

PACKET MATERIALS

DATE: May 15, 2020

Item No. 5

LOCAL AGENCY FORMATION COMMISSION

Agenda Packet Contents List

- Staff Memorandum from Bryan Goebel, Executive Officer
- "Regulating the Delivery Industry in the time of COVID-19 and Beyond"
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Completed by: Alisa Somera

Date: May 8, 2020

(This list reflects the explanatory documents provided.)



San Francisco Local Agency Formation Commission

City Hall
1 Dr. Carlton B. Goodlett Place, Room 409
San Francisco, CA 94102-4689
Tel. 415.554.6756 Fax. 415.554.5163

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Coro Research Fellow*

May 15, 2020

TO: LAFCo Commissioners

FROM: Bryan Goebel, Executive Officer

SUBJECT: Item 5 – Presentation of the USF Graduate Class’ Research and Recommendations on On-Demand Delivery Services in San Francisco

Earlier this year, the LAFCo partnered with the University of San Francisco Urban and Public Affairs graduate program for the second year in a row to produce research and recommendations to regulate the on-demand delivery industry in San Francisco. This sector of the on-demand economy is for the most part unregulated.

The research methods class of 16 students was led by Dr. Keally McBride. Today Dr. McBride and three students present the findings of their research and recommendations.

LAFCo would like to express its deep appreciation to USF for this successful partnership, and express thanks to each student: Hayden Anderson, Ryan Powell, Micha Zhao, Oscar Calderon Leon, Tyler Solario, Elizabeth Zigon, Ricky Tran, David Jefferson, Madison Holland, Campbell Beaver, Jessica Montes, Ethena Diaz, Kendra Ma, Elissa Mann, Jackson Nutt-Beers, Karol Ruiz.

RECOMMENDATION: Accept the report and recommendations and provide feedback.

LAFCO/University of San Francisco Research Collaboration
Master's of Public and Urban Affairs Program
Regulating the Delivery Industry in the time of COVID-19 and Beyond
May 2020
Research coordinator: Dr. Keally McBride

Executive Summary

Compliance and Certification

1. Create a Certification system. This can be helpful for participating firms, because firms share information with one another. It also creates a venue for competition within firms. The certification process leads to a rating, which is then advertised to the public.
2. Ratings increase public awareness and provides financial incentive for participating in the system. Ratings would incorporate employee protection and classification, health and safety compliance, traffic regulation compliance, environmental impact. There would be several levels of certification ratings, and this would allow consumer choice to reinforce the regulatory process as opposed to undermine it.
3. The role of public agencies will be to audit and provide financial support as needed for smaller firms to meet certification standards, award tax incentives, abatements and create a certification system.
4. Ensure that the language within the certification system is clear and that the benefits of joining are well defined and advertised.

Permitting

1. Create a permitting system. This will create a regulatory structure from existing regulatory bodies, allow data gathering, and extract fees from delivery companies that will create revenue streams to support the permitting process.
2. Fees for permitting can go to fund the permitting, compliance and ratings systems. The permitting fees should be borne by the companies, not the workers. This is in contrast with the approach initially taken towards having TNC drivers pay for their own small business license.
3. Strong requirement that all workers be classified as employees in compliance with AB 5. (example Seattle)
4. Smaller companies should be assisted in the permitting process as needed. Perhaps a sliding scale for permitting based upon revenue streams and the number of employees.

The permitting system could be used as a way to generate a healthier eco system of smaller, local companies and/or cooperatives to provide deliveries as opposed to only large companies.

Health and Safety

1. Similar to the restaurant industry customer surcharge on all restaurants bills currently in place, we propose adding a similar surcharge on to all delivery orders that would go to fund health insurance for workers. This should not be funneled to Healthy SF, since the majority of delivery drivers do not reside within San Francisco.
2. Food safety regulations. Delivery workers should be trained in food safety regulations.
3. When workers receive their food safety certification, they will register their phone number with the SF Department of Public Health, so they can be alerted when there are changes in protocols and alerts in changes in procedures.
4. This system could be a two-way communication system, so workers who need to request tests, or be given protective equipment can contact a central testing center and/or supplies for food and health safety.

LAFCO/ University of San Francisco Research Collaboration
May 2020
Regulating the Delivery Industry in the Time of COVID-19 and Beyond

Dr. Keally McBride, research coordinator.

Research Methods in Public and Urban Affairs Students: Hayden Anderson, Ryan Powell, Micha Zhao, Oscar Calderon Leon, Tyler Solario, Elizabeth Zigon, Ricky Tran, David Jefferson, Madison Holland, Campbell Beaver, Jessica Montes, Ethena Diaz, Kendra Ma, Elissa Mann, Jackson Nutt-Beers, Karol Ruiz

Voluntary Compliance and Ratings Systems

Summary

1. Create a Certification system. This can be helpful for participating firms, because firms share information with one another. It also creates a venue for competition within firms. The certification process leads to a rating, which is then advertised to the public.
2. Ratings increase public awareness and provide financial incentive for participating in the system. Ratings would incorporate employee protection and classification, health and safety compliance, traffic regulation compliance, and environmental impact. There would be several levels of certification ratings, and this would allow consumer choice to reinforce regulatory process as opposed to undermine it.
3. The role of public agencies will be to audit and provide financial support as needed for smaller firms to meet certification standards, award tax incentives, abate opportunity gaps, and create a certification system.
4. Ensure that the language within the certification system is clear and that the benefits of joining are well defined and advertised.

This next section provides suggestions and recommendations for the City to consider when implementing a strong, robust framework that monitors and tracks the performance of firms through an AB 5 voluntary compliance system. An extensive literature review examining a wide-range of scholarly writings and academic literature on the performance of environmental, automobile, and consumer-product industries provide the City of San Francisco with the following items to consider when designing a compliance system: (1) a rating system (2) a certification system (3) the role of public agencies and (4) language that clearly defines the structural benefits of certification.

A rating system implemented towards regulating gig-platform companies such as Uber and Lyft would ensure that companies maintain humane and ethical standards. This framework would look similar to how the automotive industry is regulated, in which the government effectively

regulates the automotive industry to comply with regulations for the benefit of consumers¹. However, the framework itself would be difficult to translate over applicably to gig-platform companies; the city would have to figure out how to develop standards on a rapidly evolving industry².

The City may implement a certification system that could help ensure effective monitoring and tracking of gig industries in compliance with AB 5. While rating systems certainly provide a public benefit, certification systems like ISO 14001 and LEED effectively function to allow credible communication about their performance between participating partners and firms, encouraging low performing firms to adopt and demonstrate stronger management practices (King, Lenox, and Terlaak 2005; Matisoff, Noonan, and Mazzolini 2014)^{3 4}.

Maintaining the City's role as distributor and auditor of an AB 5 compliance certification program is an integral part of keeping companies accountable for their workplace standards. Similar to how the Consumer Product Safety Commission is uniquely responsible for certifying the safety of products before introduction into the marketplaces, the City could certify whether a company is complying with minimum worker and consumer protections prior to certification.

Research has suggested that implementing performance management systems can result in increased company accountability standards and public transparency. Much like the Transportation Improvement Board (TIB) performance dashboard in Washington state, language that is written clearly and is easily interpretable can ensure the company is under constant public-scrutiny. As a result, the TIB agency exhibited changes in payment promptness and a decrease in delayed projects⁶ perhaps reflecting on the pressure placed knowing it was constantly being evaluated by the public. Likewise, AB 5 companies would be forced to display these ratings, in a simplified and direct format, for the public to make their own assessment of the company as a whole.

¹ "Purchasing with Safety in Mind: What to look for when buying a vehicle" U.S. Department of Transportation: National Highway Traffic and Safety Administration, May 2017.

² "Fuel Economy Guide Model Year 2020" U.S. Department of Energy: Office of Energy, Efficiency and Renewable Energy, April 27, 2020.

³ King, Andrew, Michael Lenox, and Ann Terlaak. 2005. "The Strategic Use of Decentralized Institutions: Exploring Certification with ISO 14001 Management Standard." *Academy of Management Journal* 48. doi:10.5465/AMJ.2005.19573111.

⁴ Matisoff, Daniel C., Douglas S. Noonan, and Anna M. Mazzolini. 2014. "Performance Or Marketing Benefits? the Case of LEED Certification." *Environmental Science & Technology* 48 (3): 2001-2007. doi:10.1021/es4042447. <https://doi.org/10.1021/es4042447>.

⁵ U.S. Consumer Product Safety Commission CPSC. United States, 1970. Archived Web Site. <https://www.loc.gov/item/lcwaN0018358/>.

⁶ National Performance Management Advisory Commission. *A Performance Management Framework for State and Local Government: From Measurement and Reporting to Management and Improving*. 2010. <https://www.gfoa.org/sites/default/files/APerformanceManagementFramework.pdf>.

Permitting

Summary

1. Create a permitting system. This will create a regulatory structure from existing regulatory bodies, allow data gathering, and extract fees from delivery companies that will create revenue streams to support the permitting process.
2. Fees for permitting can go to fund the permitting, compliance and ratings systems. The permitting fees should be borne by the companies, not the workers. This is in contrast with the approach initially taken by the City of San Francisco in 2016 having TNC drivers pay for their own small business license in order to be eligible to operate in the City.
3. Strong requirement that all workers be classified as employees in compliance with AB 5. (example Seattle)
4. Smaller companies should be assisted in the permitting process as needed. Perhaps a sliding scale for permitting based upon revenue streams and the number of employees. The permitting system could be used as a way to generate a healthier eco system of smaller, local companies and/or cooperatives to provide deliveries as opposed to only large companies.

In order to create a system of compliance based on a certification and rating program, we recommend that permitting serve as a means to regulate app-based delivery services. Permitting allows the city to ensure that companies within this sector will be in compliance with California state law and can furthermore serve as a base-level entry into a certification and rating system. Our research compared regulation of Transportation Network Companies in San Francisco and Seattle. Our background and comparative research informed us of many useful methods and regulatory measures that can be employed to ensure compliance and mitigate issues with trends in app-based delivery services and gig-economy work.

Permitting would require at least one department or agency to bear responsibility for issuing permits that ensure city workplace standards and regulations are met. Departments such as the San Francisco Municipal Transit Agency (SFMTA) or the San Francisco Public Utilities Commission (SFPUC) could sufficiently cover issuing permits and assist in additional administrative processes that might arise. When we examined the San Francisco Airport's (SFO) permitting structure for TNC pick-ups and drop-offs, there were key components to these permits that gave SFO the ability to decrease congestion and aid in collection of fees⁷. Among these benefits was obtaining useful data that further informed TNC decision making and assisted in other traffic models. The delivery industry is also projected to have a detrimental impact on traffic flow, and permitting could be useful for managing congestion.

⁷ Smith, Bridget. *The TNC Regulatory Landscape*. San Francisco: San Francisco County Transportation Authority, December 2017
April 28, 2010. https://www.sfcta.org/sites/default/files/2019-03/TNC_regulatory_020218.pdf

SFO's permitting of TNCs put requirements on TNC companies and operators that ensure compliance with standards set by SFO. These standards include that the companies be in compliance with California state law (certified by California Public Utilities Commission (CPUC)). This requirement informs us of what a permit for delivery-based operators and companies could look like with regards to compliance with AB5 employment requirements: in order to receive a permit to deliver in San Francisco, you must be a business that complies with California law. This would force delivery companies to adhere to recent changes in gig worker law, and ensure employment benefits are extended to drivers and operators for the delivery company. It is imperative for us to state that the cost of receiving a permit to perform delivery services within the city ought to be paid for by the companies and not the employees.

Permitting fees and the income generated will ensure that companies within the city are complying with California state law but will also serve the purpose of paying for administrative costs and generating revenue. This source of revenue can be put towards a fund that can provide relief for drivers and operators (sick fund, car insurance, etc.). Seattle's current policy initiative to regulate TNCs through a permitting process has been proposed under the Fare Share Plan (FSP), in which drivers' independent contractor status is considered detrimental, keeping drivers from receiving minimum wage or critical benefits such as worker's compensation, sick leave or health insurance⁸. Additionally, the FSP establishes an independent nonprofit Driver Resolution Center for TNC drivers to provide support in arbitration and driver outreach services. The increase in regulatory ordinance would be supported by a proposed \$0.75 City fee for Uber and Lyft riders, which the Mayor proposed to be invested in the establishment of the Driver Resolution Center, public transit improvements, and the construction of more than 500 affordable housing units near transit intended for people making between \$15 and \$25 per hour.

Seattle's initial attempts to regulate TNCs through permitting gave TNCs a seat at the negotiating table alongside elected officials and labor groups. The regulatory framework implemented from 2013 through 2015 was consumer-focused, calling for the protection of public health through TNC's expansion of insurance coverage for drivers, as well as TNC drivers' successful acquirement of annual permits through the presentation of a Washington state driver's license, background check and payment of permit fees to the Department of Licensing⁹. TNCs were happy to implement light regulations based on insurance and basic licensing requirements for drivers, but successfully argued down an additional regulatory cap on the number of TNC-affiliated cars on the road at one time¹⁰. Through the following years TNCs flooded Seattle's for-hire

⁸ City of Seattle. "Fare Share Plan: An Investment in Workers, Transit, and Housing near Transit". Council Budget Committee Presentation. October 2 2019. Accessed April 22 2020. <https://seattle.legistar.com/View.ashx?M=F&ID=7744784&GUID=04C52F2E-E85A-4158-8F8B-6484CBD3928F>

⁹ Senate Bill Report. "SB 5550: An Act relating to providers of commercial transportation services". Senate Committee on Transportation. February 3 2015, Accessed April 21 2020. <https://lawfilesexternal.wa.gov/biennium/2015-16/Pdf/Bill%20Reports/Senate/5550%20SBA%20TRAN%2015.pdf>

¹⁰O'Brien, Mike. "Taxi, for-hire and TNC issues". Seattle Council Connection News & Updates. February 28 2014, Accessed April 21 2020. <https://council.seattle.gov/2014/02/28/taxi-for-hire-and-tnc-issues/>

transportation market with unlimited TNC drivers, which negatively impacted traffic congestion, delayed public transportation, and created unsustainable labor conditions for drivers¹¹.

Health and Safety

1. Similar to the restaurant industry customer surcharge, we propose adding a similar surcharge on to all delivery orders that would go to fund health insurance for workers. This should not be funneled to Healthy SF because the majority of delivery drivers do not reside within San Francisco.
2. Delivery workers should be trained in food safety and handling regulations.
3. When workers receive their food safety certification, they will register their phone number with the SF Department of Public Health, so they can be alerted when there are changes in protocols and alerts in changes in procedures.
4. This system could be a two-way communication system, so workers who need to request tests, or be given protective equipment can contact a central testing center and/or supplies for food and health safety.

In exploring health insurance options for gig workers, different types of health spending accounts came up as potential alternatives. These options include Flexible Spending Accounts (FSAs), Health Reimbursement Agreements (HRAs), and Health Savings Accounts (HSAs). FSAs, HRAs, and HSAs are very similar in many ways. Overall, they are special untaxed accounts that are used to pay for specific out of pocket medical costs. The biggest differences lie in who holds power to set specific amounts and parameters around each account. Although they are helpful options, none of them are a comprehensive alternative to health insurance for families or higher need individuals. These types of accounts are most beneficial when used as a supplement to existing coverage or for single individuals who are relatively healthy. We do not recommend offering these accounts in lieu of health insurance for gig workers.

Along with the ability to offer health insurance assistance, we believe that food safety and the proper handling of purchased food and beverage products should be of the highest priority for workers in food and grocery delivery. There is an expectation on behalf of consumers that whomever is handling or preparing food, whether it be chefs or wait staff, are following necessary and vital health and safety regulations. Food handlers (anyone who is involved in the preparation, storage, or service of food) have a responsibility to ensure that risks are mitigated to the best of their ability. At the same time, gig workers should be concerned and invested in their own health and safety. Food safety and regulation is a two-way street: they both protect the customer as well as the driver delivering the food or grocery items.

¹¹ City of Seattle. "Fare Share Plan: An Investment in Workers, Transit, and Housing near Transit". Council Budget Committee Presentation. October 2 2019. Accessed April 22 2020.
<https://seattle.legistar.com/View.ashx?M=F&ID=7744784&GUID=04C52F2E-E85A-4158-8F8B-6484CBD3928F>

Cautions, Limitations and Results of Enforcing AB 5 and Labor Regulations

In an effort to understand potential concerns regarding strict AB 5 enforcement, we performed a comparative analysis of the ways in which different governments issued and enforced their own respective TNC regulations. These regulatory approaches and aims were varied; where we examined labor regulations and the enforcement of AB 5, drew comparisons to examples of background check regulations, operational compliance, and permit procedures enforced in different cities across the globe. A major concern associated with the potential over-regulation of these companies is the possibility of driving their business out of an area, resulting in the loss of both jobs and money. In the search for cautionary tales, we found other results.

After years of litigation battles between German courts and Uber over the ridesharing companies failure to meet the country's regulation standards, in December of 2019 a court in Frankfurt ruled that Uber lacked the necessary legal permits to operate under German law and was found to be violating competition rules and laws governing passenger transportation, thus leaving Germany to officially ban Uber from operating in German cities¹². Uber was unwilling and unable to meet Germany's licensing rules and safety requirements, and thus the country barred Uber from operating, without any economic suffering to the country. As a result of the free market, other ridesharing companies who acted in compliance with Germany's regulations emerged and continue to thrive. Ridesharing in Germany did not disappear as a result of strict regulatory action, and the conception of Uber as the proprietor of ridesharing in Germany was dismantled, a realization that is key to the future of compliance. We see similar regulation situations play out in the United States.

In 2016, Austin, Texas city-council members placed a mandatory fingerprint background check on all Uber and Lyft drivers. As a result of increased regulation, Uber and Lyft suspended operations in Austin and alternative companies in compliance with the fingerprinting mandate stepped in to fill the departure, including a competitive non-profit service, RideAustin. Here again we see a company resist regulation, but rather than bending knee, the government held its ground in enforcing necessary regulations for the well-being of the public rather than protecting the ride-sharing market, and forcing compliance with regulations. Alas, Texas State lawmakers overturned Austin's decision in 2017, in turn hurting the companies which emerged in compliance, and effectively harmed the diverse options offered to Austin residents¹³.

London also held its ground in seeking compliance with ride-sharing regulations, more specifically against Uber. According to Transport for London (TfL), Uber repeatedly failed its standards to protect clients in a variety of cases. This conflict, ongoing for years, eventually led to

¹² Eddy, Melissa. "An Uber Service Is Banned in Germany Again." *The New York Times*, March 18, 2015. <https://www.nytimes.com/2015/03/19/technology/germany>; Schuetze, Arno. "German Court Bans Uber's Ride-Hailing Services in Germany," December 19, 2019. <https://uk.reuters.com/article/us-uber-court/german-court-bans-ubers-ride-hailing-services-in-germany-idUKKBN1YN171>

¹³ Anderson, Will. "Return of Uber and Lyft Really Hurt RideAustin — but the Nonprofit Ridesharing Startup Motors On." *bizjournals.com*, May 3, 2018. <https://www.bizjournals.com/austin/news/2018/05/03/return-of-uber-and-lyft-really-hurt-rideaustin-but.html>.

TfL's decision to revoke Uber's license¹⁴. No special legislation to enforce Uber's removal was needed. Rather, it required enacting the existing London laws, making the decision to revoke the license a matter of political will. As a result, there are plenty of local ride-sharing apps that work with taxis rather than competing against them. These challenges have happened more recently, so there is less of an impact measure, but the significant oversight TfL has with TNC operations is noteworthy.

Across multiple governments, there was back and forth dealing with giants in the gig economy. The fears of these businesses ceasing to exist, resulting in thousands of jobs lost, and an important means of travel lost, did not manifest. Rather, even in the worst-case scenario of a total removal, smaller companies reemerged to be more competitive, and to operate within regulations bigger TNCs failed to accept. Many of the cautions and concerns of these large companies disappearing are seemingly overstated.

Unlike the examples above, there have been some issues across this country with states that are trying to implement their version of AB 5. For example, in New Jersey the implementation of their version of AB 5 is causing issues just like in California. There is a disconnect between the ABC test that is causing both of these states to have backlash. New Jersey is trying to have more leniency and California is having a lot of room for exemptions, making unclear who the bill is intended to protect¹⁵. The clash between the states and the gig economy workers and whoever falls in between is causing more of a stir than efficiency.

Moreover, as California grapples to find an efficient and clear way to enforce newly passed labor law AB 5, San Francisco, the hub for multi-million gig companies, has been actively looking for ways to get the ball rolling in laying out a city-based enforcement plan to ensure labor protections for essential gig employees. San Francisco has the authority to limit the operational capabilities of non-complying rideshare companies, create new ordinances protecting on-demand gig workers, and amend past ordinances to clarify that independent contractors are to receive labor protections. The Board of Supervisors, in connection with the Rules Committee and the Mayor's Office, can pass an ordinance requiring all companies who hire on-demand gig workers, regardless of their employment classification, to pay their workers no less than the city's minimum wage rate, receive paid sick leave, and be granted access to health benefits. We propose the San Francisco Office of Labor Standards Enforcement be appointed as the main enforcement agency with the authority to investigate, enforce and tackle legal procedures in collaboration with the city attorney. For those companies who do not follow this order or deny the Office of Labor Standards Enforcement the ability to comply with their duty, fines can and must be placed.

¹⁴ Warren, Tom. "Uber Loses Its London License as Regulator Cites a 'Pattern of Failures'." The Verge, November 25, 2019. <https://www.theverge.com/2019/11/25/20981492/uber-london-ban-license-renewal-transport-for-london-tfl-response>.

¹⁵ Marr, Chris. "New Jersey Gig Worker Bills Go to Governor, But Not 'Big One'." Bloomberg BNA News, January 13, 2020. <https://news.bloomberglaw.com/daily-labor-report/new-jersey-gig-worker-bills-go-to-governor-but-not-big-one>.