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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 SMALL BUSINESS**

Hon. Mark Gjonaj, Chair

**August 26, 2021**

**INT. NO. 1897-A:** By Council Members Gjonaj, Brannan, Gibson, Perkins, Louis, Ayala, Lander, Chin, and Koslowitz

TITLE: A Local Law to amend the administrative code of the city of New York, in relation to the licensing of third-party food delivery services

**INT. NO. 2390:** By Council Members Moya and Gjonaj

TITLE: A Local Law to amend the administrative code of the city of New York, in relation to the licensing of third-party food delivery services

1. **INTRODUCTION**

On August 26, 2021, the Committee on Small Business, chaired by Council Member Mark Gjonaj, held a vote on the following bills: (1) Proposed Introduction Number 1897-A (Int. 1897-A), in relation to the licensing of third-party food delivery services; and (2) Preconsidered Introduction Number 2390 (Preconsidered Int. 2390), in relation to limiting, without expiration, the fees charged to food service establishments by third-party food delivery services.

The Committee previously heard testimony on these bills from the Office of Special Enforcement (OSE), Department of Consumer Affairs and Worker Protection (DCWP), Department of Small Business Services (SBS), third-party delivery platforms, a myriad of restaurants citywide, and various trade associations. This feedback informed the final version of the bills. At the vote on August 26, the Committee voted 5 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 influenced by 150 different countries.[[1]](#footnote-1) If a person attempted 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, but rather 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 the City’s tourism industry, after accommodations.[[5]](#footnote-5)

In addition to a key contributor to the City’s economy, the restaurant industry is a vital source of employment. 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) 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. **Food Delivery in NYC**

 The history of food delivery in NYC began in the mid-20th century. Waves of Italian immigration at the turn of the 20th century led to the establishment of Italian restaurants in NYC in the early 20th century.[[8]](#footnote-8) By 1944, an article in the New York Times described a restaurant that created pizzas to “be ordered to take home… they are packed, piping hot, in special boxes for that purpose.”[[9]](#footnote-9) Chinese restaurants that specialized in takeout became popular in NYC, notably with Jewish families in the mid-20th century.[[10]](#footnote-10) Jewish customers’ patronage of Chinese restaurants in the 1950s and 1960s led to a rise in food takeout and delivery services from restaurants such that, “After a hard day’s work…families could eat delicious Chinese food without going farther than the front door.”[[11]](#footnote-11) Food takeout and delivery did not become common among other cuisines in NYC until the 1980s.[[12]](#footnote-12)

In recent years, food delivery has become standard across all cuisines. As of 2015, around $210 billion of food was ordered for delivery or takeout annually, while the two food delivery industry leaders, Grubhub and Eat24, generated a combined $2.6 billion in food sales.[[13]](#footnote-13) According to a 2016 Business Insider article, the food delivery marketplace was a “massive unfulfilled market opportunity…which will incentivize continued competition and, potentially, an influx of new entrants.”[[14]](#footnote-14) In 2016, seven percent of sales at U.S. restaurants occurred through food delivery.[[15]](#footnote-15) Seeing the potential for profit in this industry, venture capital firms invested huge sums of money in food delivery companies. Over $1 billion was invested in 2014 in food and grocery delivery, and a further half a billion dollars was invested in Q1 of 2015 in this sector.[[16]](#footnote-16) DoorDash reportedly raised nearly $2.5 billion in venture capital funding before its initial public offering.[[17]](#footnote-17)

The influx of venture capital money into food delivery companies helped these companies grow and attract new customers. A 2017 Morgan Stanley report predicted that by 2020, 40 percent of total restaurant sales could occur through online delivery.[[18]](#footnote-18) Online restaurant orders grew 23 percent annually from 2013 to 2017.[[19]](#footnote-19) In 2018, UBS predicted that by 2030 the global online food-ordering marketplace could grow to $365 billion, up from $35 billion in 2018.[[20]](#footnote-20) A 2019 survey conducted by the National Restaurant Association found that 60 percent of consumers ordering takeout used a third-party delivery service.[[21]](#footnote-21)

Within the food delivery marketplace, companies have adopted different business models that aim to either help restaurants increase their sales, or process and make deliveries. Grubhub, and its subsidiary Seamless, act as a software and marketing service that aggregate restaurants and create listings from which consumers can place orders. Typically, restaurants partnering with Grubhub manage their own fleet of couriers.[[22]](#footnote-22) These software-based businesses market to restaurants by arguing they generate incremental orders, therefore increasing a restaurant’s profitability,[[23]](#footnote-23) and by replacing a restaurant’s antiquated phone-ordering system with a more efficient web and mobile platform that is integrated with their kitchen workflow.[[24]](#footnote-24)

 Other delivery companies, such as Uber Eats and DoorDash, similarly offer marketing and software options, but also manage the delivery of the food from the restaurant to the customer. Through hiring independent contractors, these platforms have a fleet of couriers typically paid a per-trip payment to deliver the food. In addition to offering software and marketing services, these companies handle the logistics of delivering the food, which includes the hiring and paying of couriers and shift planning.[[25]](#footnote-25) These companies help solve the “last-mile” problem, the last mile of transportation of a product being the most complicated and costliest part of getting a product to a consumer.[[26]](#footnote-26)

 During the pandemic, the Council passed Local Law 52 of 2020, which capped the fees these platforms could charge restaurants. The Local Law prohibits the platforms from charging restaurants more than 15% per order for delivery and more than 5% per order for all other fees. Local Law 52 of 2020 capped delivery-related commissions at 15 percent, recognizing that delivery services might be more costly to the platforms, and certainly more valuable to the restaurants.

 Overall, food delivery is an incredibly popular way for New Yorkers to dine. According to a 2017 Department of Transportation (DOT) report, 55 percent of New Yorkers ordered take out a few times per month.[[27]](#footnote-27) City residents spend around $773.70 per year on food delivery, which is more money than residents of any other U.S. city.[[28]](#footnote-28) The frequency with which New Yorkers order takeout is a consequence of the culture and cityscape of New York. As previously mentioned, there are over 23,000 eateries in NYC, the most of any city in the country.[[29]](#footnote-29) The comparatively small percentage of New Yorkers that own cars in comparison to other American cities may also be a cause of City residents’ high use of delivery services in NYC. According to the 2019 U.S. Census, in the tristate area[[30]](#footnote-30), 31 percent of households do not own a car.[[31]](#footnote-31) The NYC Economic Development Corporation estimates that 55 percent of households in NYC do not own a car.[[32]](#footnote-32) Other major cities have much higher rates of car ownership: only 12 percent of households do not own cars in San Francisco, 12.5 percent in Chicago, 7.6% in Los Angeles.[[33]](#footnote-33)

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.[[34]](#footnote-34) 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.[[35]](#footnote-35) On June 7, 2021, a bakery in Manhattan filed a class action lawsuit against the third party delivery platforms[[36]](#footnote-36) 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.[[37]](#footnote-37)

The City Council has conducted five hearings this legislative session on the rise of third-party delivery platforms in the City.[[38]](#footnote-38) During these hearings, restaurateurs and their advocates have highlighted issues restaurants experience 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.[[39]](#footnote-39)

Even before the COVID-19 pandemic reached the City, advocates and small businesses sounded the alarm about excessively high platform commission fees. At the Council’s first hearing on the issue in June 2019, a representative from the federal government’s Small Business Administration (SBA) termed the fees “predatory” and testified that they, too, had heard it “time and again from entrepreneurs… The New York City restaurant industry is known worldwide for its flexibility, but these predatory fees are placing an undue hardship on small businesses.”[[40]](#footnote-40) He went to describe the fees as “ad hoc [sic],” and said it “worries the SBA that there’s no pricing standard.”[[41]](#footnote-41) But yet, the platforms are so popular with consumers that the restaurants “more or less need to participate in them in order to stay relevant, stay noticeable, and be accessible to patrons.”[[42]](#footnote-42) SBS also acknowledged the need to join the platforms and the difficulty to “balance” that need against high commission fees.[[43]](#footnote-43)

Restaurateurs have consistently echoed the sentiment expressed by the SBA at the Council’s June 2019 hearing. A Hospitality Alliance survey of 300 restaurants in February 2020 found that 90 percent said the Grubhub/Seamless’s commission fees were “unreasonable,” and over 60 percent were “barely profitable” on their Grubhub/Seamless orders.[[44]](#footnote-44) In the Council’s most recent hearing on July 1, 2021, restaurateurs lauded the current temporary cap, testifying, “Many restaurants would not have survived without this legislation,”[[45]](#footnote-45) and asking for it to be made permanent.[[46]](#footnote-46) One restaurateur underscored the fact that “everybody” uses the platforms and that he does not feel he has a choice but to participate, despite “working for free during the pandemic [because of low profit margins]”.[[47]](#footnote-47) Trade associations like the New York State Restaurant Association[[48]](#footnote-48) and the Hospitality Alliance[[49]](#footnote-49) affirmed the need for a permanent cap, calling the food delivery platform industry, “unchecked”[[50]](#footnote-50).

 Small businesses at City Council hearings have also questioned whether the platforms actually drive revenue to their businesses. As mentioned, platforms that provide marketing resources to businesses argue that they drive “incremental” revenue, additional profits on top of their existing dine-in customers.[[51]](#footnote-51) However, the commissions restaurants are forced to pay on those incremental sales are far less profitable than the revenue restaurants generate from dine-in customers.[[52]](#footnote-52) 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.”[[53]](#footnote-53) Morgan Stanley analysts similarly found in a 2017 report that the increase in sales from online delivery channels poses the risk of cannibalization of dine-in customers, resulting in profit-margin pressure on restaurant owners.[[54]](#footnote-54) The report found that 43 percent of consumers who ordered food for delivery say it replaced a meal at a restaurant, an increase from 38 percent in 2016, which suggests incremental cannibalization of dine-in meals.[[55]](#footnote-55)

 Restaurants have also questioned whether the marketing services the delivery platforms provide actually increase consumer traffic to their restaurant. At the Committee on Small Business hearing on June 17, 2021, Jeffrey Bank, CEO of the Alicart Restaurant Group, commented:

 When you go to Google right now, type in Carmine's, my restaurant that I own, and write Carmine's delivery, cause you want to order from Carmine's… why does Seamless and Grubhub, DoorDash, and Postmates come up before my restaurant? My customers are looking for me. They do not want me to pay any fees. So, [the platforms] need more fees to charge me more money so they can advertise more to steal my own customers. It's crazy, a little genius.[[56]](#footnote-56)

1. **The Pandemic’s Impact**

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.[[57]](#footnote-57) According to analysts from Morgan Stanley, the increase in use of food delivery that was projected to take years occurred in a few months.[[58]](#footnote-58)

Even though most 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."[[59]](#footnote-59) 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.”[[60]](#footnote-60)

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.[[61]](#footnote-61) Food delivery companies generated $50.6 billion in sales in 2020, more than double the $22.7 billion in sales generated in 2019.[[62]](#footnote-62) 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.[[63]](#footnote-63) 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.”[[64]](#footnote-64)

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.[[65]](#footnote-65) 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.”[[66]](#footnote-66) Maloney meanwhile acknowledged that restaurants could not survive on deliveries alone during the pandemic.[[67]](#footnote-67) 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.”[[68]](#footnote-68)

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.[[69]](#footnote-69) 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.[[70]](#footnote-70)

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.[[71]](#footnote-71) From 2015 to 2016 the number of independent restaurants in the City fell three percent, slightly more than the national average.[[72]](#footnote-72) 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.[[73]](#footnote-73) 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.[[74]](#footnote-74) 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.[[75]](#footnote-75)

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.[[76]](#footnote-76) Thirty-five percent of restaurant owners surveyed predicted it would take over a year before business conditions returned to their pre-COVID levels.[[77]](#footnote-77)

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;[[78]](#footnote-78) Philadelphia,[[79]](#footnote-79) Washington D.C.[[80]](#footnote-80) and Portland[[81]](#footnote-81) enacted laws limiting commission fees; and the mayors of Seattle[[82]](#footnote-82)and San Francisco[[83]](#footnote-83) issued emergency orders temporarily capping commission fees at 15 percent (Jersey City at 10 percent)[[84]](#footnote-84). 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.[[85]](#footnote-85) 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. **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 their consent 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.”[[86]](#footnote-86) 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.[[87]](#footnote-87)

 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,[[88]](#footnote-88) and menus posted by third-party platforms can be out of date or inaccurate, which can also further frustrate customers.[[89]](#footnote-89) 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.[[90]](#footnote-90) Restaurant owners unknowingly lose control of making their own business decisions and deciding the direction they want to take their business.[[91]](#footnote-91) 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.”[[92]](#footnote-92)

 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.[[93]](#footnote-93) 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.[[94]](#footnote-94)

 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.”[[95]](#footnote-95) 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.[[96]](#footnote-96) 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.[[97]](#footnote-97) In response to this problem, the City Council passed introduction 2333-A, which prohibits the inclusion of a food service establishment's products on a third-party food delivery platform without a written agreement authorizing such inclusion.

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.[[98]](#footnote-98) Telephone calls placed through the number are analyzed by an algorithm to determine whether an order was placed on the call.[[99]](#footnote-99)

 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.”[[100]](#footnote-100) 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. To address this problem, the Council passed Int. No. 2335-A, which requires third-party food delivery services to provide a description of the telephone numbers listed in connection with food service establishments. The Council also extended Local Law 87 through February 17, 2022.

 On August 23, Grubhub started implementing a new system to process telephone calls. To the Committee’s knowledge, instead of relying on an algorithm, the company is going to be using call centers with customer service representative to facilitate orders from Grubhub-owned phone lines to restaurants.[[101]](#footnote-101)

1. **BILL ANALYSIS**

**Int. 1897-A**

This bill would require the platforms (called “third-party food delivery services” in the bill”) to obtain a license in order to do business in the City. Such services would be defined as “any website, mobile application or other internet service that: (i) 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; and (ii) that is owned and operated by a person other than the person who owns such food service establishment.” The definition would encompass services like Grubhub, Uber Eats and DoorDash.

The third-party food delivery services would be required to apply for a license from DCWP every two years for a fee of $200. They would also be required to comply with the requirements of recently passed Introductions 2311-A, 2333-A, 2335-A and 2356-A, which would be incorporated into this bill’s licensing scheme. Thus, the licensed services would be required to share customer order data with the restaurant fulfilling the customer’s order (Int. 2311-A); would be prohibited from listing restaurants on their platform without the restaurants’ permission (Int. 2333-A); would be required to list a restaurant’s brick-and-mortar telephone number on their platform, and if a platform-generated phone number is also listed, identify both numbers and any fees associated with them (Int. 2335-A); and would be prohibited from charging restaurants’ for telephone orders for which a transaction did not take place during the call (Int. 2356-A). The services would also be required to comply with the provisions of Preconsidered Int. 2390, which would permanently cap the services’ commission fees. A violation of these bills’ requirements could lead to a denial, suspension or revocation of a license, among other consequences. The subchapter in which third-party food delivery service bills have been codified up until now would be repealed.

To ensure compliance with the bill’s licensing scheme, the third-party food delivery services would be required to keep certain records, such as a list of restaurants on their platform, their written agreements with the restaurants, and documentation of the fees the services have charged restaurants. If a third-party food delivery service commits two or more violations of any provision of Int. 1897-A or Preconsidered Int. 2390, or makes a material false statement in connection with the license application, the Department could deny or refuse to renew the service’s license, or suspend or revoke their license. Third-party food delivery services who violate the requirements in this bill would also be subject to civil penalties of $500 per restaurant per day, or $1000 per restaurant per day if the cap on commission fees in Preconsidered Int. 2390 is exceeded. The City would be empowered to seek restitution on behalf of a restaurant against which a violation is committed. The third-party food delivery services would also be subject to civil action from the City or any person against whom a violation was committed. The Department would be required to conduct culturally appropriate outreach to restaurants and third-party food delivery services for a period of 90 days, no more than 60 days after the bill becomes law, on the provisions of the bill.

This bill would take effect 120 days after becoming law.

**Int. No. 2390**

This bill would add a new section in the subchapter added by Int. 1897-A, prohibiting third-party food delivery services from charging food service establishments more than 15% per order for delivery and more than 5% per order for all other fees, except for transaction fees. The bill would prohibit third-party food delivery services from charging more than 3% per order for transaction fees, except that it would allow for a higher charge if the third-party food delivery service can provide proof that such higher charge was imposed upon the service by a credit card company or internet-based payment system to DCWP and the relevant food service establishment if requested. This bill would also require the Department to submit a report to the Mayor and the Speaker of the Council every two years, beginning no later than September 30, 2023, recommending the maintenance or adjustment of this bill’s cap on fees, by looking at factors such as the effect of the cap on third-party food delivery services and food service establishments; whether the cap affects delivery workers’ wages and working conditions; the products provided by third-party food delivery services for listing, processing and marketing; and figures related to the bill’s subchapter such as the number of complaints and violations, total amount of penalties imposed and the amount of restitution recovered.

Int. No. 1897-A

By Council Members Gjonaj, Brannan, Gibson, Perkins, Louis, Ayala, Lander, Chin and Koslowitz

..Title

A Local Law to amend the administrative code of the city of New York, in relation to the licensing of third-party food delivery services, and to repeal subchapter 22 of chapter 5 of title 20 of the administrative code of the city of New York, relating to 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 REPEALED.

§ 2. Chapter 2 of title 20 of the administrative code of the city of New York is amended by adding a new subchapter 36 to read as follows:

Subchapter 36

Third-Party Food Delivery Services

§ 20-563 Definitions. As used in this subchapter, 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.

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 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, which is not a third-party telephone number.

Food service establishment. The term “food service establishment” means a business establishment located in the city where food is provided for individual portion service directly to the consumer whether such food is provided free of charge or sold, and whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle.

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

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

Third-party food delivery platform. The term “third-party food delivery platform” means the online or mobile platform of the third-party food delivery service on which a customer can view products available for sale and place an online order for a food service establishment’s products.

Third-party food delivery service. The term “third-party food delivery service” means any website, mobile application or other internet service that: (i) 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; and (ii) that is owned and operated by a person other than the person who owns such food service establishment.

Third-party telephone number. The term “third-party telephone number” means a telephone number for a food service establishment that is provided by or on behalf of a third-party food delivery service, through which an online order may be placed.

Transaction fee. The term “transaction fee” means a charge for the processing of a payment for an online order imposed upon a third-party food delivery service either by: (i) a credit card issuer or (ii) an internet-based payment system.

§ 20-563.1 License. a. License required. It shall be unlawful for any person to operate a third-party food delivery service without first having obtained a license therefor issued pursuant to this subchapter. All licenses issued pursuant to this subchapter shall be valid for no more than two years and expire on a date the commissioner prescribes by rule.

b. License application. An application for any license required under this subchapter or for any renewal thereof shall be made to the commissioner in such form or manner as the commissioner shall prescribe by rule, provided that such application shall include, but need not be limited to:

1. The address of the applicant;

2. A list of all websites, mobile applications, or other third-party food delivery platforms, with relevant uniform resource locators, that the applicant uses or plans to use to conduct the business of a third-party food delivery service;

3. An e-mail address that the department can use to send the applicant license application materials, official notifications, or other correspondence; and

4. If the applicant is a non-resident of the city, the name and address of a registered agent within the city upon whom process or other notifications may be served.

c. Fee. There shall be a biennial fee of $200 for a license to operate a third-party food delivery service.

§ 20-563.2 Issuance of license. A license to operate a third-party food delivery service shall be granted in accordance with the provisions of this subchapter and any rules promulgated by the commissioner thereunder.

§ 20-563.3 Reserved.

§ 20-563.4 Telephone orders. No third-party food delivery service may charge any fee from a food service establishment for a telephone order if a telephone call between such establishment and a customer does not result in an actual transaction during such telephone call.

§ 20-563.5 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.

§ 20-563.6 Unauthorized listings. a. 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 food delivery service and such food service establishment to include the food service establishment’s products on such website, mobile application or other platform.

b. 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.

§ 20-563.7 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 cease receiving 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, in a style and form required by the commissioner, a means for a customer to make such request. To assist its customers with deciding whether their data should be shared, a third-party food 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 of 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 a customer to withdraw their consent to use of their data by the food service establishment; and shall delete any such customer data upon request by a customer.

e. Nothing in this section shall prevent a third-party food delivery service or a food service establishment from complying with any other law or rule.

§ 20-563.8 Records. a. Every third-party food delivery service required to be licensed under this subchapter shall maintain the following records in an electronic format for a period of at least three years:

1. A roster of all food service establishments the third-party food delivery service lists on its website, mobile application, or other third-party food delivery platform and has listed on such website, mobile application, or other third-party food delivery platform;

2. All written agreements with a food service establishment;

3. Records listing itemized fees the third-party food delivery service has charged each food service establishment with which the third-party food delivery service maintains an agreement;

4. Such records related to the ownership of the third-party food delivery service as the commissioner may prescribe by rule; and

5. Such other records as the commissioner may prescribe by rule.

b. All records required by this section or by the commissioner by rule shall be made available to the department electronically upon request, consistent with applicable law and in accordance with rules promulgated hereunder and with appropriate notice.

§ 20-563.9 Denial, renewal, suspension and revocation of license. In addition to any powers of the commissioner and not in limitation thereof, the commissioner may deny or refuse to renew any license required under this subchapter and may suspend or revoke any such license, after due notice and opportunity to be heard, if the applicant or licensee, or, where applicable, any of its officers, principals, directors, members, managers, employees, or stockholders owning more than ten percent of the outstanding stock of the corporation, is found to have:

a. Committed two or more violations of any provision of this subchapter or any rules promulgated thereunder in the preceding two years;

b. Made a material false statement or concealed a material fact in connection with the filing of any application pursuant to this subchapter; or

c. Committed two or more violations of chapter five of title twenty of this code and any rules promulgated thereunder in the preceding two years.

§ 20-563.10 Enforcement, civil penalties and restitution. a. Any person who violates, or causes another person to violate, a provision of this subchapter or any rule promulgated pursuant thereto, shall be subject to a civil penalty that shall not exceed $500 for each violation, except that a person that violates any provision of section 20-563.3 or any rule promulgated pursuant thereto shall be subject to a civil penalty that shall not exceed $1,000 for each violation. Violations by third-party food delivery services under this subchapter shall accrue on a daily basis for each day and for each food service establishment with respect to which a violation of this subchapter or any rule promulgated pursuant to this subchapter was committed. The department may also recover restitution on behalf of any food service establishment harmed by a violation of this subchapter or any rules promulgated pursuant to this subchapter by a third-party food delivery service. A proceeding to recover any civil penalty or restitution authorized pursuant to this subchapter may be brought in any tribunal established within the office of administrative trials and hearings or within any agency of the city designated to conduct such proceedings.

§ 20-563.11 Enforcement by the corporation counsel. a. A civil action may be brought by the corporation counsel on behalf of the city in any court of competent jurisdiction to recover any or all of the following:

1. Civil penalties authorized by this section;

2. Injunctive relief to restrain or enjoin any activity in violation of this subchapter;

3. Restitution in an amount not to exceed the amount of fees collected by a third-party food delivery service in excess of the maximum amounts permitted pursuant to this subchapter;

4. Attorneys' fees and costs, and such other remedies as a court may deem appropriate.

b. 1. Where reasonable cause exists to believe that a third-party food delivery service is engaged in a pattern or practice of violations of this subchapter, the corporation counsel may commence a civil action on behalf of the city in a court of competent jurisdiction.

2. A civil action pursuant to paragraph 1 of this subdivision shall be commenced by filing a complaint setting forth facts relating to such pattern or practice and requesting relief, which may include injunctive relief, civil penalties and any other appropriate relief.

3. In any civil action commenced pursuant to paragraph 1 of this subdivision, the trier of fact may impose a civil penalty of not more than $25,000 for a finding that a third-party food delivery service has engaged in a pattern or practice of violations of this subchapter. Any civil penalty so recovered shall be paid into the general fund of the city.

c. The corporation counsel may initiate any investigation to ascertain such facts as may be necessary for the commencement of a civil action pursuant to this section, and in connection therewith shall have the power to issue subpoenas to compel the attendance of witnesses and the production of documents, to administer oaths and to examine such persons as are deemed necessary.

d. Nothing in this section prohibits a person alleging a violation of this subchapter from filing a civil action pursuant to section 20-563.12 based on the same facts as a civil action commenced by the corporation counsel pursuant to this section.

§ 20-563.12 Private cause of action. Any person alleging a violation of any provision of this subchapter may bring a civil action, in accordance with applicable law, in any court of competent jurisdiction to recover any or all of the following remedies:

a. Injunctive relief to restrain or enjoin any activity in violation of this subchapter;

b. Restitution in an amount not to exceed the amount of fees collected by a third-party food delivery service in excess of the maximum amounts permitted pursuant to this subchapter; and

c. Attorneys' fees and costs, and such other remedies as a court may deem appropriate.

§ 20-563.13 Outreach. No more than 60 days after the effective date of this local law, and continuing for 90 days thereafter, the commissioner, in collaboration with relevant agencies, shall conduct culturally appropriate outreach in the designated citywide languages, as defined in section 23-1101, to alert food service establishments and third-party food delivery services to the requirements of this subchapter. 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.

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

SJ

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Int. No. 2390

By Council Members Moya and Gjonaj

..Title

A Local Law to amend the administrative code of the city of New York, in relation to limiting, without expiration, the fees charged to food service establishments by third-party food delivery services

..Body

Be it enacted by the Council as follows:

Section 1. Subchapter 36 of chapter 2 of title 20 of the administrative code of the city of New York, as added by a local law of the city of New York for the year 2021, relating to the licensing of third-party food delivery services, and to repealing subchapter 22 of chapter 5 of title 20 of the administrative code of the city of New York, relating to third-party food delivery services, as proposed in introduction number 1897-A for the year 2020, is amended by adding a new section 20-563.3 to read as follows:

§ 20-563.3 Fee caps. 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 or fees, other than a delivery fee and a transaction fee, for the use of their service that totals more than 5% of the purchase price of each online order.

c. It shall be unlawful for a third-party food delivery service to charge a food service establishment a transaction fee that totals more than 3% of the purchase price of each online order, provided however that a third-party food delivery service may charge a food service establishment a transaction fee of more than 3% of the purchase price of an online order if: (i) such transaction fee is charged to the food service establishment in the same amount as the charge imposed upon the third-party food delivery service for such online order, and (ii) such third-party food delivery service can provide proof of such charge imposed upon it to both the department and the relevant food service establishment upon request.

d. No later than September 30, 2023, and every two years thereafter, the commissioner shall submit to the speaker of the council and the mayor a report on the fee cap pursuant to this section, which shall include but not be limited to recommendations related to either the maintenance or adjustment of the fee cap as set forth in this section, in consideration of factors from the immediately preceding two years, such as:

1. The effect of the cap on third-party food delivery services and food service establishments;

2. Whether the cap affects wages and working conditions for persons who deliver food or beverages for third-party food delivery services;

3. Products that third-party food delivery services offer to food service establishments for listing, processing and marketing;

4. The number of complaints made to the department related to the alleged violations of this subchapter and the number of violations issued under this subchapter;

5. The total amount of penalties imposed as a result of violations of this subchapter; and

6. The amount of restitution recovered on behalf of food service establishments pursuant to this subchapter.

§ 2. This local law takes effect on the same date as a local law amending the administrative code of the city of New York, relating to the licensing of third-party food delivery services, and to repealing subchapter 22 of chapter 5 of title 20 of the administrative code of the city of New York, relating to third-party food delivery services as proposed in introduction number 1897-A for the year 2020, takes effect, except that the commissioner of consumer and worker protection may take such measures as are necessary for the implementation of this local law, including the promulgation of rules, before such date.

SJ

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8/18/21 10:10 PM

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