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MEMORANDUM OF LAW

DATE: July 1, 2016

TO: Honorable Council President Pro Tem Marti Emerald

FROM: City Attorney

SUBJECT: Local Regulation of Uber, Lyft, and other Transportation Network Companies

INTRODUCTION

You are interested in exploring ways that the City of San Diego (City) can ensure that personal transportation service companies such as Uber and Lyft (known as “transportation network companies” or TNCs), as well as their drivers, are complying with the rules established by the California Public Utilities Commission (Commission). Of particular interest is whether the City can require that the TNCs’ drivers are subjected to a criminal background check that uses fingerprint records.

QUESTION PRESENTED

May the City regulate TNCs, including requiring that they perform criminal background checks of their drivers that are more comprehensive than that required under state law? Alternatively, may the City condition the ability of TNCs to obtain a business tax certificate upon a showing of their compliance with state regulatory and statutory requirements?

SHORT ANSWER

The City is generally preempted from regulating TNCs, except as specifically authorized by statute. That limited regulatory authority most likely does not include the ability to impose separate, additional, or more comprehensive criminal background checks. In addition, the City cannot indirectly regulate TNCs, such as through its business tax ordinance, by placing conditions on the issuance of the tax certificate because the sole purpose of the ordinance is revenue generation.

BACKGROUND

Uber and Lyft are companies that provide personal transportation services that are arranged through a mobile telephone app. Such companies are defined as “transportation network companies”: a business entity “operating in California that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle.” Cal. Pub. Util. Code § 5431(a) (2016).¹ TNCs are governed by the Passenger Charter-party Carriers’ Act (Act), chapter 8, division 2 of the Public Utilities Code (§§ 5351-5444) as a type of charter-party carrier of passenger. *See* article 7, chapter 8, division 2 of the Public Utilities Code (§§ 5430-5444). Charter-party carriers of passengers are generally “person[s] 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 5360.

Taxicabs, by contrast, are specifically exempt from the Act. Section 5353(g).² And although TNCs are commonly likened to taxis, transportation service with a charter-party carrier of passengers must be prearranged and evidenced by a waybill and cannot be hailed on the street like a taxicab.³ Section 5360.5.

The Commission has imposed a number of safety requirements and other regulations on TNCs. *See Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry* (D.13-09-045) September 19, 2013. Among those requirements are obtaining a permit from the Commission, performing criminal background checks of their drivers, maintaining commercial liability insurance coverage, instituting a zero tolerance intoxicating substance policy for their drivers, and checking drivers’ driving records on a quarterly basis. *Id.* at 3, 27. The Legislature has also imposed its own requirements, expanding the TNCs’ liability insurance obligations and also extending the requirements to apply directly to the TNCs’ drivers. Sections 5430-5444.

¹ All subsequent references are to the California Public Utilities Code unless otherwise stated.

² California Government Code section 53075.5(a) mandates that local agencies regulate taxicabs: “Notwithstanding Chapter 8 (commencing with Section 5351) of Division 2 of the Public Utilities Code, 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 within the jurisdiction of the city or county.”

³ From the Commission’s pamphlet, Basic Information for Passenger Carriers and Applicants, page 7: TCP [*i.e.* Transportation – Charter Party] and Taxicabs Distinguished ... Taxis are licensed and regulated by cities and counties, while charter-party carriers operate under authority from the CPUC, subject to the Public Utilities Code and CPUC regulations. Taxis have meters and top lights; charter-party vehicles do not have either one. The most important operational difference is that TCP transportation must be prearranged. Taxis may provide transportation “at the curb”, that is, a customer may “arrange” taxi transportation by simply hailing a cab from the sidewalk. All transportation performed by charter-party carriers must be arranged beforehand, and the driver must have a completed waybill in his or her possession at all times during the trip, showing, among other things, the name and address of the person requesting or arranging the transportation (the chartering party), the time and date when the charter was arranged, and whether it was arranged by telephone or written contract, the number of persons in the charter group, the name of at least one passenger, and the points of origin and destination.

The Commission's regulation regarding criminal background checks does not specifically require TNCs utilize fingerprint records. The criminal background check services currently used by Uber and Lyft (and perhaps other TNCs) do not utilize fingerprint records.

ANALYSIS

A. City's Authority to Regulate TNCs is Partially Preempted

Article XII, section 8 of the California Constitution provides, "[a] city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission." The Legislature has granted the Commission broad authority to regulate charter-party carriers of passengers (and by inclusion, TNCs). "The 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." Section 5381. Section 1033 provides: "The commission, in the exercise of the jurisdiction conferred upon it by the Constitution of this State and by this part, may grant certificates of public convenience and necessity, make decisions and orders, and prescribe rules affecting passenger stage corporations, *notwithstanding the provisions of any ordinance or permit of any city, county, or city and county, and in case of conflict between any such order or rule and any such ordinance or permit, the certificate, decision, order, or rule of the commission shall prevail.*" (Emphasis added.) TNCs are subject to the provisions of section 1033 pursuant to section 5382.⁴

The California Attorney General opined that the City of Long Beach was preempted from requiring that a charter bus company obtain a local permit because doing so would effectively nullify the Commission-issued permit and contravene the Commission's paramount authority. 44 Op. Cal. Att'y Gen. 117 (1964). The court in *People v. Levering*, 122 Cal. App. 3d Supp. 19 (1981), came to a similar conclusion, holding that a City of El Segundo ordinance requiring limousine companies obtain a permit was preempted because it was an attempt to legislate on matters covered by the Commission. *Id.* at 21. The fact that some aspects of the ordinance may not have directly conflicted with the Public Utilities Code was immaterial. *Id.*

The Legislature has since amended the Act to permit partial regulation by local agencies. Subdivision (a) of section 5371.4 (Assem. Bill 1506 (1989-1990 Reg. Sess.)) allows local cities and counties in certain instances to issue, and charge for, business licenses to charter-party carriers of passengers as well as impose reasonable regulations:

The governing body of any city, county, or city and county may not impose a fee on charter-party carriers operating limousines.
However, the governing body of any city, county, or city and county

⁴ Section 5382 provides: "To the extent that such are not inconsistent with the provisions of this chapter, all general orders, rules and regulations, applicable to the operations of carriers of passengers under authority of certificates of public convenience and necessity issued pursuant to the provisions of Article 2 (commencing at Section 1031), Chapter 5, Part 1, Division 1 of this code, unless otherwise ordered by the commission shall apply to charter-party carriers of passengers."

may impose a business license fee on, and *may adopt and enforce any reasonable rules and regulations pertaining to operations within its boundaries for, any charter-party carrier domiciled or maintaining a business office within that city, county, or city and county.*

(Emphasis added.)

Subdivision (g) of section 5371.4, also added by A.B. 1506, provides that “nothing in this section prohibits” a city or county from “adopting and enforcing reasonable permit requirements, fees, rules, and regulations applicable to charter-party carriers of passengers *other than those operating limousines.*” (Emphasis added.)

As used in section 5371.4, the term “limousines” includes TNCs: “For the purposes of this section, ‘limousine’ includes any sedan or sport utility vehicle, of either standard or extended length, with a seating capacity of not more than 10 passengers including the driver, used in the transportation of passengers for hire on a prearranged basis within this state.” Section 5371.4(i).

Subdivision (h) of section 5371.4 (added by Assem. Bill 2591 (2003-2004 Reg. Sess.)) allows local agencies to regulate the inspection of waybills: “Notwithstanding subdivisions (a) to (f), inclusive, a city, county, or city and county may impose reasonable rules for the inspection of waybills of charter-party carriers of passengers operating within the jurisdiction of the city, county, or city and county, for purposes of verifying valid prearranged travel.” Interestingly, the statute specifically refers only to “rules” and not does not mention “regulations.”

The scope of what is meant by “reasonable rules and regulations pertaining to operations” in section 5371.4(a) is unclear. Neither the text of the statute nor the legislative history sheds any light. A.B. 1506 was a response to municipalities adopting their own laws over limousines, which were duplicative of state law and resulted in economic hardships to the limousine companies: “Recently, various governing boards of airports and municipalities have introduced regulatory schemes, encompassing licensing fees, increased insurance requirements, and administrative costs in the form of trip charges, which has as their purpose the enforcement of the regulations embodied in the Passenger Charter-Party Carriers’ Act with respect to the operations of those carriers operating limousines.” A.B. 1506 § 1(d). Additionally, neither “domicile” nor “business office” is defined.⁵ It is not clear whether the latter term refers only to a company’s primary office (e.g. headquarters) or could apply to any of its branch offices.

It appears the Legislature did not intend “reasonable rules and regulations pertaining to operations” to include adoption of local insurance requirements. In 1994, the Legislature added

⁵ For corporation income tax purposes, California defines “commercial domicile” as “the principal place from which the trade or business of the taxpayer is directed or managed.” Cal. Rev. and Tax. Code § 25120(b). Under that definition, it does not appear that either Uber or Lyft would be considered to have commercial domicile within City of San Diego boundaries.

section 5392.5 (Assem. Bill 727 (1993-1994 Res. Sess.)) which specifically prohibits additional or alternative insurance requirements: “No person, firm, or corporation holding a valid permit issued by the [C]ommission pursuant to this chapter shall be required by any agency of local government to provide insurance in a manner different from that required by the [C]ommission.” The comments to the bill include the statement, “This bill ... clarifies the pre-emptive effect of [Commission] regulations covering insurance requirements.” Sen. Floor, Analysis of Assembly Bill 727 (1993-1994 Res. Sess.), Apr. 14, 1994. Thus, insurance requirements are clearly excluded from the scope of permissible regulation cities and counties may impose on charter-party carriers, but otherwise what would be permissible regulation remains uncertain.

Reading sections 5371.4 and 5392.5 together, it seems that the extent of the City’s authority to regulate TNCs is the following: (i) may impose a “business license fee” (but not a “fee”), so long as the company is domiciled/maintains an office within the city; (ii) may impose reasonable rules and regulations pertaining to operations within city limits, so long as the company is domiciled/maintains an office inside the city; (iii) is prohibited from requiring a permit or imposing any related fees and rules and regulations, (iv) may adopt reasonable rules (but not regulations) for inspection of waybills for purposes of verifying prearranged travel; and (v) is preempted from imposing any of its own insurance requirements.

B. City’s Authority to Require More Comprehensive Background Checks of Uber and Lyft Drivers

The City may be able to require TNCs to perform criminal background checks that are more comprehensive than that required by state law, if background checks fall within the scope of section 5371.4(a)’s “reasonable rules and regulations pertaining to the operations” of TNC companies and the companies are domiciled or maintain a business office within City limits. However, if background checks are more akin to or appropriately considered to be a permit-related regulation, then the City would be prohibited from doing so pursuant to section 5371.4(g).

It is not entirely clear what the distinction is between an operations-related regulation and a permit-related regulation, but the Legislature clearly intended there be one, based on the fact that the two seemingly similar but differently worded provisions were added by the same bill. It may be the case that with respect to the matter of granting permission to operate, the Legislature intended to clarify and uphold the Commission’s paramount authority. *See, e.g. Levering*, 122 Cal. App. 3d Supp. 19; 44 Op. Cal. Att’y Gen. 117. Thus, any local regulations that constitute or act as a permit, *i.e.* conditions a TNC must satisfy before it can conduct business within the city would be prohibited. By contrast, the kind of regulation regarding a TNC’s operations that a city is authorized to adopt may likely be that which imposes conditions on how the company can conduct business in the city, such as restrictions on hours of operation or to particular geographic zones. Violations of operations-related regulations typically result in fines or other financial penalties, but do not preclude the company from conducting business in the first place.

A requirement that TNCs subject their drivers to a more comprehensive criminal background check more closely resembles a permit-related regulation because it would constitute

a prerequisite for the TNC to be able to conduct business as opposed to a limitation on how the TNC conducts its business. As such, it would be prohibited by section 5371.4(g).

C. City's Authority to Indirectly Regulate Pursuant to its Business Tax Certificate Ordinance

With respect to whether the City could indirectly regulate TNCs under its business tax certificate ordinance, by conditioning the business tax certificate upon proof of compliance with the Commission's rules, the answer is no. The City's business tax ordinance (article 1, chapter 3 of the San Diego Municipal Code) expressly provides that it is intended solely as a revenue measure and does not serve any regulatory purpose. "There is hereby imposed a business tax which, under the provisions of this Article, is enacted solely to raise revenue for municipal purposes and is not intended for the purpose of regulation." San Diego Municipal Code § 31.0101. Requiring proof of compliance with Commission rules would be an exercise of regulatory power that is without any basis in the City's business tax ordinance.

CONCLUSION

The Commission's broad authority over Uber, Lyft, and other TNCs generally preempts the City's ability to regulate those companies or their drivers. An exception exists when the TNC is domiciled or maintains a business office within City limits, in which case the City may adopt reasonable regulations on the TNC's operations. However, the City remains preempted from enacting a permit requirement or permit-related rules and regulations. A City ordinance or rule that TNCs subject their drivers to a more comprehensive criminal background check would most likely be a permit-related type of regulation that is preempted. The City cannot indirectly regulate TNCs under its business tax ordinance, such as by placing conditions upon the issuance of a business tax certificate, because the ordinance is solely a revenue measure with no regulatory purpose.

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