

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

AB 502 (Lee)  
Version: March 23, 2023  
Hearing Date: June 13, 2023  
Fiscal: No  
Urgency: No  
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**SUBJECT**

Food delivery platforms: disclosure

**DIGEST**

This bill, with respect to consumer communications intended for food facilities placed through a listing website, prohibits such websites from associating methods of communication with a food facility where they know that use of that method will result in a “forwarded call,” as defined. The bill also requires certain disclosures with respect to fees, commissions, and other costs in connection with orders placed through such websites.

**EXECUTIVE SUMMARY**

The COVID-19 pandemic has devastated the restaurant industry and made consumers and restaurants alike increasingly reliant on online food delivery options. While third party app-based food delivery companies, such as DoorDash, Uber Eats, and Grubhub, offer the promise of convenient and safe access to a variety of restaurants at the click of a button, these companies often impose hefty commissions and onerous terms that can add to the struggles of ailing restaurants. To protect restaurants and customers, the Legislature enacted the Fair Food Delivery Act of 2020 (AB 2149 (Gonzalez, Ch. 125, Stats. 2020) (Act), which prohibits food delivery platforms from arranging for the delivery of an order from a food facility without first obtaining an agreement authorizing the food delivery platform to take orders and deliver meals prepared by the food facility.

This bill seeks to expand the Act by prohibiting the practice in which various methods of communications are associated with food facilities on listing websites that route such communications intended for food facilities. The bill also requires clear disclosures where an order placed through a listing website will result in a fee, commission, or other costs paid to a third party other than the food facility.

The bill is author-sponsored. It is supported by various business and restaurant associations, including the Digital Restaurant Association. There is no known opposition. If the bill passes this Committee, it will be heard in the Senate Committee on Business, Professions, and Economic Development.

### **PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Establishes the Act (Bus. & Prof Code § 22598 et seq.)<sup>1</sup>, which prohibits food delivery platforms, as defined, from arranging for the delivery of an order from a food facility, as defined, without first obtaining an agreement with the food facility expressly authorizing the food delivery platform to take orders and deliver meals prepared by the food facility (§ 22599).
- 2) Defines:
  - a) “food delivery platform” as an online business that acts as an intermediary between consumers and multiple food facilities to submit food orders from a consumer to a participating food facility and to arrange for the delivery of the order from the food facility to consumer;
  - b) “food facility,” via a cross reference to Health and Safety Code section 113789, which generally defines that term as an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level, as specified;
  - c) “online order” as an order for food or beverage placed by a customer through or with the assistance of a food delivery platform, including, but not limited to, a telephone order, for delivery; and
  - d) “purchase price” as the price, as listed on the menu, for the items contained in an online order. This definition does not include taxes or gratuities that may make up the total amount charged to the customer of an online order. (§ 22598.)
- 3) Makes it unlawful for a food delivery platform to do the following:
  - a) charge a customer any purchase price for food or beverage that is higher than the price posted on the food delivery platform’s website by the food facility at the time of the order;
  - b) retain any portion of amounts designated as a tip or gratuity. Any tip or gratuity for a delivery order shall be paid by a food delivery platform, in its entirety, to the person delivering the food or beverage. Any tip or gratuity for a pickup order shall be paid by a food delivery platform, in its entirety, to the food facility. (§ 22599.1(a).)

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<sup>1</sup> All further section references are to the Business and Professions Code unless otherwise indicated.

- 4) Requires a food delivery platform to disclose to the customer and to the food facility an accurate, clearly identified, and itemized cost breakdown of each transaction, including the following information:
  - a) the purchase price of the food and beverage;
  - b) a notice, if applicable, that the food delivery platform charges a fee, commission, or cost to the food facility, unless the food facility directs that the food delivery platform disclose to customers the delivery fee charged to the food facility and each fee, commission, or cost charged to the food facility;
  - c) each fee, commission, or cost charged to the customer by the food delivery platform; and
  - d) any tip or gratuity. (§ 22599.1(b).)
- 5) Establishes the Unfair Competition Law, which provides a statutory cause of action for any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising, including over the internet. (§ 17200 et seq.)

This bill:

- 1) Establishes the Food Delivery Transparency Act.
- 2) Prohibits a listing website from associating a telephone number or other method of direct communication with a food facility on their internet website or application if the listing website knows the use of that telephone number or other method of direct communication will result in a forwarded call.
- 3) Requires a listing website to clearly and conspicuously disclose if an order placed through a telephone number or other interface on their website or application may result in a fee, commission, or cost paid to a party other than the food facility, and shall identify that other party.
- 4) Defines:
  - a) “clearly and conspicuously” to mean in a font no smaller than boldface, 14-point type, clearly separate from any other language on the page. For an audio disclosure, “clearly and conspicuously” means in a volume and cadence sufficient to be readily audible and understandable;
  - b) “forwarded call” as a communication made by a consumer and intended for a food facility, by telephone call or other means of communication, that has been routed by a food delivery platform, or a routing service under the direction of the food delivery platform, to the intended food facility; and
  - c) “listing website” as an internet website or application that lists, or produces through search results, telephone numbers associated with food facilities, and that has 100,000,000 or more unique monthly visitors.

## COMMENTS

### 1. Author's statement

The author writes:

Listing services, such as Yelp and Google, have historically functioned like an enhanced “Yellow Pages” – listing direct phone numbers for restaurants along with photos, information about the space, menus and user reviews. A few years ago, Yelp began re-routing customers calling restaurants to Grubhub phone lines after the two companies agreed to a “long-term partnership.”

This bill will ban the practice of re-routing calls to a third party platform that should go directly to a restaurant, and require a disclosure of any fees that are paid to a party outside of the restaurant.

This will protect our local small businesses and ensure consumers are informed and aware of where their money is going.

### 2. Food delivery platforms and the Fair Food Delivery Act of 2020

The COVID-19 pandemic decimated the restaurant industry. Millions of employees were laid off or furloughed, approximately four in 10 restaurants have closed, and it has been estimated that anywhere from 20 to 80 percent will close permanently.<sup>2</sup> Meanwhile, sales through third-party online delivery services, already a major growth industry before the pandemic, surged dramatically, growing by 122 percent in 2020.<sup>3</sup> Although these services can conveniently and safely connect restaurants with homebound customers, they can be costly – commissions are often around 30 percent of the sale price, and there may be additional fees<sup>4</sup> – and a poor fit for some restaurants.<sup>5</sup> In an industry known for thin profit margins, this impact to revenues can be a

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<sup>2</sup> National Restaurant Association, Letter to Congress (Apr. 20, 2020), see <https://www.cnbc.com/2020/04/20/coronavirus-restaurants-describe-huge-shortfalls-with-government-aid.html>; Matt Goulding, *An Extinction Event for America's Restaurants* (June 19, 2020) *The Atlantic*, available at <https://www.theatlantic.com/culture/archive/2020/06/what-will-happen-restaurants/613141/>. All internet citations are current as of June 1, 2023.

<sup>3</sup> Chris Crowley, *5 Big Reasons the Delivery 'Boom' May Soon Go Bust* (May 5, 2021) *New York Magazine*, available at <https://www.grubstreet.com/2021/05/5-reasons-the-food-delivery-boom-may-soon-go-bust.html>.

<sup>4</sup> For the top five food delivery platforms, total markups range from 17 percent to 40.5 percent of the restaurant's list price. (Noah Lichtenstein, *The hidden cost of food delivery*, (Mar. 16, 2020) TechCrunch, available at <https://techcrunch.com/2020/03/16/the-hidden-cost-of-food-delivery/>).

<sup>5</sup> Many restaurants use their own online ordering and delivery systems to ensure quality control and cost-effectiveness. Boutique restaurants may lack the capacity to absorb extra orders and may be unwilling to risk entrusting an unknown, unregulated third party to handle an order properly and deliver it promptly.

formidable barrier to sustained financial viability. Yet for many restaurants, partnering with a third-party delivery service has been the only way to continue operating in the midst of the pandemic.

Three major companies control the online food delivery industry. In April of 2021, 56 percent of meal delivery sales were through DoorDash and its subsidiaries, 26 percent were through Uber Eats and its subsidiaries (including Drizly and Postmates<sup>6</sup>), and 18 percent were through Grubhub.<sup>7</sup> Despite rapid growth and skyrocketing valuations, the companies are not making money.<sup>8</sup> As more consumers get vaccinated and restrictions ease, the industry stands to lose business from customers eager to resume dining on-premises.<sup>9</sup>

These companies have strongholds in different metro areas: for instance, whereas DoorDash had 74 percent of sales in San Francisco, it had just 41 percent of sales in Los Angeles where Uber Eats and Postmates collectively had 44 percent.<sup>10</sup> The companies also vie for partnerships with the nation's top chain restaurants. Uber Eats has a contract with Starbucks, Postmates with Popeye's, Grubhub with Taco Bell and KFC. While large corporate partners have the bargaining power to pay lower fees, many smaller restaurants that rely heavily on delivery services have reportedly operated at a loss because of fees from delivery services.<sup>11</sup> This prompted several major cities to adopt temporary ordinances capping service fees.<sup>12</sup>

Several lawsuits against food delivery platforms have been filed across the country alleging, among other unscrupulous behaviors, unfair business practices, labor violations, and the misuse of restaurants' names and logos.<sup>13</sup> One type of predatory practice involved listing restaurants on food delivery websites without their consent,<sup>14</sup>

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<sup>6</sup>Before Uber acquired Postmates, Uber and Grubhub discussed a possible merger. (Ed Hammond, *Uber Approaches Grubhub With Takeover Offer*, (May 12, 2020) Bloomberg, available at <https://www.bloomberg.com/news/articles/2020-05-12/uber-is-said-to-approach-grubhub-with-takeover-offer>.

<sup>7</sup>Liyin Yeo, *Which company is winning the restaurant food delivery war?* (May 14, 2021) Bloomberg Second Measure, available at <https://secondmeasure.com/datapoints/food-delivery-services-grubhub-uber-eats-door-dash-postmates/>.

<sup>8</sup>5 *Big Reasons the Delivery 'Boom' May Soon Go Bust*, *supra*, fn. 3.

<sup>9</sup>*Which company is winning the restaurant food delivery war?*, *supra*, fn. 7.

<sup>10</sup>*Id.*

<sup>11</sup>Supriya Yelimeli, *Berkeley limits service fees for third-party food delivery apps* (July 13, 2020) Berkeleyside, <https://www.berkeleyside.org/2020/07/13/food-delivery-berkeley>.

<sup>12</sup>*Id.*

<sup>13</sup>See Jaya Saxena *Who's Paying for the Great Delivery Wars?* (Jan. 21, 2021) Eater.com, available at <https://www.eater.com/22224695/uber-eats-postmates-grubhub-delivery-wars-2021>.

<sup>14</sup>Janelle Bitker & Shwanika Narayan, *Grubhub, DoorDash rush to add restaurants. Customers and drivers pay the price* (Feb. 2, 2020) San Francisco Chronicle, available at <https://www.sfchronicle.com/business/article/Grubhub-DoorDash-rush-to-add-restaurants-15023372.php>.

which risks overwhelming restaurant operations, creating quality and safety problems, and eroding customer bases.

In response, the Legislature adopted the Fair Food Delivery Act of 2020. The Act prohibits food delivery platforms from arranging for the delivery of an order from a food facility without first obtaining an agreement with the food facility expressly authorizing the food delivery platform to take orders and deliver meals prepared by the food facility. (§ 22599.) A violation of the Act constitutes an unfair business practice under the Unfair Competition Law.<sup>15</sup>

Last session, AB 286 (Gonzalez, Ch. 513, Stats. 2021) expanded the Act by prohibiting a food delivery platform from marking up the price of the food and beverages it delivers or retaining tips or gratuities it receives. AB 286 also requires food delivery platforms to provide itemized cost breakdowns to customers and food facilities that includes the purchase price of the food and beverage; a notice, if applicable, that the food delivery platform charges a fee, commission, or cost to the food facility, except as specified; each fee, commission, or cost charged to the customer by the food delivery platform; and any tip or gratuity.

### 3. How food delivery platforms intermediate communications between consumers and restaurants

Customers who go online to search for and contact restaurants may be unwittingly diverted to food delivery services without understanding the costs to the restaurant they intend to support. According to a 2019 *Vice* article, some food delivery platforms create specialized phone numbers that automatically forward to the restaurant of interest in order to more effectively track the calls that resulted from their marketing. As the article describes:

As it turns out, the number listed for “General Questions” in the Yelp app is the restaurant’s real number. The number listed for “Delivery or Takeout” is owned by Yelp partner Grubhub. [...] Even though restaurants are capable of taking orders directly – after all, both numbers are routed to the same place – Yelp is pushing customers to Grubhub-owned phone numbers in order to facilitate what Grubhub calls a “referral fee” of between 15 percent and 20 percent of the order total ....

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<sup>15</sup> Business and Professions Code section 17200 prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of conduct, making any business practice prohibited by law independently actionable as an unfair competitive practice. (*Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.5th 869, 896, citing *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) However, “a practice may violate the UCL even if it is not prohibited by another statute. Unfair and fraudulent practices are alternate grounds for relief.” (*Medical Marijuana, Inc. v. ProjectCBD.com, supra*, 46 Cal.App.5th at 896, quoting *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370 [citations and nested quotation marks omitted].)

Yelp has historically functioned like an enhanced Yellow Pages, listing direct phone numbers for restaurants along with photos, information about the space, menus, and user reviews. But Yelp began prompting customers to call Grubhub phone numbers in October 2018 after the two companies announced a “long-term partnership.”<sup>16</sup>

The article notes that this often results in erroneously charged referral fees for calls that do not result in orders.<sup>17</sup> Yelp no longer engages in this practice.

#### 4. Efforts to expand the Act to regulate call-forwarding and associated practices

Last session, AB 1444 (Lee, 2021) sought to augment the Act in order to address the above issues. The bill would have required agreements between food delivery platforms and food facilities to be written and apply to pickup orders in addition to deliveries. It would have prohibited food delivery platforms from charging a food facility a fee for a forwarded call unless that forwarded call directly resulted in a paid order, or an order paid for with a coupon or other promotional offer provided by the food delivery platform, from that food facility that will be delivered, or arranged for delivery or pickup, to the consumer by the food delivery platform.

AB 1444 would also have prohibited a listing website from associating a telephone number with a food facility on their website or application if the listing website knows the use of that telephone number will result in a forwarded call, unless the listing website clearly and conspicuously discloses if an order placed through a telephone number or other interface on their Internet website or application may result in a commission or fee paid to a party other than the food facility, identifies the party to which that commission or fee may be paid, and includes in the disclosure a direct link to the telephone number of the food facility. The listing website would have been prohibited from levying a charge or fee on the food facility for posting the link, and required to disclose that the link does not result in any such charge or fee.

AB 1444 defined “forwarded call” as a communication made by a consumer and intended for a food facility, by telephone call or other means of communication, that has been routed by a food delivery platform, or a routing service under the direction of the food delivery platform, to the intended food facility. It defined “listing website” as a website or application that lists, or produces through search results, telephone numbers associated with food facilities, and that has 100,000,000 or more unique monthly visitors.

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<sup>16</sup> Adrienne Jeffries, *Yelp is Screwing Over Restaurants By Quietly Replacing Their Phone Numbers* (Aug. 6, 2019) <https://www.vice.com/en/article/wjwebw/yelp-is-sneakily-replacing-restaurants-phone-numbers-so-grubhub-can-take-a-cut>.

<sup>17</sup>*Id.*

AB 1444 was passed by the Legislature, but vetoed by Governor Newsom. In his veto message, he stated:

This bill would impose requirements on the specific information included and formatting of agreements between a food delivery platform and a food facility entered into or modified after January 1, 2022, and prohibit food delivery platforms from charging a food facility for certain forwarded calls.

Third party apps and listing websites have created opportunities for consumers to find and support more of their local dining places. We have significantly increased oversight of food delivery companies in recent years. Last year I signed AB 2149 (Chapter 125, Statutes of 2020), which required a food delivery platform to first obtain an agreement with a food facility prior to taking orders or delivering meals on their behalf. It has been less than one year since these provisions took effect. AB 1444 would prescribe the specific content and format of these agreements, triggering companies to again modify their contracts without a clear, additional public benefit.

Further, companies have stated that call forwarding tracking numbers, a focus of AB 1444, are no longer used. I appreciate these companies voluntarily ceasing the practice of charging restaurants simply for connecting calls, as many small businesses, particularly restaurants, survive on small margins.

This bill is a narrower version of AB 1444 that hones in on forwarded calls and pricing transparency. The bill first prohibits a listing website from associating methods of direct communication with a food facility on their websites or applications if it knows that use of that method will result in a forwarded call.

The bill further requires listing websites to clearly and conspicuously disclose if an order placed through a telephone number or other interface on their website or application may result in a fee, commission, or cost paid to a party other than the food facility. The listing website is required to also identify that other party if applicable. It uses identical definitions for "listing website" and "forwarded call" as in AB 1444.

The Hispanic Chamber of Commerce Silicon Valley explains its support for the bill:

In addition to requiring greater fee transparency, it would also prohibit a listing service from posting a phone number under a restaurant that does not go directly to the restaurant, and would require a disclosure to the consumer if an order they are placing will result in a cost to the restaurant.



The COVID pandemic continues to impose hardship on local restaurants and food establishments, with delivery app fees taking up to a 30% commission. However, partnering with third-party ordering systems was the only way many businesses stayed open throughout the pandemic, thus creating a disparity in bargaining power between the platforms and restaurants.

The current third-party ordering ecosystem is alarming; as fees have ratcheted up, restaurants and small business owners have been fighting a losing battle. California is leading in the number of restaurant closures in the nation, while market revenue for food delivery in the US has increased 205% over the past five years, totaling \$26.5 billion.

A few years ago, Yelp began rerouting customers calling restaurants on Yelp to Grubhub phone lines after the two companies agreed to a “long-term partnership.” While they eventually stopped this practice, which resulted in numerous fees to restaurants, it is important to codify this in statute and prevent any other listing service from participating in this practice. Consumers may be financially benefiting food delivery platforms at the expense of restaurants without their consent or knowledge.

Consumers are kept in the dark on the relationship between food delivery platforms and restaurants, and are often unaware how much of their money actually goes toward supporting their local businesses. Consumers have a right to know where their money goes, and the lack of transparency around food delivery platform charge makes informed choice difficult.

This bill will create more transparency surrounding the online third-party ordering ecosystem and ban the practice of rerouting calls to a third party platform that should go directly to a restaurant, and require a disclosure of any fees that are paid to a party outside of the restaurant. This information will ensure consumers know where their money is going so they can make informed choices.

### **SUPPORT**

Digital Restaurant Association  
Hispanic Chamber of Commerce Silicon Valley  
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### **OPPOSITION**

None known

### **RELATED LEGISLATION**

Pending Legislation: AB 375 (Davies, 2023) requires a food delivery platform to provide specified information to a consumer about their delivery driver and the driver's vehicle. This bill is currently in the Assembly Privacy and Consumer Protection Committee.

Prior Legislation:

AB 286 (Gonzalez, Ch. 513, Stats. 2021) *See* Comment 2.

AB 1444 (Lee, 2021) *See* Comment 3.

AB 2149 (Gonzalez, Ch. 125, Stats. 2020) *See* Executive Summary.

AB 3336 (Carrillo, Ch. 105, Stats. 2020) requires ready-to-eat food delivered by third-party food delivery services to be transported in a manner that protects the food from contamination and spoilage, including by requiring the interior floor, sides, and top of the food holding area to be clean, requiring the food to be maintained at a holding temperature necessary to prevent spoilage, and by requiring bags or containers to be closed with a tamper-evident method prior to the food deliverer taking possession of the ready-to-eat food.

AB 1360 (Ting, 2019) would have established requirements on food delivery platforms that deliver food to consumers from a grocery establishment, a retail store with a grocery department, or a grocery warehouse, including requiring that a food delivery driver has specified training, and that the food delivery platform maintains liability insurance. The bill died on the Senate floor.

### **PRIOR VOTES:**

Assembly Floor (Ayes 68, Noes 0)  
Assembly Privacy and Consumer Protection Committee (Ayes 11, Noes 0)

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