Committee on Consumer Affairs and Business Licensing

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

**Committee Report of the Governmental Affairs Division**

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**COMMITTEE ON CONSUMER AFFAIRS AND BUSINESS LICENSING**

**Hon. Diana Ayala, Chair**

##### July 29, 2021

**INT. NO. 2311-A** By Council Members Powers, Rosenthal, Kallos, Ayala, Lander, Menchaca and Gjonaj

**TITLE:** A Local Law to amend the administrative code of the city of New York, in relation to data on orders placed through third-party food delivery services

1. **INTRODUCTION**

On July 29, 2021, the Committee on Consumer Affairs and Business Licensing, chaired by Council Member Diana Ayala, held a vote on Proposed Introduction Number 2311-A (Int. 2311-A), in relation to data on orders placed through third-party food delivery services. The Committee previously heard testimony on this bill from the Department of Consumer and Worker Protection (DCWP), third-party delivery platforms, restaurants, trade associations and other advocates. This feedback informed the final version of the bill. At the vote on July 29, the Committee voted 8 in favor, 1 opposed and 0 abstentions on the bill.

1. **BACKGROUND**

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-2) 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-3)

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-4) 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-5) and that New York City’s eateries form the second-largest component of City’s tourism industry, after accommodations.[[5]](#footnote-6)

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-7) Furthermore, in 2019, the industry accounted for one in every 12 private sector positions, supporting around 317,800 jobs.[[7]](#footnote-8) 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.

Given the important role that the food and restaurant industry plays in New York City, it is crucial that governments do all they can to support this sector as it weathers the ongoing effects of the COVID-19 pandemic. Over the past year and a half, the City Council has passed a number of bills to assist the restaurant industry through this difficult time. This includes allowing a recovery surcharge, a suspension on certain fees and applications, and permitting the use of public streets and sidewalks to accommodate outdoor dining.

**Third-Party Delivery Platforms**

The three major third-party platforms (TPPs) in New York City are Uber Eats, DoorDash and Grubhub (which also does business as Seamless),[[8]](#footnote-9) each of which account for approximately a third of all online food orders.[[9]](#footnote-10) Each platform utilizes a different commission model to facilitate online ordering for customers and restaurants. Typically though, the TPPs charge a commission as well as additional fees for increased visibility on their platform, access to customer data,[[10]](#footnote-11) promotions and marketing, as well as delivery[[11]](#footnote-12)

With strict limitations on dining throughout the pandemic, TPPs were a crucial lifeline to New York City’s restaurants, but that role also earned them hefty rewards. The major TPPs 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.[[12]](#footnote-13) These companies generated $50.6 billion in sales in 2020, more than double the $22.7 billion in sales generated in 2019.[[13]](#footnote-14) Absent the pandemic, it is estimated that sales for TPPs would have grown by only 38 percent, which is significantly below the actual sales growth of 122 percent achieved due to the pandemic.[[14]](#footnote-15)

**TPPs and Customer Data Collection**

Clearly there are mutual benefits for both restaurants and TPPs in utilizing online ordering and delivery. However, as the major TPPs expand their control of the market, the espoused benefits to restaurants have come under scrutiny.[[15]](#footnote-16) One important aspect is that of customer ordering data. While each TPP has a different privacy policy, it is typical for them to collect and analyze the data supplied by restaurant customers in connection with their orders. This will include the customer’s name, location, specific food order, email address and payment information.[[16]](#footnote-17) GrubHub additionally requests access to customers’ “photos or contact list from your mobile device, Facebook Messenger account or email account”.[[17]](#footnote-18) Grubhub may also gather each customer’s location data from sources including IP addresses, GPS, Google Maps, WiFi access points and cell towers.[[18]](#footnote-19) DoorDash will also collect information from customers’ social media account if the customer logs in to DoorDash from such an account.[[19]](#footnote-20) In all instances, the data is collected from or shared with third-parties.

Compared to other online platforms, TPPs are some of the most frequent trackers and sharers of customer data. According to a study by pCloud, Uber Eats shared 50 percent of the personal data it collected with third parties.[[20]](#footnote-21) When it came to collecting data to benefit their own business, Grubhub collected 64 percent of personal data while Uber Eats collected 57 percent.[[21]](#footnote-22) Overall, according to the study, Uber Eats tracked 50 percent of personal data collected, while GrubHub tracked 36 percent, making these platforms some of the most “invasive” apps studied by pCloud.[[22]](#footnote-23) An example of these practices may be found in Grubhub’s policy “About Our Ads”. The disclosure, dated January 1, 2020, reveals that the platform allows third parties to place tracking technologies within their service and advertise to users[[23]](#footnote-24) based upon an extensive amount of information they are allowed to collect by Grubhub: users’ geolocation data, navigation on the Grubhub website (called “clickstream”), use of third-party applications, times and dates of use and “other information” – all with a common account identifier so that advertisers can combine this information with other devices users employ.[[24]](#footnote-25) The user may navigate to this disclosure by clicking on the Grubhub Privacy Policy and finding the link within a sentence in the Privacy Policy.[[25]](#footnote-26) In total, the Terms of Use,[[26]](#footnote-27) Privacy Policy and About Our Ads disclosure (the latter two of which are incorporated by reference into the users’ agreement) contain about 26 pages of text equaling almost 17,000 words.

Although TPPs are recipients of a trove of customer data and may share this information with third-parties, very little of this customer data is shared with the restaurants that the customer is actually ordering from. Instead, TPPs typically limit the ability of restaurants to retain data on their own customers, as the platforms assert ownership over all orders placed through their products.

Customers who sign up to use TPPs typically agree that the TPP may use their data in accordance with guidelines laid out in the agreement.[[27]](#footnote-28) These agreements allow the TPP to limit the restaurants’ access to data on their own customers,[[28]](#footnote-29) even though the order is placed with the restaurant and the TPP simply acts as a conduit for that order. Although TPPs have to provide restaurants with certain information on the customer and their order to fulfill the order, the TPP may opt to limit future access to or retention of that information after the order is completed. In some instances, TPPs may provide the restaurant with historical information on their most popular menu items, and restaurant reviews; however, they may not allow restaurants to access data on past customers’ contact information or phone numbers.[[29]](#footnote-30) Accordingly, restaurants may develop loyal customers ordering food regularly through a TPP, but the restaurant owner may have no record of the specific customers placing repeat orders.[[30]](#footnote-31)

TPPs are acutely aware of the value of customer data. Running analytics of current customer data enables TPPs to expose customers to restaurants that pay a higher commission to the platform, creating a hierarchy of advertisements to benefit the TPP. For example, if a customer regularly orders pizza from a specific restaurant through a TPP the TPP will analyze that habit. In order to capitalize on this information, the next time that customer logs in to their TPP account, they will likely see advertisements, deals and promotions from additional pizza restaurants; however, those highlighted by the TPP will typically be those that have paid additional fees and commissions to the TPP.[[31]](#footnote-32) There have also been instances of TPPs listing false information about a restaurant (for example, listing it as closed), in order to direct traffic to a restaurant paying higher commissions and fees.[[32]](#footnote-33)

Ownership of data of thousands of restaurants in a city also enables TPPs to help create targeted restaurant concepts that exist only on their platforms, thereby deepening dependency on their products. Platforms like Uber Eats analyze the ordering data and persuade restaurants to open virtual restaurants – re-branded cuisine concepts from the same restaurant – to meet demand for dishes in a given neighborhood.[[33]](#footnote-34) Some of these virtual restaurants may be “ghost” or “dark” or “cloud” kitchens, which are restaurants without an actual storefront or dining room.[[34]](#footnote-35) At times, one of these kitchens may actually fulfill orders for a number of different restaurants – both in name and cuisine.[[35]](#footnote-36) This model allows restaurants to maximize kitchen space and produce a greater variety of food, while reducing labor and other costs.[[36]](#footnote-37) For example, in one New York City ghost kitchen, chefs prepare food for Frato’s pizza, along with food for restaurants under the banners of: Halal Kitchen, Tenderlicious, Cheesy Deliciousness and Heavenly Shakes – “all of which can only be ordered through online sites Grubhub, DoorDash and Uber Eats.”[[37]](#footnote-38)

Key to establishing these kitchens is the data that explains what food is in demand, at what times, in which neighbors and by which customers – data that restaurants themselves rarely have access to. By monopolizing the data, TPPs have a clear advantage over the restaurants whose orders and customers actually produced the data. Consumers using TPPs are clearly customers of the restaurants from which they order, but restaurants are precluded from equitable access to this data.

While TPPs might be using this data in unique and innovative ways that provide options for consumers, customer data can also be a very useful mechanism to drive future profits for restaurant owners, including growing the loyalty of a restaurant’s existing customer base and reaching new audiences. It is common in the restaurant industry for 80 percent of a restaurant’s business to come from 20 percent of its customers.[[38]](#footnote-39) Therefore, possessing information on their loyal customers – such as their contact information and commonly ordered items – can inform business decisions and enable restaurants to conduct specific outreach to retain those customers.[[39]](#footnote-40) Infrequent or new customers can also be made into loyal customers through marketing outreach like offering promo codes, new menu items, or special discounts, but data on these customers is crucial.[[40]](#footnote-41) Data on customers’ ordering habits can further enable a restaurant owner to assess the popularity of their menu items, allowing a restaurant owner to decide which items they should keep or drop from their menu, or which to highlight in marketing campaigns.[[41]](#footnote-42) Aside from driving profits, knowing more about their customers can also enable restaurateurs to develop interpersonal relationships in their communities.

Unlike the comprehensive data that TPPs currently collect and analyze, however, the customer information that would be provided to restaurants under Int. 2311-A is, by comparison, much less: the customer's name, telephone number, e-mail address, delivery address, and what they are ordering. Although basic, this information for restaurants is vital in terms of keeping in contact with loyal customers and expanding their base. Furthermore, unlike TPPs, sharing customer data with third parties is not a traditional revenue stream for restaurants and, in fact, sharing it with competitors could be detrimental to their bottom line. This again differs from the main objective TPPs have in collecting customer data.

1. **BILL ANALYSIS**

 Int. 2311-A would require the TPPs to share information related to each delivery order placed through their platform with the restaurant that fulfills that order, upon that restaurant’s request. The information would consist of the customer’s name, phone number, e-mail address, delivery address and the contents of their order (this information is outlined in Prop. Int. No. 2335-A, which contains all new definitions for the subchapter). The customer would be able to opt out of the sharing of this information, and the TPP would be required to provide a clear disclosure to the customer explaining what information would be shared with the restaurant. The restaurant fulfilling the customer’s order would be permitted to retain that information, which must be provided by the platform in a machine-readable format. The TPP could not limit the restaurants’ use of the information, but the customer could. The bill would prohibit the restaurant from selling, renting or disclosing the information for financial benefit without express consent from the customer. The customer would also be able to withdraw their consent to using their information and request that the restaurant delete their information. 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 Proposed Introduction Number 2333-A takes effect (which is 120 days after becoming law).

Int. No. 2311-A

By Council Members Powers, Rosenthal, Kallos, Ayala, Lander, Menchaca and Gjonaj

..Title

A Local Law to amend the administrative code of the city of New York, in relation to data on orders placed through third-party food delivery services

..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 20-847.3 to read as follows:

§ 20-847.3 Customer data. a. A food service establishment may request customer data from a third-party food delivery service. Upon such a request, a third-party food delivery service shall provide to the food service establishment all applicable customer data, until such food service establishment requests to no longer receive such customer data.

b. Notwithstanding the requirements of subdivision a of this section, a third-party food delivery service shall not share customer data applicable to an online order pursuant to subdivision a of this section if such customer requests that such data not be shared in relation to such online order. The customer shall be presumed to have consented to the sharing of such customer data applicable to all online orders unless such customer has made such a request in relation to a specific online order. The third-party food delivery service shall provide in a conspicuous manner on its website a means for a customer to make such request. To assist its customers with deciding whether their data should be shared, a third-party delivery service shall clearly and conspicuously disclose to the customer the customer data that may be shared with the food service establishment and shall identify the food service establishment fulfilling such customer’s online order as a recipient of such data.

c. Third-party food delivery services that share customer data pursuant to this section shall provide such data in a machine-readable format, disaggregated by customer, on an at least monthly basis. Third-party food delivery services shall not limit the ability of food service establishments to download and retain such data, nor limit their use of such data for marketing or other purposes outside the third-party food delivery service website, mobile application or other internet service.

d. Food service establishments that receive customer data pursuant to this section shall not sell, rent, or disclose such customer data to any other party in exchange for financial benefit, except with the express consent of the customer from whom the customer data was collected; shall enable customers to withdraw their consent to use of their data by the food service establishment; and shall enable customers to request and receive deletion of their customer data by the food service establishment.

e. This section does not apply to telephone orders.

f. Nothing in this section shall prevent third-party food delivery services or food service establishments from complying with any other law or rule.

§ 2. 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.

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