by the District Attorneys of Los Angeles and San Francisco (the “DA Lawsuit”).²

Second, the argument advanced by TNCs and other commenters that fingerprint-based background checks will have a disparate impact on people of color is without merit. California law

¹ In its Opening Comments, the City erroneously stated that two Uber drivers who had previous convictions for sex crimes involving minors provided 8,870 rides to unaccompanied minors. (*See City’s Opening Brief*, at 10.) In fact, these two drivers gave 8,870 rides to consumers, “including unaccompanied children.” (*See Appendix A to City’s Opening Comments*, at 28-29.)

² *See Rasier-CA, LLC’s Opening Comments*, page 1; and *Appendix A to SFO/SFMTA’s Opening Comments*.

prohibits the disclosure of arrest information from both the CA DOJ and the FBI databanks unless corresponding disposition information is provided.³

Third, the California State Legislature recently passed AB 1289 (Cooper) which was introduced in response to the DA Lawsuit in an attempt to ensure public safety with respect to TNC driver criminal background checks.⁴ If signed into law by the Governor, this bill would establish baseline requirements for such background checks. AB 1289 is directed at TNCs, not the Commission. Nothing in AB 1289 prohibits the Commission from imposing additional background check procedures such as requiring fingerprinting of potential TNC drivers.

Finally, the Commission has the difficult obligation of protecting public safety without over-regulating the TNC industry. The City respectfully submits that the existing regulations are in need of rebalancing for the sake of public safety. Adopting a hybrid solution will not gut TNC business models, stifle innovation or be the death knell of the “nascent,” multi-billion dollar TNC industry. The 35,000 fingerprinted Uber drivers in New York City attest to that.⁵

III. COMMERCIAL NAME-BASED CRIMINAL BACKGROUND CHECKS FAIL TO IDENTIFY POTENTIAL TNC DRIVERS WHO HAVE SERIOUS CRIMINAL HISTORIES

After receiving the records of Uber drivers as part of discovery in the DA Lawsuit, the People identified 25 examples of drivers who passed Uber’s background check but, nevertheless, had disqualifying criminal convictions or were driving on suspended licenses. The criminal background check procedure that Uber used at the time, and continues to use, failed to identify criminal histories including convictions for murder, sex offenses, kidnapping, assault, robbery, burglary, fraud, and identity theft. Further, their driving records included convictions for driving under the influence, driving with a suspended license, and reckless driving.

³ See 11 C.C.R. §§721-724.

⁴ See “Uber and Lyft drivers could soon face tougher background checks, thanks to bill headed to Gov. Jerry Brown,” Los Angeles Times, 8/31/16; <http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-tighter-background-checks-for-uber-and-1472683639-htmlstory.html>

⁵ See <http://www.nyc.gov/html/tlc/html/industry/drivers.shtml>, and <http://money.cnn.com/2016/07/11/news/companies/uber-new-york-city-union/>

For example, Uber Driver #1 was convicted of second degree murder in Los Angeles in 1982 and was released on parole in 2008. When he applied to become an Uber driver, Driver #1 used a different name. Uber’s commercial background check firm stated Driver #1 had no known aliases. It therefore failed to detect the criminal history of Driver #1. Under California Civil Code § 1785.13(a)(6), consumer credit reporting agencies are prohibited from making a report of “records of ... conviction of a crime that, from the date of disposition, release, or parole, antedate the report by more than seven years.” Driver #1 was paroled in 2008. The commercial background report was generated in November 2014, and therefore was subject to consideration by Uber, had its background check firm been able to locate the criminal record. Until May 28, 2015, Driver #1 provided 1,168 rides to consumers.⁶

Uber Driver #2 was convicted of committing lewd or lascivious acts against a child under the age of 14 in 1999, and he was required to register as a sex offender in the State of California. However, because his name does not appear on the National Sex Offender Public Website (the “NSOPW”), the 2014 Uber background check did not uncover this prior conviction or his status as a registered sex offender. Until May, 2015, Uber Driver #2 provided 5,697 rides to Uber passengers, including unaccompanied children. According to the DA Lawsuit, a fingerprint-based criminal background check would have identified this driver’s criminal history since it identifies all sex offense convictions regardless of when they occurred and uses the National Sex Offender Registry.⁷

Uber Driver #4 had a conviction of felony kidnapping for ransom with a firearm in Los Angeles County in 1994. He was released from prison in 2013, applied to drive for Uber in 2015, and passed the Checkr background check, which did not find the Los Angeles County conviction because it only checked county-level records for San Bernardino, California and Middlesex, Massachusetts.⁸

⁶ See City’s Opening Comments, Appendix A, DA Lawsuit, at 27.

⁷ See *id.*, at 27.

⁸ See *id.*, at 28.

Uber Driver #10 was convicted of 14 counts of felony identity theft in 2011. After being released from incarceration, he applied for a commercial transportation company, but was rejected after a fingerprint-based background check. He then became an Uber driver.⁹

Uber Driver #11 was convicted of felony welfare fraud in 2009 and felony burglary in 2011, both of which are disqualifying offenses under Commission Decision 13-09-045. Nevertheless Uber's background check either failed to uncover these disqualifying crimes, or found them and brought Driver #11 on as a "driver partner" anyway.¹⁰

Because commercial name-based criminal background checks do not use an applicant's unique biometric identifier such as a fingerprint, they cannot ensure that the information obtained actually pertains to the applicant. Further, commercial background check companies, such as Checkr, cannot assert that they obtain the complete criminal history information for *any* applicant because private companies cannot access either the CA DOJ database or the FBI criminal database. Although Lyft argues that it is *possible* for an individual to pass a fingerprint-based criminal background check without ever submitting actual fingerprints and photo identification for verification, no actual evidence documenting such a situation is provided.¹¹

The San Francisco Municipal Transportation Agency (the "SFMTA"), which conducts fingerprint-based criminal background checks for taxi drivers, is unaware of *any* circumstance under which a taxi driver applicant has passed a fingerprint-based criminal background check under similar circumstances. However, there are instances where an applicant had to resubmit his or her fingerprints when requested to do so by CA DOJ. Further, the SFMTA is unaware of *any* situation in which the submission of fingerprint images of poor quality or with pressure induced distortions has resulted in the misidentification of a taxi driver applicant or his or her corresponding criminal history, nor has Lyft presented any evidence to support such an allegation.¹² Notwithstanding these facts and

⁹ See *id.*, at 31.

¹⁰ See *id.*, at 32.

¹¹ See Lyft's Opening Comments, page 6.

¹² In fact, the document submitted by Lyft states that "(l)aw enforcement agencies rely on standard, government issued photo identification when receiving fingerprints." See Lyft's Opening Comments, pages 15-16 and Rockey Decl., Exh. 8, at 5.

circumstances, TNC companies continue to assert that their background check procedures are “rigorous.”

IV. CALIFORNIA LAW REQUIRES THAT ARREST INFORMATION CAN ONLY BE RELEASED IF CORRESPONDING DISPOSITION INFORMATION IS PROVIDED

Lyft, Uber and other parties argue that fingerprint-based background checks have a disparate impact on people of color because they may include information of an arrest, but no corresponding disposition information. They are wrong, at least with respect to California.

The CA DOJ is prohibited from disclosing arrest information *unless* the record includes disposition information,¹³ and California law prohibits agencies and private corporations from using any record of arrest that did not result in a conviction as a factor in determining any condition of employment.¹⁴

Further, a series of Penal Code statutes require the CA DOJ, courts and law enforcement agencies to collect, maintain and promptly report certain criminal history information, including dispositions. Collectively, these statutes require, among other things, that: (1) police and sheriff departments make daily reports to CA DOJ of enumerated serious crimes and file disposition reports to CA DOJ and the FBI within 30 days of a transfer or release of an arrested person; (2) courts report case dispositions to CA DOJ within 30 days of the disposition date; and (3) the CA DOJ provide criminal history information to requesting agencies within 72 hours.¹⁵ State officers are presumed to follow the law in general,¹⁶ and to correctly maintain official records in particular.¹⁷

In attacking the accuracy of CA DOJ records, Uber refers to a class action suit, which alleges that 25,000 of the CA DOJ’s arrest records fail to specify that an individual was exonerated for the arresting charge.¹⁸ In fact, the case referenced is a class action petition for injunctive relief that alleges that three individuals – Doe, Roe and Poe – were unable to get the CA DOJ to correct RAP sheets with

¹³ See 11 C.C.R. §§721-724.

¹⁴ See Cal. Labor Code §432.7(a); see also *Gregory v. Litton Sys. Inc.*, 316 F.Supp. 401, 403 (C.D. Cal. 1970), modified on other grounds, 472 F.2d 631 (9th Cir. 1972).

¹⁵ See *People v. Martinez*, 22 Cal.4th 2nd 687 (2000).

¹⁶ See *Connerly v. Schwarzenegger*, 146 Cal.App.4th 739, 751 (2007).

¹⁷ See *People v. Martinez*, 22 Cal.4th 2nd 687 (2000), at 125.

¹⁸ See Uber’s Opening Comments, at 24-25.

erroneous dispositions. But this case is not evidence of widespread, faulty record keeping on the part of CA DOJ – at best, it alleges anomalies in a system that handles millions of records.

We urge the Commission to focus instead on the weight of California law, which (1) limits disclosure of RAP sheets to public agencies that require it for employment or license screening purposes, (2) prohibits the CA DOJ from disclosing arrest information to public agencies in the absence of a final disposition, and (3) requires prompt and thorough updating of criminal information by law enforcement and the courts. In California, these requirements apply equally to FBI records.

V. THE CPUC HAS AUTHORITY TO REQUIRE FINGERPRINT-BASED BACKGROUND CHECKS

Uber baldly asserts that “... no California or federal statute grants the Commission authority to require fingerprint-based background checks on TNC drivers.”¹⁹ Uber is wrong.

California Public Utilities Code § 5381 authorizes the Commission to “supervise and regulate every charter-party carrier of passengers in the state and [to do] all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction” so long as such actions are not inconsistent with the Charter Party Carriers Act. Consistent with § 5381, the Commission issued Decision 13-09-045, which set out regulations for the operation of TNCs in the state, including the requirement that certain criminal histories would disqualify an individual from driving for a TNC, and requiring TNCs to conduct criminal history background checks.

We anticipate that the TNCs and other parties may argue that AB 1289, which was passed by the Legislature on September 1, 2016, would be inconsistent with a Commission regulation requiring TNC drivers to undergo fingerprint-based background checks. That would be an incorrect interpretation of AB 1289.

If AB 1289 is signed into law by the Governor, TNCs could face stricter background check requirements before they could allow drivers to provide service. The bill reflects growing public concern regarding the safety of passengers using the ride services provided by TNCs, and would prohibit those companies from hiring drivers who are registered sex offenders, have been convicted of

¹⁹ See Uber’s Opening Comments, at 4.

violent felonies or domestic violence, or, within the last seven years, have a driving-under-the-influence conviction as well as other enumerated offenses. The bill's author, who served as a Captain in the Sacramento County Sheriff Department for thirty years, sponsored the legislation in response to the DA Lawsuit which was filed last year, and believes the measure "will help ensure the safety of passengers utilizing ride-hailing services".²⁰

On its face, AB 1289 articulates a requirement for TNCs. It does not limit the Commission's authority to set more rigorous standards. It is the floor, not the ceiling.

Citing to a 1997 Commission decision, Uber also argues that the Commission itself has determined that it lacks the authority to require charter-party carrier drivers to submit to a fingerprint-based background check.²¹ The Commission should disregard this assertion for two reasons: (1) an opinion rendered by commissioners in 1997 regarding their authority is not controlling on commissioners 19 years later; and (2) Penal Code § 11105(b)(10), together with Public Utilities Code § 5381 provide the statutory authority for the CA DOJ to furnish RAP sheets to the Commission, should the Commission require them.

Contrary to Uber's assertions, nothing requires state legislation expressly authorizing the California Public Utilities Commission to obtain criminal history information from the CA DOJ in order to carry out a CPUC regulation. The statutory authority for that already exists in Penal Code §11105(b)(10). If the Commission concludes that public safety is best protected by requiring thousands of TNC drivers to first have a fingerprint-based background check before driving millions of Californians, it could amend TNC regulations accordingly. In fact, SFMTA requires fingerprint background checks for taxi drivers, and so does the City of Los Angeles, but there is no special statute expressly authorizing CA DOJ to release RAP sheets to these local regulators. Rather, the agencies regulating the taxi industry in Los Angeles and San Francisco determined that public safety requires fingerprint-based background checks as a condition for taxi driver applicants to obtain a permit to drive members of the public. The Commission should do the same.

²⁰ See "Uber and Lyft drivers could soon face tougher background checks, thanks to bill headed to Gov. Jerry Brown," Los Angeles Times, 8/31/16; <http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-tighter-background-checks-for-uber-and-1472683639-htmstory.html>

²¹ See Uber's Opening Comments, at 4.

VI. CONCLUSION

The City respectfully submits that the existing regulations are in need of rebalancing for the sake of public safety. We believe that a hybrid solution will provide much needed public safety protections without unduly limiting the robust and profitable TNC industry.

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Respectfully submitted,

By: _____/s/
Ivar C. Satero
Airport Director
San Francisco International Airport

By: _____/s/
Edward D. Reiskin
Director of Transportation
San Francisco Municipal Transportation Agency