

**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 SAN
FRANCISCO MUNICIPAL TRANSPORTATION AGENCY TO PHASE III.B SCOPING
MEMO AND RULING OF ASSIGNED COMMISSIONER**

TRACK 1 – BACKGROUND CHECK REQUIREMENTS

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I. INTRODUCTION

The Commission should make public safety the highest priority for hiring TNC drivers by requiring fingerprint-based background checks to protect TNC customers and members of the public. There is no legitimate public safety reason to require otherwise. New York City has done so, and California should as well.¹ Uber's reported valuation is approximately \$50 billion.² Lyft's valuation is approximately \$6.9 billion - a \$2.4 billion increase over the prior year.³ In 2015, reportedly 166,000 TNC drivers drove for Uber in California.⁴ Approximately 100,000 drivers drive for Lyft.⁵ From 2012 to 2014, California had four of the country's top five fastest-growing metropolitan areas for TNC drivers.⁶ In San Jose, San Francisco, Los Angeles, and San Diego, the number of TNC drivers more than doubled over that four year period alone.⁷ Neither Uber nor Lyft are small, boutique companies that need to be protected from sensible government regulation. In reality, the TNC market is mature enough for the Commission to require the same criminal history background checks that taxi drivers in San Francisco and the City of Los Angeles are required to undergo.

II. SUMMARY OF COMMENTS

Uber and Lyft raise several objections to fingerprint-based background checks, none of which have merit.

First, both Lyft and Uber argue that the State Legislature expressed its intent that TNCs can satisfy the background check requirement through the use of third party commercial background checks and, as a result, the Commission *cannot* now require fingerprint background checks. They are wrong. AB 1289 articulates requirements for TNCs, not the Commission. Nothing in AB 1289 prohibits the Commission from imposing additional fingerprint background check requirements in addition to state law requirements.

¹ <http://www.nyc.gov/html/tlc/html/industry/drivers.shtml>

² <http://www.reuters.com/article/us-uber-valuation-breakingviews-idUSKBN14B23A>

³ <https://techcrunch.com/2017/04/06/lyft-said-to-have-raised-over-500m-at-a-6-9b-valuation>

⁴ <https://thinkprogress.org/judge-in-california-delivers-ubers-worst-nightmare-f0d2f5d7aaf2>

⁵ <http://www.latimes.com/business/technology/la-fi-tn-lyft-settlement-approval-20160623-snap-story.html>

⁶ <http://www.latimes.com/politics/la-pol-sac-uber-unionization-bill-20170402-htmlstory.html>;

<https://www.brookings.edu/research/tracking-the-gig-economy-new-numbers>

⁷ <http://www.latimes.com/politics/la-pol-sac-uber-unionization-bill-20170402-htmlstory.html>;

<https://www.brookings.edu/research/tracking-the-gig-economy-new-numbers/>

Second, the TNCs argue that fingerprint-based background checks are flawed because they rely on inaccurate government repositories, flag arrests that do not result in convictions, and take an inordinate amount of time. Again, the TNCs misstate the truth and make false assertions.

Third, these companies assert that requiring fingerprint-based background checks in order to protect public safety would jeopardize their business model. We ask the Commission to determine what is more important. Ensuring public safety or the economic success of these multi-billion dollar ride-hailing companies? We argue that the balance should tip in favor of protecting TNC customers and the public instead of profits.

III. AB 1289 DOES NOT PRECLUDE THE COMMISSION FROM ACTING

Lyft falsely asserts that, with respect to AB 1289, “(t)he Legislature thus clearly expressed its view that – barring further action by the Legislature – a fingerprint background check requirement should *not* be imposed upon TNC drivers.”⁸ But nothing in AB 1289’s statutory language indicates that the Commission is precluded from requiring more rigorous standards for screening TNC drivers, such as fingerprint-based background checks, *in addition to* the requirements set forth in the California Public Utilities Code.⁹ As a result of AB 1289, effective January 1, 2017, TNCs now face *stricter* background check requirements than ever before. This state legislation reflects growing – not decreasing – concern regarding the safety of TNC passengers.¹⁰ Further, no additional state legislation is required in order for the Commission to obtain criminal history information from the California Department of Justice (“CA DOJ”) in order to carry out such a regulation.¹¹ AB 1289 was drafted in response to a lawsuit filed by the District Attorneys of San Francisco and Los Angeles (“the DA Lawsuit”) in order to prohibit TNCs from hiring drivers with certain types of convictions, such as person who are registered sex offenders, violent felons, or domestic violence offenders, in order to protect TNC passengers in the absence of TNC background checks which failed to capture “an individual’s complete criminal history.”¹²

⁸ See Lyft’s Opening Comments, page 2.

⁹ https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1289

¹⁰ <http://fox40.com/2016/09/28/new-california-law-requires-comprehensive-background-checks-for-uber-lyft-drivers/>

¹¹ California Penal Code §11105(b)(10).

¹² <https://a09.asmdc.org/press-release/bill-protect-safety-passengers-utilizing-ride-sharing-services-sent-governor>

With respect to how a court would analyze AB 1289, a court will first look at the plain meaning of the statute. Under the "plain-meaning" rule, if the intention of the legislature is "so apparent from the face of the statute that there can be no question as to its meaning, there is no need for the court to apply canons of construction."¹³ Thus, before even considering what canons of statutory construction to apply, the court must first determine whether the statute in question is ambiguous. Courts have generally held that a statute is ambiguous when reasonably well-informed persons could understand the language in either of two or more senses.¹⁴ Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.¹⁵ Here, the statutory language is clear and unambiguous. A TNC must conduct a local and national criminal background check that includes a multistate and multijurisdictional criminal records locator or other similar commercial nationwide database with validation, and a search of the United States Department of Justice National Sex Offender Public Web site for each driver applicant.¹⁶ AB 1289's legislative history would only be considered if the statute were ambiguous. It is not. Neither Lyft nor Uber assert that the type of criminal background check that a TNC must conduct is unclear. Since the statutory language is clear, there is no need to consider the statute's legislative history in interpreting the statute.

Further, statutory silence does not mean that the Commission cannot impose additional requirements such as fingerprint-based criminal background checks. Courts assume that when a legislature wishes to address major issues, it does so directly. In other words, a finding of intentional silence can be a preferred outcome. "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not ...hide elephants in mouseholes."¹⁷ Here, Lyft and Uber argue exactly the opposite. They argue that, since the statute is silent on the issue of

¹³ *Overseas Education Ass'n v. Federal Labor Relations Authority*, 876 F.2d 960 (D.C. Cir. 1989).

¹⁴ *State ex rel. Neelen v. Lucas*, 24 Wis. 2d 262, 128 N.W.2d 425 (1964).

¹⁵ William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3d. ed. 2001).

¹⁶ *See*, California Public Utilities Code section 5445.2.

¹⁷ *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). *See also MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (conferral of authority to "modify" rates was not a cryptic conferral of authority to make filing of rates voluntary); *Director of Revenue of Mo. v. CoBank, ACB*, 531 U.S. 316, 323 (2001) ("it would be surprising, indeed," if Congress had effected a "radical" change in the law "sub silentio" via "technical and conforming amendments").

whether the Commission can impose a fingerprint-based background check requirement, one must read that silence as *clear evidence* that the State Legislature intended to prohibit the Commission from imposing such a requirement. This is an incorrect application of one of the canons of statutory construction. If the State Legislature intended to prohibit the Commission from imposing an additional fingerprint-based criminal background check requirement, the legislation would have clearly and unambiguously stated so. Since the State Legislature declined to do so, the Commission should not infer that it intended such a restriction.

IV. FINGERPRINT-BASED CRIMINAL BACKGROUND CHECKS ARE MORE ACCURATE AND COMPREHENSIVE THAN COMMERCIAL NAME-BASED BACKGROUND CHECKS.

Notwithstanding the extensive evidence presented in prior comments filed by the San Francisco International Airport and the San Francisco Municipal Transportation Agency to the contrary, Uber continues to baldly assert that “(s)kepticism about fingerprint-based background checks is well-founded: they are often flawed, harmful and unnecessary.”¹⁸

The California State Legislature’s own analysis, conducted during its consideration of AB 1289, refutes Uber’s position and lays bare the shortcomings and inaccuracies of commercial name-based background checks Uber and Lyft currently use. The analysis states:

*While no one background check system is completely full-proof, a combination of name and social security checks with a biometric identifier, such as a fingerprint, would ensure the greatest level of accuracy, and therefore, the best protection of public safety and fairness to potential drivers. ...Moreover, the Senate Committee on Public Safety noted in its analysis: “Historically, this Committee [Public Safety] has not passed bills providing for background checks that are not fingerprint based. Name based checks are not as reliable as similar names exist and there is not (sic) check on the information.” However, fingerprinting requires applicants to visit a police station or other channeling office in order to provide fingerprints that can be used to search in federal, state, and local law enforcement databases. The TNCs argue that such delay in hiring drivers could jeopardize their business model which relies on signing-up drivers fairly instantaneously via a phone application.*¹⁹

Further, the analysis notes that “(w)hen the DOJ releases a criminal history based on a fingerprint check it may not release arrest information unless and until they can make a determination as to the final disposition of the arrest.”²⁰ While the CA DOJ process prevents the release of arrest records without disposition information, “non-fingerprint checks do not utilize the DOJ database,

¹⁸ See Uber’s Opening Comments, page 1.

¹⁹ See http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB1289 at page 5-6.

²⁰ See *id* at page 6.

which as a result, do not stop a TNC from receiving an arrest record where an arrest record should not be used against a person.”²¹ Contrary to Uber’s assertions that “(f)ingerprint-based background checks are harmful because they regularly flag arrests without saying whether or not they resulted in convictions,” Uber has the actual facts backwards.²² It is *Uber’s* use of commercial background checks that can lead to the improper release of arrest records – not the other way around.

Rather than address the State Legislature’s analysis, Uber and Lyft simply choose to ignore the facts. Further illustration is Uber’s reliance on a California State Auditor’s report.²³ While CA DOJ acknowledged that the agency did not always provide information to the Department of Social Services within the required time frames, the percentage of criminal background checks that were delayed because CA DOJ needed to further research court information for the individuals who were initially fingerprinted for the Department of Social Services was just *4 percent*.²⁴

Further, although Uber states that its background check provider, Checkr, “pulls criminal history information directly from the primary source of conviction information: courthouse records,” it is unclear which specific databases Checkr has access to because these databases are not identified.²⁵ Similarly, Lyft uses another commercial firm to conduct its background checks but the extent to which specific databases are accessed is unknown. What we do know is that neither Lyft nor Uber access the CA DOJ database or the FBI’s criminal database for records regarding TNC driver applicants, and TNC driver background checks are particularly susceptible to error when individuals use aliases to pass non-fingerprint-based background checks.

The DA Lawsuit provided 25 examples of TNC drivers who passed Uber’s background check but who nevertheless had criminal convictions or were driving on suspended licenses. Uber Driver #3 in that lawsuit committed crimes in Wyoming which were not detected by Uber’s background check

²¹ *See id* at page 7.

²² *See* Uber’s Opening Comments at page 2.

²³ California State Auditor, *California Department of Social Services: Its Caregiver Background Check Bureau Lacks Criminal History Information It Needs to Protect Vulnerable Populations in Licensed Care Facilities*, Report 2016-126, March 2017 (at <https://www.auditor.ca.gov/pdfs/reports/2016-126.pdf>).

²⁴ *See id* at page 43.

²⁵ *See* Uber’s Opening Comments at page 2; <https://checkr.com/resources/faq/>.

company because it does not have access to government databases.²⁶ Other examples covered in the DA Lawsuit include people with previous convictions for identity fraud, kidnapping and numerous individuals with serious offenses related to driving. As noted in our Opening Comments, a recent Boston Globe article found that over 8,000 applicants approved by the TNCs' commercial background check firms failed when their records were compared to the state's criminal offender records. These individuals would still be driving but for that state's required criminal history records check.²⁷

The Commission should ensure that TNC customers and the public are kept safe by requiring TNCs to conduct more exhaustive background checks for its drivers than what they currently do.

V. BALANCING THE COMPETING INTERESTS SHOULD TIP IN FAVOR OF PROTECTING TNC CUSTOMERS AND THE PUBLIC RATHER THAN PROFITS.

Uber argues that “(u)sing new technological innovations, TNCs have pioneered further safety innovations to keep both riders and drivers safe and accountable.”²⁸ These “innovations” help ensure that TNC customers are in the correct vehicle with the correct driver but are of little consequence to a passenger once he or she is in the vehicle and that driver has a serious criminal history that the TNC failed to detect. On March 30, 2017, an Uber driver sexually assaulted a female passenger in his vehicle while driving her from a work event in Newport Beach to her home in Santa Ana.²⁹ Before attacking her, the Uber driver parked his car near her home. Thankfully, she was able to escape and call the police. The Uber driver has now been charged with rape.³⁰ Although law enforcement suspects that this was not the driver's first sexual assault offense, Uber did not claim that the driver failed its background check process.³¹

This is not an isolated incident. In November, 2016, an Uber driver in Laguna Beach was arrested and charged with rape of an unconscious and intoxicated 17-year old passenger in the back seat of his vehicle. A family member had requested the Uber vehicle to bring the victim home.

²⁶ See Opening Comments of San Francisco International Airport and San Francisco Municipal Transportation Agency to Assigned Commissioner's Ruling Inviting/Instructing Party Comments on Background Checks of Prospective Transportation Network Company Drivers, Appendix A, DA Lawsuit, at 27-28.

²⁷ <https://www.bostonglobe.com/business/2017/04/05/uber-lyft-ride-hailing-drivers-fail-new-background-checks/aX3pQy6Q0pJvbtKZKw9fON/story.html>

²⁸ See Uber's Opening Comments at page 3.

²⁹ <http://fox40.com/2017/04/02/uber-driver-accused-of-assaulting-passenger-in-southern-california/>

³⁰ <http://losangeles.cbslocal.com/2017/04/26/uber-driver-rape-suspect/>

³¹ <https://consumerist.com/2017/04/03/police-uber-driver-sexually-assaulted-passenger-more-victims-may-be-out-there/>

Although the victim's family used Uber's app to locate the vehicle, luckily parked near her family's home, a family member had to literally pull the victim out of the car while the sexual assault was occurring.³² In response, Uber issued condolences to the victim and her family and barred the driver from using its app. Uber has not asserted that this driver failed its commercial background check either.

The reason for requiring a fingerprint-based criminal background check is to help prevent serious TNC passenger safety incidents from ever happening in the first place.³³ While we do not know if the Uber drivers involved in either incident had prior convictions, it is possible. If so, having knowledge of these drivers' prior convictions could have avoided one or both of these serious incidents. Further, even if these Uber drivers did not have prior convictions, assuming that one or both are convicted of sexual assault charges, a fingerprint background check will prohibit one or both of them from gaining employment as a TNC driver in the future.

Both Uber and Lyft object to a fingerprint-based background check requirement because it jeopardizes their business model of having a simple, easy and non-comprehensive driver screening process in order to maximum the number of their drivers on the street to increase their profits at the expense of public safety. The Commission should determine that public safety is more important than ensuring the economic success of these multi-billion dollar ride-hailing companies at the public's expense.

³² <https://consumerist.com/2016/11/10/uber-driver-charged-with-raping-unconscious-teenage-passenger/>;
<http://abc7.com/news/uber-driver-charged-with-raping-unconscious-teen-in-laguna-beach-da-says/1599254/>

³³ The City commends the Commission for its recent investigation and \$1.1 million dollar penalty assessment against Uber for its failure to comply with its Zero Tolerance regulations and Cal. Public Utilities Code section 5381;
<http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M182/K872/182872304.PDF>

Dated: May 15, 2017

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