Small Business Committee Staff:

Stephanie Jones, Counsel

Noah Meixler, Policy Analyst

Aliya Ali, Principal Finance Analyst



**THE COUNCIL OF THE CITY OF NEW YORK**

COMMITTEE REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION

Jeffrey Baker, Legislative Director

Rachel Cordero, Deputy Director for Governmental Affairs

**COMMITTEE ON SMALL BUSINESS**

Hon. Mark Gjonaj, Chair

**July 29, 2021**

**INT. NO. 2333-A:** By Council Members Gjonaj, Perkins and Cornegy Jr.

TITLE: A Local Law to amend the administrative code of the city of New York, in relation to prohibiting the inclusion of a food service establishment's products on a third-party food delivery platform without a written agreement authorizing such inclusion, and to provide penalties

**INT. NO. 2335-A:** By Council Member Gjonaj, Perkins and Cornegy Jr.

TITLE: A Local Law to amend the administrative code of the city of New York, in relation to requiring third-party food delivery services to provide a description of the telephone numbers listed in connection with food service establishments

**INT. NO. 2356-A:** By Council Member Gjonaj

TITLE: A Local Law to amend the administrative code of the city of New York, in relation to extending the prohibition of certain telephone order charges by third-party food delivery services

**INT. NO. 2359-A:** By Council Members Moya and Gjonaj

TITLE: A Local Law to amend the administrative code of the city of New York, in relation to extending the limitation on fees charged to food service establishments by third-party food delivery services

1. **INTRODUCTION**

On July 29, 2021, the Committee on Small Business, chaired by Council Member Mark Gjonaj, held a vote on the following bills: (1) Proposed Introduction Number 2333-A (Int. 2333-A), in relation to prohibiting the inclusion of a food service establishment's products on a third-party food delivery platform without a written agreement authorizing such inclusion, and to provide penalties; (2) Proposed Introduction Number 2335-A (Int. 2335-A), in relation to requiring third-party food delivery services to provide a description of the telephone numbers listed in connection with food service establishments; (3) Proposed Introduction Number 2356-A (Int. 2356-A), in relation to extending the prohibition of certain telephone order charges by third-party food delivery services; and (4) Proposed Introduction Number 2359-A (Int. 2359-A), in relation to extending the limitation on fees charged to food service establishments by third-party food delivery services.

The Committee previously heard testimony on this bill from the Office of Special Enforcement (OSE) and Department of Consumer Affairs and Worker Protection (DCWP), third-party delivery platforms, restaurants and trade associations. This feedback informed the final version of the bills. At the vote on July 29, the Committee voted 7 in favor, 0 opposed and 0 abstentions on the bill.

1. **BACKGROUND**
2. **NYC’s Restaurant Industry**

New York City is a mecca for acclaimed and diverse food options. With more than 23,000 establishments (as of 2019), the City’s eateries represent food from over 150 different countries.[[1]](#footnote-1) If you tried to eat, just once, at every restaurant in New York City, it would take over twenty years to visit them all.[[2]](#footnote-2)

Just like the food they offer, the City’s food and restaurant industry is not monolithic, and is comprised of everything from small mom-and-pop establishments, to street vendors, to Michelin-starred, fine dining restaurants. Eighty percent of the City’s restaurants are small, with fewer than 20 employees, while only one percent have more than 500 workers.[[3]](#footnote-3) With such a diverse food landscape within such a small geographic area, it is no wonder that New York City is consistently ranked as one of the culinary capitals of the world,[[4]](#footnote-4) and that New York City’s eateries form the second-largest component of City’s tourism industry, after accommodations.[[5]](#footnote-5)

The restaurant industry is also a vital source of employment and key contributor to the economy. Prior to the COVID-19 pandemic, there were more than 23,600 food establishments in New York City, which contributed to nearly $27 billion in taxable sales.[[6]](#footnote-6) Furthermore, in 2019, the industry accounted for one in every 12 private sector positions, supporting around 317,800 jobs.[[7]](#footnote-7) Clearly, the food and restaurant sector is a pivotal economic contributor and an essential component of the City’s identity, to New Yorkers and visitors alike.

1. **Third-Party Platforms**

Before the COVID-19 pandemic, online food delivery services were becoming an increasingly popular way for consumers to dine. Online restaurant orders grew 23 percent annually from 2013 to 2017.[[8]](#footnote-8) In 2018, UBS predicted that by 2030 the global online food-ordering marketplace could grow to $365 billion, up from $35 billion in 2018.[[9]](#footnote-9) Sales for the third-party food delivery industry rose 31 percent in 2019, and the percentage of Americans who ordered food from a third-party platform increased from 20 percent to 26 percent. A 2019 survey conducted by the National Restaurant Association found that 60 percent of consumers ordering takeout used a third-party delivery service.[[10]](#footnote-10)

The three major third-party delivery platforms utilize different commission models to remain profitable in this overcrowded and competitive marketplace. Grubhub currently accounts for about 36 percent of meal delivery sales in New York City.[[11]](#footnote-11) Prior to the Council’s passage of Local Law 52 of 2020, Grubhub charged restaurants a 10 percent fee for all orders delivered by a Grubhub courier,[[12]](#footnote-12) and charged restaurants higher commissions in exchange for increased visibility on their platform.[[13]](#footnote-13) DoorDash accounts for 35 percent of meal delivery sales in NYC.[[14]](#footnote-14) Doordash charges restaurants promotion fees, marketing fees, and subscription fees.[[15]](#footnote-15) Similar to Grubhub, DoorDash charges restaurants a commission fee “in exchange for promoting and featuring the Merchant…on the DoorDash platform,” and for all orders delivered by DoorDash couriers (known as “Dashers”).[[16]](#footnote-16) Uber Eats accounts for 28 percent of delivery sales in NYC.[[17]](#footnote-17) Uber Eats charged restaurants a 30 percent fee for orders delivered by Uber couriers,[[18]](#footnote-18) and a 15 percent fee for orders that are made on the Uber Eats website but are delivered by a restaurant’s delivery worker.[[19]](#footnote-19)

During the COVID-19 pandemic, when lockdowns were in place across the country, many consumers turned to take-out due to restricted dine-in options. Over 65 percent of consumers in the United States are more likely to purchase takeout from a restaurant now than before the pandemic, and over 50 percent of consumers say that takeout and delivery are essential to the way they now live.[[20]](#footnote-20) Even though COVID-19 restrictions have been lifted in New York and City residents are able to dine-in at restaurants, the shift in consumer behavior may remain. According to Scott Duke Kominers, an associate professor at Harvard Business School, “People have gotten much more used to ordering food and other products through delivery services. Some of that will decline once it's safe to do things in person, of course… But new habit formation is powerful."[[21]](#footnote-21) Uber CEO Dara Khosrowshahi similarly expects Uber Eats to experience a small decline in new customers as COVID-19 restrictions are lifted, however, he acknowledged “it looks like the habit [of consumers ordering food on Uber Eats] is sticking.”[[22]](#footnote-22)

Third-party platforms profited from the surge in consumer use of their platforms during the pandemic. The major food delivery platforms doubled their combined revenue during the pandemic, making a profit of $5.5 billion in April to September 2020, compared to $2.5 billion during the same months the previous year.[[23]](#footnote-23) Food delivery companies generated $50.6 billion in sales in 2020, more than double the $22.7 billion in sales generated in 2019.[[24]](#footnote-24) A study found that of the $28 billion increase in sales that occurred between 2019 and 2020, over $19 billion (69 percent) of this increase was due to the pandemic.[[25]](#footnote-25) The report concludes, “Sales would have grown by 38% in the absence of the pandemic, significantly less than the 122% [growth] that was actually observed.”[[26]](#footnote-26)

The increase in consumer usage of third party food delivery platforms during the pandemic was also caused by an increase in restaurants joining delivery platforms. Because restaurants across the country were only open for take-out and delivery, many restaurants not previously on delivery platforms joined the platforms for the first time. The de Blasio administration issued a COVID-19 related guidance sheet for business owners on March 16, 2020, advising restaurants and food services to join food delivery platforms.[[27]](#footnote-27) Accordingly, the platforms were able to expand their footprint in NYC by increasing the number of restaurants on their platforms. During an interview with MarketWatch, Grubhub CEO Matt Maloney acknowledged that the pandemic caused the platform to receive “10 to 15 times our usual new restaurant leads. This interest has led to four to five times more new restaurant go-lives compared to our previous record-breaking day.”[[28]](#footnote-28) Maloney meanwhile acknowledged that restaurants could not survive on deliveries alone during the pandemic.[[29]](#footnote-29) According to Maloney, “The industry isn’t large enough for all restaurants to survive just on delivery, but they can survive for a matter of weeks potentially. It’s definitely not a long-term solution to bridge across restaurants.”[[30]](#footnote-30)

The financial success of these companies is also apparent from their corporate strategies during this period. Uber acquired the delivery service Postmates in November 2020, further consolidating the food delivery marketplace.[[31]](#footnote-31) In December 2020, DoorDash made its public market debut and the DoorDash stock rose 86 percent during its initial public offering (IPO), one of the biggest IPOs of 2020.[[32]](#footnote-32)

While platforms profited during the pandemic, the restaurant industry has struggled. Even before the pandemic, the costs to operate a restaurant in the City, including rent, labor and inventory, were high, leaving little room for added costs like platform commission fees.[[33]](#footnote-33) From 2015 to 2016 the number of independent restaurants in the City fell three percent, slightly more than the national average.[[34]](#footnote-34) The onset of the pandemic only worsened conditions for restaurants. According to Partnership for New York City, 5,000 eateries have closed in New York City since the start of the pandemic.[[35]](#footnote-35) In December 2020, the National Restaurant Association reported that over 110,000 restaurants, around 17 percent of restaurants in the U.S., were either closed permanently or long-term due to the pandemic.[[36]](#footnote-36) Opportunity Insights reports that revenue for small businesses in the leisure and hospitality industry are still down 70 percent in June 2021 in comparison to January 2020.[[37]](#footnote-37)

While restaurants made a greater percentage of their earnings through off-premise sales during the pandemic, the increase in off-premise sales did not compensate for the loss of in-person dining. According to a NYS Restaurant Association survey from March 2021, among restaurant owners in New York whose off-premise business increased compared to pre-COVID levels, over 65 percent say their higher off-premises sales made up less than 30 percent of their lost on-premises sales.[[38]](#footnote-38) Thirty-five percent of restaurant owners surveyed predicted it would take over a year before business conditions returned to their pre-COVID levels.[[39]](#footnote-39)

As shown by the NYS Restaurant Association survey, the increase in consumers ordering takeout did not lead restaurants to recover the loss of in-person sales that they were experiencing due to the pandemic. While the platforms often market to restaurants by arguing they will generate “incremental” sales for restaurants, additional profit on top of their existing dine-in customers, the commissions restaurants are forced to pay on those incremental sales are far less profitable than the revenue restaurants generate from dine-in customers.[[40]](#footnote-40) Because of the increase in use of delivery platforms by New Yorkers due to the pandemic, and because this consumer behavior change will likely continue to a degree after the pandemic subsides, the platforms may take the business of existing dine-in customers.[[41]](#footnote-41) Since customers have become accustomed to ordering on the platforms, many may switch from being more profitable dine-in customers to less profitable delivery customers, which will continue to hurt restaurants.[[42]](#footnote-42) According to a restaurant owner in NYC, “We know for a fact that as delivery increases, our profitability decreases,” and accordingly, “sometimes it seems like we’re making food to make Seamless profitable.”[[43]](#footnote-43)

In response to this financial devastation, the Council passed Local Laws 51 and 52, which went into effect in June 2020, and then further extended these pieces of legislation through the passage of Local Laws 87 and 88 of 2020. These laws prohibited platforms from charging restaurants for telephone orders that did not result in an actual transaction during the call and limited the amount of fees per order that may be charged by the platforms, respectively. Other jurisdictions have taken similar measures to limit third-party platform fees. The State of New Jersey has limited commission fees to 10 or 20 percent depending on whether the order is delivered by a restaurant worker or a restaurant’s contractor;[[44]](#footnote-44) Philadelphia,[[45]](#footnote-45) Washington D.C.[[46]](#footnote-46) and Portland[[47]](#footnote-47) enacted laws limiting commission fees; and the mayors of Seattle[[48]](#footnote-48)and San Francisco[[49]](#footnote-49) issued emergency orders temporarily capping commission fees at 15 percent (Jersey City at 10 percent)[[50]](#footnote-50). On June 22, 2021, the San Francisco Board of Supervisors voted unanimously to pass a permanent fee cap on the amount that platforms can charge restaurants.[[51]](#footnote-51) The cap prohibits the platforms from charging over 15 percent per order for delivery fees, however, the cap does not cover other costs like marketing fees.

1. **Issues with Restaurants**

While third-party delivery platforms provide restaurants a unique marketing and delivery service, small businesses have accused these platforms of acting in a predatory manner. A class action lawsuit was filed in the United States District Court for the Southern District of New York in April 2020 against the major third-party delivery platforms.[[52]](#footnote-52) The lawsuit alleges that the platforms have violated U.S. antitrust law by requiring restaurants to charge delivery customers and dine-in customers the same price for each menu item, while imposing “exorbitant” fees of 10 to 40 percent of revenue to process delivery orders.[[53]](#footnote-53) On June 7, 2021, a bakery in Manhattan filed a class action lawsuit against the third party delivery platforms[[54]](#footnote-54) alleging they have violated Local Law 52 of 2020. The plaintiff alleged that the platforms failed to comply with the Council’s Local Law, as they overcharged the bakery above the permitted fee cap and inflated credit card processing fees.[[55]](#footnote-55)

The City Council has conducted three oversight hearings this legislative session on the rise of third-party delivery platforms in the City.[[56]](#footnote-56) During these hearings, small businesses and advocates have highlighted issues they experienced from using these platforms, including high commission fees, restrictions on menu pricing, and erroneous fees they are forced to pay from consumer phone calls that do not result in orders.[[57]](#footnote-57)

1. **Listing Non-Participating Restaurants**

Since the food delivery sector is a competitive marketplace, certain practices have become commonplace in the industry that are disadvantageous to restaurant owners. For example, restaurants that have not joined a third-party delivery service may find their restaurant listed on a delivery application without their consent. According to Grubhub spokesperson Grant Klinzman, a delivery service may add a restaurant to its platform without the consent of the restaurant owner if the service sees local demand for the restaurant owner’s cuisine. Grubhub adds these unlisted restaurants so “the restaurant can receive more orders and revenue from deliveries completed by our drivers. This is a model that other food delivery companies have been doing for years as a way to widen their restaurant supply, and we’re using it as well in some markets to create a level playing field.”[[58]](#footnote-58) A delivery application may add restaurants to their platform, even in the absence of a contract with the restaurant, to ensure they are not at a disadvantage in comparison to other food delivery platforms. This system may also benefit a restaurant owner, who could begin to get higher order volumes through the application.[[59]](#footnote-59)

Nonetheless, the model of platforms adding restaurants without the restaurant owner’s knowledge can be detrimental to a restaurant owner’s business. Restaurants may not have designed dishes for long travel or high volume,[[60]](#footnote-60) and menus posted by third-party platforms can be out of date or inaccurate, which can also further frustrate customers.[[61]](#footnote-61) Delivery platforms’ practice of listing restaurants without consulting the restaurant owner also robs the restaurant of the agency to decide whether they want to contract with a platform.[[62]](#footnote-62) Restaurant owners unknowingly lose control of making their own business decisions and deciding the direction they want to take their business.[[63]](#footnote-63) According to Grubhub, “[T]he non-partnered model is no doubt a bad experience for diners, drivers and restaurants. But our peers have shown growth – although not profits – using the tactic, and we believe there is a benefit to having a larger restaurant network: from finding new diners and not giving diners any reason to go elsewhere.”[[64]](#footnote-64)

Restaurants have filed lawsuits against delivery platforms after finding out they have been listed on a platform without their knowledge. In 2015, In-N-Out filed a lawsuit against DoorDash for trademark infringement and unfair competition under state and federal laws for DoorDash advertising and delivering In-N-Out orders without the company's agreement.[[65]](#footnote-65) In October 2020, two restaurants in California filed a class action lawsuit against Grubhub for listing their restaurants on the platform without the restaurants’ consent, which the restaurants have alleged has caused their businesses to suffer reputational harm and a loss in control over their customers’ experiences.[[66]](#footnote-66)

Regulators have taken action to stop the practice of platforms listing restaurants without the consent of the restaurant owner. In September 2020, Governor Newsom signed AB-2149, which prevents platforms from delivering food from a restaurant unless the restaurant has “expressly authoriz[ed] the food delivery platform to take orders and deliver meals prepared by the food facility.”[[67]](#footnote-67) The Seattle City Council passed a similar law on June 14, 2021, which requires food delivery platforms to have a written agreement with a restaurant prior to offering consumers delivery from that restaurant.[[68]](#footnote-68) In the New York State Legislature, A4651/S1630A, which would similarly prohibit the unauthorized listing of restaurants on food delivery platforms, passed in the State Senate and Assembly. It has not yet been delivered to the Governor for his signature.[[69]](#footnote-69)

1. **Telephone Orders**

As previously mentioned, during past Committee hearings on the rise of third party delivery platforms, restaurants have testified that they have been charged erroneous fees they are forced to pay from consumer phone calls that do not result in orders. When consumers call a restaurant directly instead of ordering from the platform’s website or phone application, delivery platforms are left out of the transaction and therefore do not profit from the order. To capitalize off these transactions, certain third party platforms have generated their own numbers for restaurants online.[[70]](#footnote-70) Telephone calls placed through the number are analyzed by an algorithm to determine whether an order was placed on the call.[[71]](#footnote-71)

The algorithm often does not accurately identify telephone orders, however, according to restaurants that have been charged these fees. In 2018, a class action lawsuit was filed in the United States District Court for the Eastern District of Philadelphia against Grubhub. According to the plaintiff, an owner of a local Indian restaurant chain, Grubhub had committed wrongful conduct, including, but not limited to, “withholding commissions for sham telephone food orders, depriving more than 80,000 restaurants of revenues and profits that rightfully belong to them.”[[72]](#footnote-72) At the Committee hearing on August 13, 2020, a restaurant owner testified that despite the Council’s passage of Local Law 51, he continued to be charged by a platform erroneously for phone orders. The Council subsequently extended Local Law 51 through the passage of Local Law 87.

1. **BILL ANALYSIS**

**Int. 2333-A, in relation to prohibiting the inclusion of a food service establishment's products on a third-party food delivery platform without a written agreement authorizing such inclusion, and to provide penalties**

This bill would prohibit third-party delivery platforms from listing food service establishments on their application or website and making deliveries from those establishments, without a written agreement granting permission to do so. It would also prohibit the delivery platforms from requiring the food service establishments, in these written agreements, to indemnify the platform or their independent contractors or agents for damage that occurs after food or beverages leave the establishment. Violations of this bill would result in a civil penalty of not more than $500 per day per food service establishment with respect to which a violation was committed. The Commissioner of DCWP would be required to conduct outreach about the requirements of this bill. This bill would take effect 120 days after it becomes law.

**Int. 2335-A, in relation to requiring third-party food delivery services to provide a description of the telephone numbers listed in connection with food service establishments**

This bill would require the platforms to list a food service establishment’s direct telephone number, if listing any telephone number for that establishment. If the platform also includes an alternate number, they would be required to provide a description that identifies each type of telephone number and any fees associated with their use. The Commissioner of DCWP would be required to promulgate rules defining the content, size and location of the description. Violations of this bill would result in a civil penalty of not more than $500 per day per restaurant with respect to which a violation was committed. This bill would take effect on the same day that Prop. Int. No. 2333-A takes effect.

**Int. 2356-A, in relation to extending the prohibition of certain telephone order charges by third-party food delivery services**

This bill would extend Local Laws 51 and 87 of 2020, which prohibit third-party delivery platforms from charging restaurants for telephone orders that did not result in a transaction. Under the existing law, such charges are prohibited only when certain conditions apply. This bill would extend protections past the anticipated end date of those conditions until February 17, 2022. Violations of this bill would result in a civil penalty of not more than $500 per day per restaurant with respect to which a violation was committed. This bill would take effect immediately.

**Int. 2359-A, in relation to extending the limitation on fees charged to food service establishments by third-party food delivery services**

This bill would extend Local Laws 52 and 88 of 2020, which prohibit third-party delivery platforms from charging restaurants more than 15% per order for delivery and more than 5% per order for all other fees. This bill would instead prohibit such charges from the anticipated end date of those conditions until February 17, 2022. It would also clarify the types of transaction fees exempted from these limits on charges. Violations of this bill would result in a civil penalty of not more than $1000 per day per restaurant with respect to which a violation was committed. This bill would take effect immediately.

Int. No. 2333-A

By Council Members Gjonaj, Perkins and Cornegy

..Title

A Local Law to amend the administrative code of the city of New York, in relation to prohibiting the inclusion of a food service establishment's products on a third-party food delivery platform without a written agreement authorizing such inclusion, and to provide penalties

..Body

Be it enacted by the Council as follows:

Section 1. Subchapter 22 of chapter 5 of title 20 of the administrative code of the city of New York is amended by adding a new section 20-847.2 to read as follows:

§ 20-847.2 Unauthorized listings. a. Notwithstanding section 20-845, for the purposes of this section the term “third-party food delivery service” means any website, mobile application or other internet service that offers or arranges for the sale of food and beverages prepared by, and the same-day delivery or same-day pickup of food and beverages from, a food service establishment located in the city that is owned and operated by a different person.

b. A third-party food delivery service shall not list, advertise, promote, or sell a food service establishment’s products on, or arrange for the delivery of an order of such products through, the website, mobile application or other platform of such third-party food delivery service without a written agreement between such third-party delivery service and such food service establishment to include the food service establishment’s products on such website, mobile application or other platform.

c. An agreement executed in accordance with this section shall not include a provision, clause, or covenant that requires a food service establishment to indemnify a third-party food delivery service, any independent contractor acting on behalf of the third-party food delivery service, or any registered agent of the third-party food delivery service, for any damages or harm by an act or omission occurring after the food service establishment’s product leaves the place of business of the food service establishment. To the extent an agreement executed in accordance with this section contains such a provision, such provision shall be deemed void and unenforceable.

d. Outreach. No more than 30 days after the effective date of the local law that added this section, and continuing for 90 days thereafter, the commissioner shall conduct outreach in the designated citywide languages, as defined in section 23-1101, to alert food service establishments and third-party food delivery services to this section. Such outreach shall include, but need not be limited to, posting information on relevant agency websites and distributing information to food service establishments, third-party food delivery services and other relevant stakeholders.

§ 2. Subdivision a of section 20-848 of the administrative code of the city of New York, as amended by local law number 51 for the year 2020, is amended to read as follows:

a. Any person that violates any provision of [section 20-846] this subchapter or any rule promulgated pursuant thereto shall be subject to a civil penalty that shall not exceed [$1,000] $500 per violation[. Any person] except that a person that violates any provision of section [20-847] 20-846 or any rule promulgated pursuant thereto shall be subject to a civil penalty that shall not exceed [$500] $1000 per violation. Violations under this subchapter shall accrue on a daily basis for each day and for each food service establishment [charged a fee in] with respect to which a violation of this subchapter or any rule promulgated pursuant to this subchapter was committed.

§ 3. This local law takes effect 120 days after it becomes law, except that the commissioner of consumer and worker protection shall take such measures as are necessary for the implementation of this local law, including the promulgation of rules, before such date.

NLB/SJ

LS #17479

7/21/21 6:20 PM

Int. No. 2335-A

By Council Members Gjonaj, Perkins and Cornegy..Title

A Local Law to amend the administrative code of the city of New York, in relation to requiring third-party food delivery services to provide a description of the telephone numbers listed in connection with food service establishments

..Body

Be it enacted by the Council as follows:

Section 1. Section 20-845 of the administrative code of the city of New York, as amended by local law number 88 for the year 2020, is amended to read as follows:

§ 20-845 Definitions. For the purposes of this subchapter, the following terms have the following meanings:

Customer data. The term “customer data” means the following information provided to a third-party food delivery service by a customer who has placed an online order:

(i) Name;

(ii) Telephone number;

(iii) E-mail address;

(iv) The delivery address of the online order; and

(v) The contents of the online order being requested to be fulfilled by a food service establishment.

Delivery fee. The term "delivery fee" means a fee charged by a third-party food delivery service for providing a food service establishment with a service that delivers food from such establishment to customers. The term does not include any other fee that may be charged by a third-party food delivery service to a food service establishment, such as fees for listing or advertising the food service establishment on the third-party food delivery service platform or fees related to processing the online order.

Direct telephone number. The term “direct telephone number” means a telephone number by which the caller communicates directly with a food service establishment.

Food service establishment. The term "food service establishment" has the same meaning as provided in subdivision s of section 81.03 of the health code of the city of New York.

Online order. The term "online order" means any order placed by a customer through or with the assistance of a platform provided by a third-party food delivery service, including a telephone order.

Purchase price. The term "purchase price" means the total price of the items contained in an online order that are listed on the menu of the food service establishment where such order is placed. Such term does not include taxes, gratuities and any other fees that may make up the total cost to the customer of an online order.

Telephone order. The term "telephone order" means an order placed by a customer to a food service establishment through a telephone call forwarded by a call system provided by a third-party food delivery service or by another entity by agreement with a third-party food delivery service.

Third-party food delivery service. The term "third-party food delivery service" means any website, mobile application or other internet service that offers or arranges for the sale of food and beverages prepared by, and the same-day delivery or same-day pickup of food and beverages from, no fewer than 20 food service establishments located in the city that are owned and operated by different persons.

Third-party telephone number. The term “third-party telephone number” means a telephone number by which a customer may place a telephone order that is not a direct telephone number.

§ 2. Subchapter 22 of chapter 5 of title 20 of the administrative code of the city of New York is amended by adding a new section 20-847.1 to read as follows:

§ 20-847.1 Telephone number listings. a. A third-party food delivery service that lists or links to a telephone number for a food service establishment shall include in such listing or link the direct telephone number of such food service establishment. A third-party food delivery service may also list or link to a third-party telephone number, in addition to such direct telephone number, provided that such listing or link includes a prominent and conspicuous description of each telephone number, including but not limited to identification of each telephone number as a third-party telephone number or a direct telephone number, as applicable, and any fee associated with the use of each telephone number for telephone orders, whether imposed on the food service establishment or on the caller.

b. The commissioner shall adopt such rules and regulations as may be necessary to effectuate the purposes of this section, including but not limited to defining the contents, size and location of the descriptions required by this section.

§ 3. This local law takes effect on the same day as a local law amending the administrative code of the city of New York, relating to prohibiting the inclusion of a food service establishment’s products on a third-party food delivery platform, as proposed in introduction number 2333-A for the year 2021, takes effect, except that the commissioner of consumer and worker protection shall take such measures as are necessary for the implementation of this local law, including the promulgation of rules, before such date.

SG/SJ

LS #17482

7/21/21 6:20 PM

Int. No. 2356-A

By Council Member Gjonaj

..Title

A Local Law to amend the administrative code of the city of New York, in relation to extending the prohibition of certain telephone order charges by third-party food delivery services

..Body

Be it enacted by the Council as follows:

Section 1. Subdivision b of section 20-847 of the administrative code of the city of New York, as amended by local law number 87 for the year 2020, is amended to read as follows:

b. The requirements of this section apply only [during the period in which a state disaster emergency has been declared by the governor of the state of New York or a state of emergency has been declared by the mayor, such declaration is in effect in the city, and all food service establishments in the city are prohibited from operating at the maximum indoor occupancy and for a period of 90 days thereafter] until February 17, 2022.

§ 2. This local law takes effect immediately, except that if it becomes law after August 17, 2021, it shall be retroactive to and deemed to have been in effect on and after August 17, 2021.

SJ

LS #17899

7/16/21 1:00 PM

Int. No. 2359-A

By Council Members Moya and Gjonaj

..Title

A Local Law to amend the administrative code of the city of New York, in relation to extending the limitation on fees charged to food service establishments by third-party food delivery services

..Body

Be it enacted by the Council as follows:

Section 1. Section 20-846 of the administrative code of the city of New York, as added by local law number 52 for the year 2020 and subdivisions b and c as amended by local law number 88 for the year 2020, is amended to read as follows:

§ 20-846 [Fee limits during declared emergencies] Fees. a. It shall be unlawful for a third-party food delivery service to charge a food service establishment a delivery fee that totals more than 15% of the purchase price of each online order.

b. It shall be unlawful for a third-party food delivery service to charge a food service establishment any fee other than a delivery fee for the use of their service greater than 5% of the purchase price of each online order, provided that such cap shall not apply to a transaction fee imposed either by: (i) a credit card issuer or (ii) an internet-based payment system, when such transaction fee [that] is charged to the third-party food delivery service and is charged in the same amount by the third-party food delivery service to such food service establishment.

c. The requirements of this section apply only [during the period in which a state disaster emergency has been declared by the governor of the state of New York or a state of emergency has been declared by the mayor, such declaration is in effect in the city, and all food service establishments in the city are prohibited from operating at the maximum indoor occupancy and for a period of 90 days thereafter] until February 17, 2022.

d. Definitions. For purposes of this section, the following terms have the following meanings:

Credit card. The term “credit card” means any credit card, charge card, courtesy card, debit card, or other device issued by a person to another person which may be used to obtain a cash advance or a loan or credit, or to purchase or lease property or services on the credit of the person issuing the credit card or a person who has agreed with the issuer to pay obligations arising from the use of a credit card issued to another person.

Internet-based payment system. The term “internet-based payment system” means any mobile application or other internet service that facilitates electronic payments.

Transaction fee. The term “transaction fee” means a charge for the processing of a payment for an online order.

§ 2. This local law takes effect immediately, except that if it becomes law after August 17, 2021, it shall be retroactive to and deemed to have been in effect on and after August 17, 2021.

SJ

LS #15934

7/21/21 8:15 PM

1. Thomas P. DiNapoli “The restaurant industry in New York City: Tracking the recovery”, *Office of the New York State Comptroller*, September 2020, available at: <https://www.osc.state.ny.us/files/reports/osdc/pdf/nyc-restaurant-industry-final.pdf>, p. 1. [↑](#footnote-ref-1)
2. Nick Hines “It would take 22.7 Years to eat at every New York City restaurant”, *Vinepair*, May 9, 2017, available at: <https://vinepair.com/booze-news/new-york-restaurants-eat-at-every-on/>. [↑](#footnote-ref-2)
3. Thomas P. DiNapoli “The restaurant industry in New York City: Tracking the recovery”, *Office of the New York State Comptroller*, September 2020, available at: <https://www.osc.state.ny.us/files/reports/osdc/pdf/nyc-restaurant-industry-final.pdf>, p. 1. [↑](#footnote-ref-3)
4. See for example: “New York beats Paris to be named the culinary capital of the world”, *Luxury Travel Magazine*, June 4, 2019, available at: <https://www.luxurytravelmagazine.com/news-articles/new-york-beats-paris-to-be-named-the-culinary-capital-of-the-world>; and Kendall Cornish “These are the world’s best cities for food”, *Travel and Leisure*, July 8, 2020, available at: <https://www.travelandleisure.com/food-drink/worlds-best-cities-for-food>. [↑](#footnote-ref-4)
5. Thomas P. DiNapoli “The restaurant industry in New York City: Tracking the recovery”, *Office of the New York State Comptroller*, September 2020, available at: <https://www.osc.state.ny.us/files/reports/osdc/pdf/nyc-restaurant-industry-final.pdf>, p. 1. [↑](#footnote-ref-5)
6. Thomas P. DiNapoli “The restaurant industry in New York City: Tracking the recovery”, *Office of the New York State Comptroller*, September 2020, available at: <https://www.osc.state.ny.us/files/reports/osdc/pdf/nyc-restaurant-industry-final.pdf>, p. 1. [↑](#footnote-ref-6)
7. Thomas P. DiNapoli “The restaurant industry in New York City: Tracking the recovery”, *Office of the New York State Comptroller*, September 2020, available at: <https://www.osc.state.ny.us/files/reports/osdc/pdf/nyc-restaurant-industry-final.pdf>, p. 2. [↑](#footnote-ref-7)
8. The NPD Group “Feeding the growing appetite for restaurant apps, <https://www.npd.com/wps/portal/npd/us/news/infographics/2018/feeding-the-growing-appetite-for-restaurant-apps/>. [↑](#footnote-ref-8)
9. USB Investment Bank “Is The Kitchen Dead?”,June 18, 2018, available at: <https://www.ubs.com/global/en/investment-bank/in-focus/2018/dead-kitchen.html> [↑](#footnote-ref-9)
10. Hudson Riehle and Melissa Wilson “Harnessing Technology to Drive Off-Premises Sales”, 2019, *National Restaurant Association*, available at: <https://www.restaurant.org/Downloads/PDFs/Research/research_offpremises_201910>. [↑](#footnote-ref-10)
11. Kathryn Roethel Rieck, “Which company is winning the food delivery war?”, June 14, 2021, *Second Measure*, available at: <https://secondmeasure.com/datapoints/food-delivery-services-grubhub-uber-eats-doordash-postmates/> [↑](#footnote-ref-11)
12. Grubhub “Grubub Pricing”, available at: <https://learn.grubhub.com/wp-content/uploads/2018/08/Grubhub_One-Pager_Pricing-Overview_Final.pdf> [↑](#footnote-ref-12)
13. David Yaffe-Bellany, “New York vs. Grubhub”, September 30, 2019, *The New York Times*, available at: <https://www.nytimes.com/2019/09/30/business/grubhub-seamless-restaurants-delivery-apps-fees.html> [↑](#footnote-ref-13)
14. Kathryn Roethel Rieck, “Which company is winning the food delivery war?”, June 14, 2021, *Second Measure*, available at: <https://secondmeasure.com/datapoints/food-delivery-services-grubhub-uber-eats-doordash-postmates/> [↑](#footnote-ref-14)
15. DoorDash “Terms of Service - United States DoorDash Merchants”, available at: <https://help.doordash.com/merchants/s/terms-of-service-us?language=en_US#payment-fees-and-taxes> [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. Kathryn Roethel Rieck, “Which company is winning the food delivery war?”, June 14, 2021, *Second Measure*, available at: <https://secondmeasure.com/datapoints/food-delivery-services-grubhub-uber-eats-doordash-postmates/> [↑](#footnote-ref-17)
18. Julie Littman “Delivery by the numbers: How top third-party platforms compare”, October 3, 2019, *Restaurant Dive*, available at: <https://www.restaurantdive.com/news/delivery-by-the-numbers-how-top-third-party-platforms-compare/564279/>. [↑](#footnote-ref-18)
19. Uber “How do fees work on Uber Eats”, available at: <https://help.uber.com/ubereats/article/how-do-fees-work-on-uber-eats?nodeId=65d229e2-a2b4-4fa0-b10f-b36c9546cf55> [↑](#footnote-ref-19)
20. “National Restaurant Association Releases 2021 State of the Restaurant Industry Report”, January 26, 2021, available at: <https://restaurant.org/news/pressroom/press-releases/2021-state-of-the-restaurant-industry-report> [↑](#footnote-ref-20)
21. Sara Ashley O’Brien, “The pandemic boosted food delivery companies. Soon they may face a reality check” December 6, 2020, available at: <https://www.cnn.com/2020/12/06/tech/food-delivery-pandemic-doordash/index.html> [↑](#footnote-ref-21)
22. “Food Delivery Is Keeping Uber Alive. Will It Kill Restaurants?” Kara Swisher, *The New York Times*, January 14, 2021, available at: <https://www.nytimes.com/2021/01/14/opinion/sway-kara-swisher-dara-khosrowshahi.html?showTranscript=1> [↑](#footnote-ref-22)
23. Levi Sumagaysay “The pandemic has more than doubled food-delivery apps’ business. Now what?”, *MarketWatch*, November 27, 2020, available at: <https://www.marketwatch.com/story/the-pandemic-has-more-than-doubled-americans-use-of-food-delivery-apps-but-that-doesnt-mean-the-companies-are-making-money-11606340169>. [↑](#footnote-ref-23)
24. Elliot Shin Oblander and Daniel Minh McCarthy, “How has COVID-19 Impacted Customer Relationship

    Dynamics at Restaurant Food Delivery Businesses?” April 26, 2021, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3836262> [↑](#footnote-ref-24)
25. *Id.* [↑](#footnote-ref-25)
26. *Id.* [↑](#footnote-ref-26)
27. Flatiron District “Guidance for business owners – Updated March 16, 2020: Tips for addressing changes in

    customer behavior due to the Novel (New) Coronavirus (COVID19)”, available at: <https://www.flatirondistrict.nyc/uploaded/files/COVID-19/COVID-19%20Guidance%20for%20Business%20Owners%20-%203-16-2020.pdf> [↑](#footnote-ref-27)
28. *Id.* [↑](#footnote-ref-28)
29. Elisabeth Buchwald, “Restaurants can’t survive on delivery alone, says Grubhub CEO Matt Maloney”, March 23,

    2020, MarketWatch, available at: https://www.marketwatch.com/story/restaurants-wont-be-able-to-survive-ondelivery-only-says-grubhub-ceo-matt-maloney-2020-03-21 [↑](#footnote-ref-29)
30. *Id.* [↑](#footnote-ref-30)
31. “Mike Isaac, Erin Griffith and Adam Satariano, “Uber Buys Postmates for $2.65 Billion,” *The New York Times*, Updated November 13, 2020, available at: <https://www.nytimes.com/2020/07/05/technology/uber-postmates-deal.html#:~:text=SAN%20FRANCISCO%20%E2%80%94%20Uber%20has%20agreed,stock%20deal%20on%20Monday%20morning> [↑](#footnote-ref-31)
32. Erin Griffith, “DoorDash Soars in First Day of Trading,” *The New York Times*, Updated March 19, 2021, available at: <https://www.nytimes.com/2020/12/09/technology/doordash-ipo-stock.html> [↑](#footnote-ref-32)
33. Karen Stabiner, “Is New York Too Expensive for Restaurateurs? We Do the Math,” *The New York Times*, October 25, 2016, <https://www.nytimes.com/2016/10/26/dining/restaurant-economics-new-york.html>. *See also* Gabe Flores, “What Is the Average Profit Margin for a Restaurant?” *Restaurant365*, February 25, 2020, <https://www.restaurant365.com/blog/what-is-the-average-profit-margin-for-a-restaurant/> (asserting the average profit margin of a restaurant is three to six percent, with a possible margin of up to 10 percent). [↑](#footnote-ref-33)
34. *Id.* [↑](#footnote-ref-34)
35. “Jobs, not Taxes, Should be Top Priority for 2021-22” *Partnership for New York City*, February 17, 2021, available at: <https://pfnyc.org/news/jobs-not-taxes-should-be-top-priority-for-2021-22/> [↑](#footnote-ref-35)
36. “Restaurant Industry in Free Fall; 10,000 Close in Three Months”, *National Restaurant Association*, December 7, 2020, available at: <https://restaurant.org/news/pressroom/press-releases/restaurant-industry-in-free-fall-10000-close-in> [↑](#footnote-ref-36)
37. “Percent Change in Small Business Revenue”, *Opportunity Insights*, Updated June 2, 2021, available at: <https://tracktherecovery.org/> [↑](#footnote-ref-37)
38. “State Restaurant Association Survey: Majority of Operators Report Delivery and Take-Out Sales Make Up Less Than One Third of Lost Sales,” New York State Restaurant Association, March 4, 2021, available at: <https://www.nysra.org/uploads/1/2/1/3/121352550/nys_survey_results_march_4_2021.pdf> [↑](#footnote-ref-38)
39. *Id.* [↑](#footnote-ref-39)
40. Pnina Feldman, Andrew E. Frazelle, and Robert Swinney, “Can Delivery Platforms Benefit Restaurants?”, April 30, 2019, Available at SSRN: https://ssrn.com/abstract=3258739 or <http://dx.doi.org/10.2139/ssrn.3258739> [↑](#footnote-ref-40)
41. *Id.* [↑](#footnote-ref-41)
42. *Id.* [↑](#footnote-ref-42)
43. *Id.* [↑](#footnote-ref-43)
44. New Jersey Senate Bill 2437, available at: <https://legiscan.com/NJ/text/S2437/id/2203307>. [↑](#footnote-ref-44)
45. The Philadelphia Code, Chapter 9-5000, available at: <https://phila.legistar.com/LegislationDetail.aspx?ID=4553673&GUID=0DE18EE1-E462-4B1E-B58F-746F39D76748&Options=ID%7cText%7c&Search=200344&fbclid=IwAR02ax6pEBPrAZVOYk4jBY5ydrD_ZbeiA2WwwroV9E-CFOeQD4MKzlp5I-U>; *see also* Jenn Ladd, “How Philly’s new food-delivery law changes the rules for Grubhub, DoorDash, and other services”, July 30, 2020, *The Philadelphia Inquirer*, <https://www.inquirer.com/food/philadelphia-caps-third-party-delivery-fees-restaurants-pandemic-20200730.html>. [↑](#footnote-ref-45)
46. Code of the District of Columbia, § 48-641, available at: <https://code.dccouncil.us/dc/council/code/sections/48-641.html>. [↑](#footnote-ref-46)
47. Portland Ordinance available at: <https://efiles.portlandoregon.gov/Record/13908986/File/Document> [↑](#footnote-ref-47)
48. City of Seattle, Civil Emergency Order: Restricting Restaurant Delivery and Pick-Up Commission Fees, April 24, 2020, available at: <https://durkan.seattle.gov/wp-content/uploads/sites/9/2020/04/Emergency-Order-Delivery-Fee-Cap-4-24-2020.pdf>. [↑](#footnote-ref-48)
49. City and County of San Francisco, Office of the Mayor, Mayor London Breed Announces Delivery Fee Cap to Support San Francisco Restaurants During COVID-19 Pandemic, April 10, 2020, available at: <https://sfmayor.org/article/mayor-london-breed-announces-delivery-fee-cap-support-san-francisco-restaurants-during-covid>. [↑](#footnote-ref-49)
50. City of Jersey City Office of the Mayor, Executive Order – Third-Party Food Service Fee Cap, May 7, 2020, available at: <https://jerseycitynj.gov/UserFiles/Servers/Server_6189660/File/City%20Hall/Mayors%20Office/Mayoral%20Executive%20Orders/2020/Executive%20Order%20Food%20Delivery%20App%20Price%20Cap%20-%205.4.20.pdf>. [↑](#footnote-ref-50)
51. Tanay Warerkar, “San Francisco will permanently cap food delivery fees for DoorDash, Grubhub and other apps”, San Francisco Chronicle, June 23, 2021, available at: <https://www.sfchronicle.com/food/restaurants/article/Food-app-delivery-commission-in-S-F-capped-at-16266468.php> [↑](#footnote-ref-51)
52. The four platforms are Grubhub Inc. (which also does business as Seamless), DoorDash Inc., Postmates Inc., and Uber Technologies, Inc., which is the parent company of Uber Eats. [↑](#footnote-ref-52)
53. Jonathan Stempel, “Grubhub, DoorDash, Postmates, Uber Eats are sued over restaurant prices amid pandemic” April 13, 2020, *Reuters*, available at: <https://www.reuters.com/article/us-health-coronavirus-food-delivery-laws-idUSKCN21V2C1>. [↑](#footnote-ref-53)
54. Including Grubhub and Seamless, Uber Eats and Postmates, and DoorDash. [↑](#footnote-ref-54)
55. Micheli & Shel, LLC individually and on behalf of others similarly situated, *v.* GRUBHUB INC., GRUBHUB INC. d/b/a SEAMLESS, SEAMLESS NORTH AMERICA, LLC, UBER TECHNOLOGIES INC., UBER EATS, POSTMATES LLC, and DOORDASH INC., UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK [↑](#footnote-ref-55)
56. New York City Council “Oversight – The Changing Market for Food Delivery”, June 6, 2019, available at: <https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=705634&GUID=0BC09A92-5DB4-496B-90EE-BF75DF712131&Options=info|&Search=>; and New York City Council “Oversight: ‘Ghost Kitchens’ ‘Virtual Restaurants’ and the Future of the Restaurant Industry”, February 6, 2020, available at: <https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=759804&GUID=B42220FE-417A-484C-B7CF-51725F784A71&Options=info|&Search=>; and New York City Council “Oversight - The Impact of COVID-19 on Small Businesses in New York City.” April 29, 2020, available at: <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4424922&GUID=F205F93F-5C61-490F-ACA3-D343CA9C8584&Options=&Search>= [↑](#footnote-ref-56)
57. *Id.*  [↑](#footnote-ref-57)
58. Christopher Robbins, “New Bill Aims To Curb "Parasite" Food Delivery Apps In NY State”, *Gothamist*, January 6, 2021, available at: <https://gothamist.com/food/new-bill-aims-curb-parasite-food-delivery-apps-ny-state> [↑](#footnote-ref-58)
59. Jaya Saxena, “Grubhub’s New Strategy Is to Be an Even Worse Partner to Restaurants” *Eater NY*, October 30, 2019, available at: <https://www.eater.com/2019/10/30/20940107/grubhub-to-add-restaurants-without-permission-like-postmates> [↑](#footnote-ref-59)
60. Caleb Pershan, “‘We Don’t Even Do Takeout’: Why, Then, Is This Restaurant on Seamless?” Eater, January 29, 2020, available at: <https://www.eater.com/2020/1/29/21113416/grubhub-seamless-kin-khao-online-delivery-mistake-doordash> [↑](#footnote-ref-60)
61. *Id.* [↑](#footnote-ref-61)
62. “Restaurants File Class Action Lawsuit Against Grubhub for Adding Them to Its Platform Without Permission” *Business Wire*, October 27, 2020, available at: <https://www.businesswire.com/news/home/20201027006171/en/Restaurants-File-Class-Action-Lawsuit-Against-Grubhub-for-Adding-Them-to-Its-Platform-Without-Permission> [↑](#footnote-ref-62)
63. *Id.* [↑](#footnote-ref-63)
64. Jaya Saxena, “Grubhub’s New Strategy Is to Be an Even Worse Partner to Restaurants” *Eater NY*, October 30, 2019, available at: <https://www.eater.com/2019/10/30/20940107/grubhub-to-add-restaurants-without-permission-like-postmates> [↑](#footnote-ref-64)
65. Whitney Filloon, “In-N-Out Burger Sues DoorDash for Delivering Its Food Without Permission,” *Eater*, November 11, 2015, available at: <https://www.eater.com/2015/11/11/9714840/in-n-out-doordash-delivery-lawsuit> [↑](#footnote-ref-65)
66. LYNN SCOTT, LLC; THE FARMER’s WIFE, LLC, on behalf of themselves and all others similarly situated,

    v. GRUBHUB INC. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION, October 26, 2020, available at: <https://www.classlawgroup.com/wp-content/uploads/Grubhub-Class-Action-Lawsuit-Gibbs-Law-Group.pdf?x96633> [↑](#footnote-ref-66)
67. Assembly Bill No. 2149, California Legislative Information, available at: <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2149> [↑](#footnote-ref-67)
68. “CB 120092, AN ORDINANCE relating to the regulation of food delivery businesses and platforms; adding a new Chapter 7.30 to the Seattle Municipal Code.” Office of the City Clerk, available at: <https://seattle.legistar.com/LegislationDetail.aspx?ID=4969081&GUID=75D6EFC5-36FB-4B08-AFA5-3898DC755786&Options=ID%7CText%7C&Search=120092> [↑](#footnote-ref-68)
69. Assembly Bill A4651, New York State Assembly, <https://www.nysenate.gov/legislation/bills/2021/a4651> [↑](#footnote-ref-69)
70. Jaya Saxena, “Delivery Apps Aren’t Getting Any Better” *Eater*, May 29, 2019, available at: <https://www.eater.com/2019/5/29/18636255/delivery-apps-hurting-restaurants-grubhub-seamless-ubereats> [↑](#footnote-ref-70)
71. *Id.* [↑](#footnote-ref-71)
72. *TIFFIN EPS, LLC v. GrubHub*, *Inc*, 2:18-cv-05630-PD, Complaint, p. 2l.5., available at: <https://cdn.vox-cdn.com/uploads/chorus_asset/file/16288289/Grubhub_lawsuit.pdf>. [↑](#footnote-ref-72)