

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 2 on Competition and Regulation****Taxi, ride-sourcing and ride-sharing services - Note by the United States****4 June 2018**

This document reproduces a written contribution from the United States submitted for Item 3 of the 65th meeting of Working Party No 2 on Competition and Regulation on 4 June 2018. More documents related to this discussion can be found at www.oecd.org/daf/competition/taxis-and-ride-sharing-services.htm

Please contact Mr Chris PIKE if you have any questions about this document
[Email: Chris.Pike@oecd.org]

JT03432446

United States

1. Introduction

1. In the United States, passenger motor vehicle transportation services are variously regulated at the state or local level. Historically, commercial services included cruising taxis that respond to street hails, taxis that wait for riders at taxi stands, radio-dispatched taxis, prearranged limousine and sedan-type vehicle service, and jitney-type service.

2. Common regulatory features included licensing requirements, formal classifications for various vehicle and service types; entry restrictions such as taxi medallion systems or requirements that new entrants demonstrate a need for service; fare regulation; prescribed methods of calculating fares and fare information; minimum fares and prearrangement requirements for limousines and sedans; safety and liability issues; and handicapped access, universal service, and non-discrimination requirements.¹

3. More recently, in response to the introduction of smartphones around 2007, both incumbent passenger motor vehicle transportation service providers and other entrepreneurs have introduced software applications, which allow consumers to arrange and pay for passenger motor vehicle transportation services in a variety of ways.² These applications are sometimes called digital dispatch or an electronic hail (“e-hail”). These software applications may make use of technologies such as mobile smartphone applications, Internet web pages, e-mail messages, and text messages. These new types of services have variously been referred to as transportation network companies (“TNCs”), transportation network providers (“TNPs”), private vehicles for-hire, variants of traditional “ridesharing” arrangements, or “peer-to-peer” (“P2P”) forms of passenger motor vehicle transportation.

4. Around forty-five states have passed legislation regarding these new types of services.³ A number of jurisdictions have also updated their regulatory frameworks to allow traditional forms of passenger motor vehicle transportation to arrange fares through digital dispatch, typically subject to existing regulated rates. In addition, some jurisdictions have recently allowed taxicabs to charge dual-mode fares, depending on the method of arrangement, and others are considering similar approaches to help taxicabs better compete with newer forms of transportation.

¹ Almost all large U.S. cities regulate taxi fares; some jurisdictions, however, allow taxicab firms latitude to set fares, subject to certain constraints, while requiring them to file their fares with the relevant regulatory authority and post them for consumers.

² See generally Lauren Goode, *Worth It? An App to Get a Cab*, Wall Street J., June 17, 2011, <http://blogs.wsj.com/digits/2011/06/17/worth-it-an-app-to-get-a-cab/> and Andy Vuong, *Taxi Magic Relaunches as Curb amid competition from Uber, Lyft*, Denver Post, Aug. 5, 2014, <https://www.denverpost.com/2014/08/05/taxi-magic-relaunches-as-curb-amid-competition-from-uber-lyft/>.

³ See generally Mallory Moench, *Uber, Lyft can now operate across all of Alabama*, Assoc. Press, Mar. 1, 2018, <https://apnews.com/d28f9e9f4f514d7c99cad60a5d5097d1>.

5. The United States federal antitrust agencies have historically advocated that markets should generally be left unfettered to permit competition to flourish unless regulation is necessary to achieve some legitimate public interest, and against entry restrictions by states and localities. The agencies have recommended that any regulation of traditional or newer services should focus primarily on ensuring the safety of customers and drivers, deterring deceptive practices relating to fares, safety and liability, and other terms of use, and addressing other consumer protection issues.

2. Agency Activities in Passenger Motor Vehicle Transportation

2.1. Federal Trade Commission Historical Activities

6. Historically, the involvement of the Federal Trade Commission (“FTC”) in this sector focused primarily on efforts to assist deregulation in the industry, through reports and advocacy efforts, including 18 advocacy filings with various local authorities from 1984 through 1989.⁴ In addition, the FTC brought enforcement actions against two U.S. cities in 1984.⁵ The FTC’s major contribution is a staff report on taxicab regulation.⁶ The main conclusions of the report were that restrictions on entry (numerical limits, limits based on cab/population ratios, or public convenience and necessity requirements) did not appear to be supported by plausible theoretical arguments.⁷ That report was submitted to the Competition Law and Policy Committee in 1990 in connection with a roundtable discussion of this topic. The United States also provided a submission in 2007 to the OECD Working Party on Competition and Regulation, describing experiments with

⁴ These advocacy filings are available at FTC, Advocacy Filings (transportation topic filter), <https://www.ftc.gov/policy/advocacy/advocacy-filings>.

⁵ The FTC sued the cities of New Orleans and Minneapolis in 1984, charging both cities with unfair competition by combining with taxicab operators to impose regulations that limited the number of taxicab licenses, increased fares, and eliminated competition in violation of the federal antitrust laws. The complaint against Minneapolis was withdrawn after the city revised its ordinance to permit more competition. The complaint against New Orleans also was withdrawn after the state authorized the conduct in question by a new law. See generally FTC, 1985 Annual Report 5 (1985), <http://www.ftc.gov/os/annualreports/ar1985.pdf>.

⁶ Mark W. Frankena & Paul A. Pautler, An Economic Analysis of Taxicab Regulation (1984) (FTC Bureau of Economics Staff Report), <https://www.ftc.gov/reports/economic-analysis-taxicab-regulation>. The report described the various market segments that exist, including cruising cabs, cabs that wait for riders at taxi stands, radio-dispatched cabs, and cabs providing services under contract. The report also reviewed the history of taxicab regulation in the United States and described various types of regulation that existed in the taxi industry. The report also discussed many theories of market failure that might justify regulation of taxicabs serving cruising, cabstand, radio-dispatched, and contract segments of the market. In addition to an analytical examination of the market segments, the report reviewed the evidence of deregulation during the late 1970s and early 1980s in thirteen U.S. cities, focusing on Seattle, San Diego, Phoenix, Tucson, Berkeley, and Oakland.

⁷ Even in those situations where problems had arisen following a change to open entry, other regulatory responses (e.g., maximum price levels, physical reconfiguration of taxicab queues) would likely be more efficient responses to such problems. *Id.* at 8-9.

deregulation in the United States and lessons from those experiences.⁸ As of 2007, the general description of the taxicab industry and taxicab regulation in the United States remained much as it was at the time of the 1984 staff report.

2.2. Federal Trade Commission Recent Advocacy Comments and Guiding Principles for Regulation

7. Since 2013, FTC staff have provided four advocacy comments in regard to various regulatory proposals concerning the development of new types of passenger motor vehicle transportation services.⁹ These comments have addressed the competition, consumer protection, and economic aspects of these proposals. The advocacy comments have noted that these technologies and new methods appear to be responsive to consumer demand, and also may promote a more efficient allocation of resources (e.g., vehicles and drivers) to consumers, help to meet unmet demand for passenger motor vehicle transportation services, and improve service in traditionally underserved areas. They also may reduce consumers' transaction costs in arranging and paying for such services. At the very least, these technologies and methods provide consumers new alternatives to street hailing or telephoning for arranging service.

8. FTC staff have further observed that applications that facilitate using personal automobiles to provide transportation services to the public may provide consumers with expanded transportation options, at potentially lower prices, thereby better satisfying consumer demand, and potentially increasing competition and promoting a more economically efficient use of personal vehicles.

9. The staff comments have recommended that unless regulation is necessary to achieve some legitimate public interest, markets should be left unfettered to permit competition to flourish. Any regulation of traditional or newer services should focus primarily on ensuring the safety of customers and drivers, deterring deceptive practices relating to fares, safety and liability, and other terms of use, and addressing other

⁸ United States, Roundtable on "Taxi Services Regulation and Competition," Submission to OECD Working Party No. 2 on Competition and Regulation (DAF/COMP/WP2/WD(2007)58), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/ustaxis.pdf>.

⁹ FTC Staff Comment Before the Colorado Public Utilities Commission Concerning Proposed Rulemaking on Passenger Vehicle Transportation Services (Mar. 6, 2013), <https://www.ftc.gov/policy/advocacy/advocacy-filings/2013/03/ftc-staff-comment-colorado-public-utilities-commission> ("Colorado Comment"); FTC Staff Comment to Anchorage Assembly Member Debbie Ossiander Concerning AO No. 2013-36, Proposing Changes to the Regulatory Framework for the Licensing and Permitting of Taxicabs, Limousines, and Other Vehicles for Hire (Apr. 19, 2013), <https://www.ftc.gov/policy/advocacy/advocacy-filings/2013/04/ftc-staff-comment-anchorage-assembly-member-debbie> ("Anchorage Comment"); FTC Staff Comment Before the District of Columbia Taxicab Commission Concerning Proposed Rulemakings on Passenger Motor Vehicle Transportation Services (June 7, 2013), <https://www.ftc.gov/policy/advocacy/advocacy-filings/2013/06/ftc-staff-comments-district-columbia-taxicab-commission> ("D.C. Comment"); FTC Staff Comment to the Hon. Brendan Reilly Concerning Chicago Proposed Ordinance O2014-1367 Regarding Transportation Network Providers (Apr. 15, 2014), <https://www.ftc.gov/policy/advocacy/advocacy-filings/2014/04/ftc-staff-comment-honorable-brendan-reilly-concerning> ("Chicago Comment"). These jurisdictions have continued to update their regulatory frameworks since the time of these comments.

consumer protection issues, especially data security and the prevention of identity theft. These might include: provisions that relate to ensuring qualified drivers, safe and clean vehicles, sufficient liability insurance, transparency of fare information, and compliance with other applicable laws.¹⁰

10. The comments emphasize that regulatory frameworks, when needed, should be flexible enough to allow new and innovative forms of competition to enter the marketplace. Consumers benefit from the introduction of innovative products, services, and new business models for delivering services, as well as the competition among new and traditional suppliers. Therefore, laws and regulations should be reviewed periodically to facilitate and encourage the emergence of new forms of competition. Where appropriate, innovation may be promoted through deregulation or through the development of more flexible and adaptive regulations. The comments stress that regulations should not in purpose or effect favor one group of competitors over another or impose unnecessary burdens that impede participants' ability to compete without benefitting the public.¹¹

11. FTC staff have recognized that such technologies and methods may raise novel issues for policymakers. While these concerns may provide grounds for some regulations to protect consumers, staff have encouraged policymakers to carefully consider the potential competitive effects of such regulations as well as the justifications for them. To the extent that evidence of such harm is received, staff have recommended that any restriction designed to address that harm should be narrowly crafted to minimize its anticompetitive effect.

12. For example, the advocacy comments recognize that demand-based pricing (sometimes called "surge pricing") can be an efficient way to allocate resources (e.g., vehicles and drivers) to consumers, particularly during times of peak demand (e.g., during particular times of day, periods of traffic congestion, around the time of special events).¹² Demand pricing is a mechanism by which resources are allocated to more highly valued consumer uses. Demand pricing directly responds to the level of consumer demand: when demand increases, prices increase, which provides incentives for increased supply to serve increased demand. Demand pricing also may result in lower fares during off-peak times, which may potentially result in an overall increase in the quantity of service utilized by consumers. Demand-based pricing, therefore, can be more responsive to consumer preferences than fixed pricing models.¹³

¹⁰ The FTC has subsequently brought two consumer protection enforcement actions under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), regarding claims made by Uber. See Press Release, FTC, Uber Agrees to Pay \$20 Million to Settle FTC Charges That It Recruited Prospective Drivers with Exaggerated Earnings Claims (Jan. 19, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited>; Press Release, FTC, Uber Settles FTC Allegations that It Made Deceptive Privacy and Data Security Claims (Aug. 15, 2017), <https://www.ftc.gov/news-events/press-releases/2017/08/uber-settles-ftc-allegations-it-made-deceptive-privacy-data>; Press Release, FTC, Uber Agrees to Expanded Settlement with FTC Related to Privacy, Security Claims (Apr. 12, 2018), <https://www.ftc.gov/news-events/press-releases/2018/04/uber-agrees-expanded-settlement-ftc-related-privacy-security>.

¹¹ Chicago Comment, *supra* note 9, at 4.

¹² *Id.* at 6.

¹³ For example, the FTC staff discussed electricity dynamic pricing and competition issues in its

13. At the same time, FTC staff have recommended that pricing practices should be truthful and non-deceptive, in order for the passenger motor vehicle marketplace to function efficiently.¹⁴ Staff comments have recognized that in certain limited circumstances, such as at airport or railroad taxi lines, where it might be difficult for travelers to determine the cost of service in advance of actually needing to obtain it, regulation of maximum prices may be an efficient means to protect them from paying higher prices due to a lack of local knowledge. Requiring the posting of rates on vehicles may also be an efficient means to protect consumers in such situations, and in other circumstances, such as street hails, where it might also be difficult for consumers to determine service costs in advance. But these particular situations do not provide a rationale for the general regulation of prices where there is open entry, nor do they provide a basis for regulation of minimum prices.¹⁵

14. To the extent there may be evidence that consumers do not understand or are confused by alternative payment calculation methods associated with newer technologies, staff have recommended considering alternatives to fixing and limiting permissible payment calculation methods. For example, the staff comments have recommended that policymakers consider requiring better disclosures, expressly allowing or requiring applications to provide an electronic receipt to customers for verification purposes, or requiring applications to maintain a trip log or manifest for verification purposes.¹⁶ Requiring certain advance disclosures or the provision of certain information in a receipt may be efficient ways to promote pricing transparency and protect consumers from misleading “drip pricing” practices, and to help avoid or resolve other instances of significant consumer confusion.¹⁷ Otherwise, staff have recommended that policymakers should allow for flexibility and experimentation to facilitate innovative forms of pricing that may benefit consumers.

Comment Before the District of Columbia Public Service Commission in the Matter of the Investigation into the Potomac Electric Power Company’s Residential Air Conditioner Direct Load Control Program and the Potomac Electric Power Company’s District of Columbia Dynamic Pricing Program Proposal, Formal Cases 1086 and 1109 (Feb. 6, 2014), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-reply-comment-district-columbia-public-service-commission-concerning-proposed-program.1086-1109/140117dcdynamicpricing.pdf; Comment Before the Public Service Commission of the State of Delaware in the Matter of the Adoption of Rules and Regulations To Implement the Provisions of 26 DEL. C. CH. 10 Relating to the Creation of a Competitive Market for Electric Supply Service, PSC Regulation Docket No. 49 (Nov. 13, 2013), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-public-service-commission-state-delaware-concerning-its-proposal-revised-its-rules/131114delawareretailelectric.pdf; and Comment Before the Public Utility Commission of Texas in the Rulemaking Regarding Demand Response in the Electric Reliability Council of Texas (ERCOT) Market, Project No. 41061 (Mar. 11, 2013), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-public-utility-commission-texas-concerning-rulemaking-regarding-demand-response/1303texaspucomment.pdf.

¹⁴ D.C. Comment, *supra* note 9, at 7-8.

¹⁵ Anchorage Comment, *supra* note 9, at 5.

¹⁶ Colorado Comment, *supra* note 9, at 5.

¹⁷ D.C. Comment, *supra* note 9, at 7-8.

2.3. Federal Trade Commission Recent Advocacy Comment Outcomes

2.3.1. Colorado

15. FTC staff submitted comments to the Colorado Public Utilities Commission (“CPUC”) in March 2013, expressing concern about proposed rule changes to: equate the advertisement or offering of transportation with being a motor carrier; require sedans to operate using a specific fixed price; and prohibit sedans from stationing within 200 feet of certain areas where customers are likely to want to be picked up.¹⁸ Staff expressed concern that these proposed changes could inhibit the use of mobile smartphone software applications that allow consumers to arrange and pay for transportation services in new ways. Staff recommended that a regulatory framework be flexible and adaptable in response to new and innovative methods of competition, such as smartphone applications, while still maintaining appropriate consumer protections.

16. A CPUC administrative law judge held hearings on the proposed rules in March 2013 and on revised proposed rules in April 2013, and issued a recommended decision in August 2013. The recommended decision did not adopt any of the three proposed rule changes on which staff commented. The decision proposed a new definition of a transportation broker that appeared to distinguish applications from actual transportation service providers, but would have required sedan service to be arranged for a specific period of time, which might potentially impede the arrangement of service through applications. Thus, the matter was initially successful.

17. On October 10, 2013, the CPUC tentatively adopted their own revised rules, which declined to adopt any of the three proposed changes on which FTC staff commented and which adopted a definition for transportation brokers that appeared to distinguish applications from providers of transportation services. On November 26, 2013, the CPUC issued a formal decision for which associated rules became effective in February 2014. These rules distinguish transportation brokers from motor carriers, and do not require a fixed price for sedans, but maintain a minimum stationing requirement of 100 feet away from certain areas, similar to a pre-existing rule. Thus, the advocacy was successful.

2.3.2. Anchorage, Alaska

18. Staff provided comments in April 2013 regarding certain proposed changes to Anchorage, Alaska's regulatory framework for passenger vehicle transportation services.¹⁹ A proposed ordinance would allow additional entrants into taxicab services through 2022, after which there would be no limits on how many taxicabs could operate in Anchorage. FTC staff strongly supported eliminating restrictions on the number of vehicles that may provide taxicab service by 2022, or sooner. The comments also recommended that, in markets with open entry, rates regarding passenger motor vehicle transportation services should generally be set by competitive forces and disclosed in a truthful and non-deceptive manner. In addition, staff suggested that the Assembly may want to consider additional steps to modernize its regulatory framework to respond to the

¹⁸ Colorado Comment, supra note 9.

¹⁹ Anchorage Comment, supra note 9.

development of smartphone software applications that provide consumers with new means of arranging for passenger vehicle transportation services and other new services.

19. The Anchorage Assembly increased the existing number of 173 taxicab permits by fifteen, consistent with staff's recommendation to allow for additional entry. However, the Assembly did not adopt the other recommendations in staff's comments. Thus, the advocacy was partially successful.

2.3.3. Washington, D.C.

20. FTC staff submitted comments in June 2013 to the District of Columbia Taxicab Commission ("DCTC") on proposed rules regarding passenger motor vehicle transportation services, including rules that would apply to new smartphone software applications for arranging and paying for such services.²⁰ The comments expressed concern that certain proposed rules may unnecessarily impede competition. The comments also noted that requiring certain advance disclosures or provision of certain information in a receipt may be efficient ways to promote pricing transparency, protect consumers from misleading pricing practices, and help avoid or resolve significant consumer confusion. In addition, the comments emphasized that applications should implement security practices that are reasonable and appropriate in light of the types of information they collect, the risks and vulnerabilities they face, and associated implementation costs.

21. Press reports indicated that DCTC considered the staff comment. On August 30, 2013, DCTC adopted final rules regarding vehicle requirements for sedan-class vehicles hired through applications, which were somewhat less restrictive than the proposed rules. DCTC adopted largely without change the other rule provisions on which staff commented, except revised proposed rules for digital dispatch services. Thus, the advocacy was initially successful. On May 2, 2014, DCTC issued final rules relating to digital dispatch services, that were somewhat more procompetitive than the proposed rules. Thus, the advocacy was partially successful.

2.3.4. Chicago, Illinois

22. FTC staff provided a comment in April 2014 on a proposed Chicago ordinance that would provide for the licensing and operation of transportation network providers, particularly software applications that enable consumers to arrange for transportation services via personal vehicles.²¹ The comment stated that, if regulation of TNP services is warranted, regulation should focus primarily on ensuring the safety of customers and drivers and other consumer protection issues. The comment noted that some provisions may unnecessarily impede competition, and recommended that the City Council carefully consider the justification for and effects of such provisions. In particular, the comment noted provisions regarding a required annual fee for a non-transferable TNP license of \$25,000, greater insurance requirements than for other types of vehicles, prohibitions on airport and convention center pick-ups and drop-offs, records and data collection requirements, TNP business relationships relating to vehicles, and vehicle advertising.

²⁰ D.C. Comment, supra note 9.

²¹ Chicago Comment, supra note 9.

The comment also recommended that the city should more clearly allow for flexibility and experimentation in pricing.

23. In June 2014, Chicago enacted a revised version of the proposed ordinance that created two classes of TNP licenses, with regulatory requirements similar to regulated taxis for drivers operating more than twenty hours per week and a \$25,000 annual fee for a TNP license, and less stringent regulation for drivers operating twenty hours per week or less and an annual fee of \$10,000 for a TNP license. The revised ordinance also allowed for possible airport and convention center pick-ups and drop-offs after further study by the city, and more clearly allowed for demand-based pricing while also reserving the discretion of the city to regulate such fares. Thus, the advocacy was partially successful.

2.4. Federal Trade Commission “Sharing Economy” Workshop and Report

24. The Federal Trade Commission held a workshop in 2015 to explore issues relating to emerging Internet peer-to-peer platforms—often called the “sharing” economy—and the economic activity these platforms facilitate.²² The workshop examined competition, consumer protection, and economic issues arising in the sharing economy to promote more informed analysis of its competitive dynamics as well as benefits and risks to consumers. The workshop considered if, and the extent to which, existing regulatory frameworks can be responsive to sharing economy business models while maintaining appropriate consumer protections. It also examined how various regulatory choices may affect competition and consumers.

25. The FTC issued a related report in 2016, summarizing the workshop, providing an in-depth assessment of evolving business models that rely on Internet and app-based “sharing economy” platforms used by millions of Americans, and highlighting a number of competitive benefits and potential consumer protection challenges posed by disruptive business models in markets such as passenger motor vehicle transportation.²³

26. The report discusses the issues facing regulators in adapting traditional regulatory systems to innovative suppliers entering the market. It reviews some of the principles articulated in the advocacy letters discussed above, as well as views of regulators and industry participants.²⁴ For example, the report discusses the issue of regulatory fairness in the for-hire transportation sector, and concerns that newer forms of app-based transportation may face lesser requirements than do traditional taxi operators in some aspects, such as background checks and insurance.²⁵ The report stresses that regulation should address particular public policy concerns, but avoid actions that are likely to hinder competition and are either not necessary or broader than necessary to achieve

²² FTC, The “Sharing Economy,” Issues Facing Platforms, Participants, and Regulators, <https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators>.

²³ FTC, The “Sharing” Economy: Issues Facing Platforms, Participants & Regulators 3, 8-9, 11-13, 21, 24-26, 32-36, 48-49, 52-54, 60-61, 66-68, 71-75, 78-83, 88-89 (2016), <https://www.ftc.gov/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission>.

²⁴ *Id.* ch. 3.

²⁵ *Id.* at 71-75 and 77-79.

legitimate consumer protection and other public policy goals.²⁶ It also discusses how trust mechanisms commonly used in transportation and other sharing economy platforms may help address policy concerns such as safety.²⁷

2.5. Department of Justice-Federal Trade Commission Amicus Brief

27. The Department of Justice and Federal Trade Commission filed a joint amicus brief in November 2017 in the U.S. Court of Appeals for the Ninth Circuit in *Chamber of Commerce v. Seattle*. The case concerns an ordinance enacted by the city of Seattle in the State of Washington that permits independent for-hire drivers to collectively negotiate their contracts with taxicab associations, and transportation network companies such as Uber and Lyft. The Chamber of Commerce sued the city in federal district court, alleging that the ordinance violates the Sherman Act by impermissibly authorizing price fixing among competing independent drivers. The district court dismissed the Sherman Act claim on the basis of the state action doctrine, and the Chamber of Commerce appealed to the Ninth Circuit.²⁸ The amicus brief urges the court to reject the state action doctrine in this case, because the general Washington State statutes delegating authority to municipalities to regulate for-hire transportation services do not clearly express a legislative intention to displace competition in the markets at issue in the case.²⁹ On May 11, 2018, the Ninth Circuit reversed the district court's dismissal of the Chamber's antitrust claim, concluding that the state action doctrine did not apply.³⁰ The Ninth Circuit agreed with the joint amicus brief that the clear-articulation requirement was not satisfied because the State of Washington had not clearly articulated a policy "authorizing private parties to price-fix the fees for-hire drivers pay to companies like Uber or Lyft in exchange for ride-referral services."³¹ The Ninth Circuit also held (although the joint amicus brief did not address this issue) that Seattle was required to, but did not, show that the drivers' fixing of prices was actively supervised by the state itself.³²

²⁶ Id. at 51-52.

²⁷ Id. ch. 2.

²⁸ *Chamber of Commerce of the United States of America v. Seattle*, 274 F.Supp.3d 1155 (W.D. Wash. 2017), appeal pending, No. 17-35640, oral argument held (9th Cir. Feb. 5, 2018). The U.S. Chamber of Commerce is a private business advocacy organization; it is not a federal government agency.

²⁹ Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant and in Favor of Reversal, *Chamber of Commerce of the United States of America v. Seattle*, No. 17-35640 (9th Cir. Nov. 3, 2017), <https://www.justice.gov/atr/case-document/file/1009051/download>.

³⁰ *Chamber of Commerce of the United States of Am. v. City of Seattle*, No. 17-35640, 2018 WL 2169057 (9th Cir. May 11, 2018).

³¹ Id. at *8.

³² Id. at *12-14.

3. Taxicab Dual-Mode Fare Regulatory Frameworks

28. Some jurisdictions such as Washington, D.C. and New York City have recently adopted a dual-mode approach that allows taxicabs to charge fares not subject to regulated rates, for trips arranged through a smartphone application, while still requiring regulated metered fares for street hails. This approach is a substantial change from typical regulatory frameworks. Although a number of jurisdictions now allow arrangement of traditional forms of passenger motor vehicle transportation through digital dispatch, the fares charged for these services typically remain subject to existing regulated rates. Various other jurisdictions, including those where FTC staff filed advocacy comments, have also considered allowing more flexible fare structures for digitally dispatched trips, to help traditional forms of passenger motor vehicle transportation better compete with newer forms of transportation.³³

3.1. Washington, D.C. Vehicle-for-Hire Innovation Amendment Act of 2014

29. The District of Columbia enacted the “Vehicle-for-Hire Innovation Amendment Act of 2014,” which became effective in 2015.³⁴ The Act amended the District’s statutory scheme governing for-hire vehicles to legalize and deregulate transportation services organized through “digital dispatch” using smartphone applications. The statutory scheme sets various requirements for several types of transportation services, and regulates newer “private vehicles-for-hire,” using personal motor vehicles, somewhat differently than traditional “public vehicles-for-hire,” consisting of licensed taxicabs, sedans, and limousines.³⁵ Private vehicles-for-hire may be arranged only by digital dispatch.³⁶ Arrangement of public for-hire vehicles varies based on the type of vehicle in that class of service.³⁷ The Act also made Washington, D.C. one of the first jurisdictions

³³ See, e.g., Hal Dardick, Emanuel: Allow taxis to charge surge prices, require same background checks as Uber, Lyft drivers, Chicago Tribune, Nov. 9, 2017, <http://www.chicagotribune.com/news/local/politics/ct-met-chicago-taxis-ride-sharing-20171108-story.html> (describing proposal to allow taxicabs to use surge pricing in Chicago, Illinois); Kyle Hopkins, As taxis struggle to compete with Uber, Assembly will consider ‘surge pricing’ for cab rides, KTUU (Jan. 18, 2018), <http://www.ktuu.com/content/news/As-taxis-struggle-to-compete-with-Uber-Assembly-will-consider-surge-pricing-for-cabs-470037333.html> (describing proposed Anchorage, Alaska ordinance to allow taxis charge customers up to 20 percent more during periods of peak demand for trips arranged through digital dispatch); Joe St. George, Lawmakers debate letting Colorado taxis set prices like Uber, KDVR (Apr. 6, 2018), <http://kdvr.com/2018/04/06/lawmakers-debate-letting-colorado-taxis-set-prices-like-uber/> (discussing proposed bill to deregulate taxicabs in Colorado).

³⁴ 2014 District of Columbia Laws 20-197 (D.C. 2015) (Act 20-489) (B20-0753).

³⁵ The Act defines a private vehicle-for-hire as “a class of transportation service by which a network of private vehicle-for-hire operators in the District provides transportation to passengers to whom the private vehicle-for-hire operators are connected by digital dispatch.” D.C. Code § 50-301.03(16A). The Act defines a public vehicle-for-hire as “a class of transportation service by motor vehicle for hire in the District, including a taxicab, limousine, or sedan-class vehicle, that provides for-hire service exclusively using drivers and vehicles licensed pursuant to this subchapter and § 47-2829.” Id. § 50-301.03(17).

³⁶ Id. § 50-301.03(16A).

³⁷ Id. § 50-301.03(14) (limousine), (20) (sedan-class vehicle), (21) (taxicab).

in the United States to allow taxicabs to operate in a dual-mode manner in regard to fares.³⁸

30. Under the Innovation Act, “‘Taxicab’ means a class of public vehicle-for-hire that may be hired by dispatch, digital dispatch, or hailed on the street, and for which the fare charged is calculated by a Commission-approved meter with uniform rates determined by the Commission; provided, that a taxicab hired by a passenger through digital dispatch may use rates set by the company that operates the digital dispatch pursuant to the requirements of this subchapter.”³⁹ Transportation by taxicab may be arranged by street hail (subject to a regulated metered fare), traditional dispatch (same), or digital dispatch (using the regulated metered fare or rates set by the company).⁴⁰ Thus, a taxicab arranged by digital dispatch could charge the metered fare, or a fare lower or higher than the metered fare.⁴¹ For all fares not charged according to the metered fare, “before booking a vehicle the company shall disclose to the customer the fare calculation method, the applicable rates being charged, and the option for an estimated fare.”⁴² The Act therefore allows taxicabs to operate in dual modes in regard to ride fares, depending on the method of arrangement. By contrast, other public vehicles-for-hire may not accept street hails.⁴³

31. Individual taxicab drivers and the Washington D.C. Metro Taxi Operators Association sued the District of Columbia in federal district court, claiming the law created a two-tiered system for regulating taxicabs and digitally dispatched transportation services.⁴⁴ Plaintiffs focused on the Act’s distinctions between taxicab operators and private vehicles-for-hire, which they termed, “*De Facto* Taxicab Service Providers.” They argued the classification scheme imposed unequal, discriminatory burdens on local taxicab drivers and violated the Equal Protection clause of the Fourteenth Amendment of

³⁸ Lori Aratani, Proposal would allow D.C. cabs to embrace ‘surge pricing,’ Wash. Post, Apr. 7, 2014, <http://www.washingtonpost.com>.

³⁹ D.C. Code § 50–301.03(21). The D.C. Taxicab Commission (“DCTC”) was reorganized and renamed the Department of For-Hire Vehicles (“DFHV”) in 2016. *Id.* § 50-301.04.

⁴⁰ *Id.* § 50–301.03(21). However, during a state of emergency, the use of “surge pricing” is limited. “During a state of emergency as declared by the Mayor, a company that provides digital dispatch that engages in surge pricing shall limit the multiplier by which its base fare is multiplied to the next highest multiple below the 3 highest multiples set on different days in the 60 days preceding the declaration of a state of emergency for the same type of service in the Washington Metropolitan Area.” *Id.* § 50–301.31(b)(13).

⁴¹ *Id.* § 50-301.31(b)(1).

⁴² *Id.* § 50-301.31(b)(2).

⁴³ The statute defines a limousine as “a public vehicle-for-hire that operates exclusively through advanced registration, charges exclusively on the basis of time, and shall not accept street hails.” *Id.* § 50–301.03(14). The statute defines a sedan-class vehicle as “a public vehicle-for-hire that operates exclusively through digital dispatch, charges on the basis of time and distance, except for trips to airports, and other point-to-point trips based on well-traveled routes or event-related trips such as sporting events, which may be charged on a flat-fee basis, and shall not accept street hails.” *Id.* § 50–301.03(20).

⁴⁴ *Gebresalassie v. District of Columbia*, 170 F.Supp.3d 52 (D.D.C. 2016) (mem. op.). Plaintiffs alleged the statute is unconstitutional under the U.S. Constitution; they did not allege a violation of the federal antitrust laws.

the United States Constitution.⁴⁵ Applicable case law required the court to use a deferential rational basis standard of review in this case.⁴⁶

32. With regard to ride fares, the court observed that the District of Columbia justified distinctions between rides arranged by street hail or traditional dispatch and rides arranged by digital dispatch based on consumers' relative ability to obtain a fair rate.⁴⁷ "The District concluded that the *method* of arranging a ride determines the ease with which a customer can obtain a predictable estimate of the fare and can comparison shop among different providers."⁴⁸ In particular, "the District of Columbia has concluded that digital dispatch allows consumers to immediately obtain a fare for the planned trip and that it allows customers to comparison shop easily among different companies that provide private vehicle-for-hire services. By contrast, the District concluded that a customer could not practically negotiate among several taxicab companies when hailing a vehicle on the street or when arranging a ride by telephone."⁴⁹ The court similarly found rational the requirement that taxicabs, which can carry rides whose fares must be calculated by meter, have meter systems, while private vehicles-for-hire, which cannot provide metered services, are not required to have a meter.⁵⁰ The court likewise held the District of Columbia had provided sufficiently rational justifications for other varying requirements for taxicabs and private vehicles-for-hire, including greater insurance requirements for taxicabs, which the District concluded are likely to be used more often than private vehicles-for-hire.⁵¹

33. Plaintiffs also argued the statute arbitrarily and capriciously reduced the value of their taxicab licenses, and thus violated the Due Process Clause of the Fifth Amendment of the United States Constitution.⁵² The court applied the same rational basis standard to the due process claim, and for the same reasons concluded their claim failed.⁵³ The court allowed that, "[i]t may well be that the right to carry passengers for trips initiated by street hail or traditional dispatch has declined in value as a result of the advent of digital dispatch—implemented famously by companies such as Uber and Lyft. It may well also

⁴⁵ The Equal Protection Clause of the Fourteenth Amendment provides that, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. The Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment applies to the District of Columbia through the Due Process Clause of the Fifth Amendment. See 170 F.Supp.3d 52, 60 n.5.

⁴⁶ Plaintiffs did not allege the Act affected a "fundamental right" or implicated a "suspect class" of persons that have historically been subject to discrimination, which would require a court to apply a greater level of scrutiny. *Gebresalassie* at 60-61, 68.

⁴⁷ *Id.* at 61-62.

⁴⁸ *Id.* at 62 (emphasis original).

⁴⁹ *Id.*

⁵⁰ *Id.* at 66.

⁵¹ *Id.* at 62-68.

⁵² *Id.* at 68-71. The Due Process Clause of the Fifth Amendment provides that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

⁵³ Plaintiffs did not allege the Act affected a protected "fundamental interest" in "property" or "liberty." *Gebresalassie* at 68-71.

be that the legalization of such services in the District of Columbia, without requiring such operators to comply with the various requirements applicable to taxicabs discussed above, has contributed to the decline in the value of such licenses in the District of Columbia.”⁵⁴ At the same time, the court observed that plaintiffs did not dispute, and could not dispute, that despite the advent of digital dispatch, taxicabs still maintained a collective legal monopoly over certain types of services, particularly street hails.⁵⁵

34. Because plaintiffs’ lawsuit had failed to state a claim upon which relief could be granted, the court granted the defendant District of Columbia’s motion to dismiss the complaint. The court dismissed the case in its entirety and the statute was upheld.⁵⁶

3.2. New York City Flexible Fare Pilot Program

35. In March 2018, the New York City Taxi and Limousine Commission approved a two-year “Flex Fare” pilot program to allow yellow and green taxicabs to implement variable or surge pricing for fares arranged through a smartphone application, and require the provision of an upfront binding price when a passenger requests a taxi in such instances.⁵⁷ The pilot program will not apply to street hails, which will remain subject to the metered rate. Current rules require metered fares based on trip duration and distance for all taxi trips.⁵⁸ The resolution states that, “[f]are quotes make it easier for passengers to compare prices between services and passengers enjoy the certainty of knowing the final price before they get into a vehicle. However taxis are unable to attract passengers by offering upfront fare quotes because of the metered fare requirement.”⁵⁹ The resolution indicates that a goal of the Flex Fare Pilot Program is to allow the taxi industry to adopt and evaluate some of the upfront pricing structures that exist for other types of for-hire vehicles.⁶⁰

⁵⁴ *Id.* at 70.

⁵⁵ *Id.* at 71.

⁵⁶ Plaintiffs also claimed that the District of Columbia, in light of the alleged constitutional violations, exceeded its authority under the D.C. Home Rule Act, which devolved certain powers of the U.S. Congress over the District of Columbia to local government; but the court found that the Home Rule Act provided no independent cause of action. *Id.*

⁵⁷ New York City Taxi & Limousine Commission, Resolution Approving a Pilot Program to Allow Licensed E-Hail Apps to Offer Flexible Fares in Taxicabs (Mar. 29, 2018), http://www.nyc.gov/html/tlc/downloads/pdf/flex_fare_resolution_03_29.pdf (“Flex Fare Resolution”).

⁵⁸ Rules of the City of New York, 35 R.C.N.Y. 80-17(a)(1) (“A Driver of a Taxicab or Street Hail Livery must not charge or attempt to charge a fare above the Commission-approved rates. This includes a fare in a Street Hail Livery for a Hail Trip or a fare for any trip initiated or accepted through an E-Hail Application.”), (k)(3) (“The fare must be calculated as required by these rules and the Taximeter must be used for all trips, including trips paid for by E-Payment. Any fare paid for by E-Payment must be calculated by the Taximeter and not by any other method.”).

⁵⁹ Flex Fare Resolution, *supra* note 51, at 1.

⁶⁰ *Id.*

4. Conclusion

36. In the United States, the development of new technologies and methods for arranging passenger motor vehicle transportation service has raised novel legal and policy questions regarding the continuing role of traditional forms of service. The Federal Trade Commission and Department of Justice have been involved in various litigation and policy activities in this sector.

37. The dual-mode fare approaches of Washington, D.C. and New York City provide illustrative examples of how regulatory frameworks might be further updated to promote competition by traditional forms of passenger motor vehicle transportation, along with newer forms of service.

38. The U.S. experience suggests that policymakers should carefully consider the particular characteristics of various forms of passenger motor vehicle transportation, including the method of arrangement, and the justifications for any restrictions on competition, in order to maximize the competitive benefits of both traditional and newer forms of service.