Session 7: New Product Entry

We will start by looking at a press release on U.S. Federal Trade Commission’s July 2019 $5 billion fine against Facebook. We will then turn to Section 230 and short-term rentals and will read Homeaway.com, Inc. v. City of Santa Monica, 918 F.3d 676 (9th Cir. 2019). We will then switch to transportation and will look at California Proposition 22. That is provided in full but you need only read the first three articles of it. Finally, we will look at a recent set of Chicago food delivery ordinances.
FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook

July 24, 2019

FTC settlement imposes historic penalty, and significant requirements to boost accountability and transparency

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TAGS: Bureau of Consumer Protection | Consumer Protection | Privacy and Security | Consumer Privacy | Data Security


Participants included: FTC Chairman Joe Simons, FTC Commissioners Noah Joshua Phillips and Christine S. Wilson, and Gustav W. Eyler, Director of the Department of Justice Civil Division’s Consumer Protection Branch.

Facebook, Inc. will pay a record-breaking $5 billion penalty, and submit to new restrictions and a modified corporate structure that will hold the company accountable for the decisions it makes about its users’ privacy, to settle Federal Trade Commission charges that the company violated a 2012 FTC order by deceiving users about their ability to control the privacy of their personal information.

The $5 billion penalty against Facebook is the largest ever imposed on any company for violating consumers’ privacy and almost 20 times greater than the largest privacy or data security penalty ever imposed worldwide. It is one of the largest penalties ever assessed by the U.S. government for any violation.

The settlement order announced today also imposes unprecedented new restrictions on Facebook’s business operations and creates multiple channels of compliance. The order requires Facebook to restructure its approach to privacy from the corporate board-level down, and establishes strong new mechanisms to ensure that Facebook executives are accountable for the decisions they make about privacy, and that those decisions are subject to meaningful oversight.

“Despite repeated promises to its billions of users worldwide that they could control how their personal information is shared, Facebook undermined consumers’ choices,” said FTC Chairman Joe Simons. “The magnitude of the $5 billion penalty and sweeping conduct relief are unprecedented in the history of the FTC. The relief is designed not only to punish future violations but, more importantly, to change Facebook’s entire privacy culture to decrease the likelihood of continued
violations. The Commission takes consumer privacy seriously, and will enforce FTC orders to the fullest extent of the law."

"The Department of Justice is committed to protecting consumer data privacy and ensuring that social media companies like Facebook do not mislead individuals about the use of their personal information," said Assistant Attorney General Jody Hunt for the Department of Justice’s Civil Division. "This settlement’s historic penalty and compliance terms will benefit American consumers, and the Department expects Facebook to treat its privacy obligations with the utmost seriousness."

More than 185 million people in the United States and Canada use Facebook on a daily basis. Facebook monetizes user information through targeted advertising, which generated most of the company’s $55.8 billion in revenues in 2018. To encourage users to share information on its platform, Facebook promises users they can control the privacy of their information through Facebook’s privacy settings.

Following a yearlong investigation by the FTC, the Department of Justice will file a complaint on behalf of the Commission alleging that Facebook repeatedly used deceptive disclosures and settings to undermine users’ privacy preferences in violation of its 2012 FTC order. These tactics allowed the company to share users’ personal information with third-party apps that were downloaded by the user’s Facebook “friends." The FTC alleges that many users were unaware that Facebook was sharing such information, and therefore did not take the steps needed to opt-out of sharing.

In addition, the FTC alleges that Facebook took inadequate steps to deal with apps that it knew were violating its platform policies.

In a related, but separate development, the FTC also announced today separate law enforcement actions against data analytics company Cambridge Analytica, its former Chief Executive Officer Alexander Nix, and Aleksandr Kogan, an app developer who worked with the company, alleging they used false and deceptive tactics to harvest personal information from millions of Facebook users. Kogan and Nix have agreed to a settlement with the FTC that will restrict how they conduct any business in the future.

**New Facebook Order Requirements**

To prevent Facebook from deceiving its users about privacy in the future, the FTC’s new 20-year settlement order overhauls the way the company makes privacy decisions by boosting the transparency of decision making and holding Facebook accountable via overlapping channels of compliance.

The order creates greater accountability at the board of directors level. It establishes an independent privacy committee of Facebook’s board of directors, removing unfettered control by Facebook’s CEO Mark Zuckerberg over decisions affecting user privacy. Members of the privacy committee must be independent and will be appointed by an independent nominating committee. Members can only be fired by a supermajority of the Facebook board of directors.

The order also improves accountability at the individual level. Facebook will be required to designate compliance officers who will be responsible for Facebook’s privacy program. These compliance officers will be subject to the approval of the new board privacy committee and can be removed only by that committee—not by Facebook’s CEO or Facebook employees. Facebook CEO Mark Zuckerberg and designated compliance officers must independently submit to the FTC quarterly certifications that the company is in compliance with the privacy program mandated by the order, as well as an
annual certification that the company is in overall compliance with the order. Any false certification will subject them to individual civil and criminal penalties.

The order also strengthens external oversight of Facebook. The order enhances the independent third-party assessor’s ability to evaluate the effectiveness of Facebook’s privacy program and identify any gaps. The assessor’s biennial assessments of Facebook’s privacy program must be based on the assessor’s independent fact-gathering, sampling, and testing, and must not rely primarily on assertions or attestations by Facebook management. The order prohibits the company from making any misrepresentations to the assessor, who can be approved or removed by the FTC. Importantly, the independent assessor will be required to report directly to the new privacy board committee on a quarterly basis. The order also authorizes the FTC to use the discovery tools provided by the Federal Rules of Civil Procedure to monitor Facebook’s compliance with the order.

As part of Facebook’s order-mandated privacy program, which covers WhatsApp and Instagram, Facebook must conduct a privacy review of every new or modified product, service, or practice before it is implemented, and document its decisions about user privacy. The designated compliance officers must generate a quarterly privacy review report, which they must share with the CEO and the independent assessor, as well as with the FTC upon request by the agency. The order also requires Facebook to document incidents when data of 500 or more users has been compromised and its efforts to address such an incident, and deliver this documentation to the Commission and the assessor within 30 days of the company’s discovery of the incident.

Additionally, the order imposes significant new privacy requirements, including the following:

- Facebook must exercise greater oversight over third-party apps, including by terminating app developers that fail to certify that they are in compliance with Facebook’s platform policies or fail to justify their need for specific user data;
- Facebook is prohibited from using telephone numbers obtained to enable a security feature (e.g., two-factor authentication) for advertising;
- Facebook must provide clear and conspicuous notice of its use of facial recognition technology, and obtain affirmative express user consent prior to any use that materially exceeds its prior disclosures to users;
- Facebook must establish, implement, and maintain a comprehensive data security program;
- Facebook must encrypt user passwords and regularly scan to detect whether any passwords are stored in plaintext; and
- Facebook is prohibited from asking for email passwords to other services when consumers sign up for its services.
Alleged Violations of 2012 Order

The settlement stems from alleged violations of the FTC’s 2012 settlement order with Facebook. Among other things, the 2012 order prohibited Facebook from making misrepresentations about the privacy or security of consumers’ personal information, and the extent to which it shares personal information, such as names and dates of birth, with third parties. It also required Facebook to maintain a reasonable privacy program that safeguards the privacy and confidentiality of user information.

The FTC alleges that Facebook violated the 2012 order by deceiving its users when the company shared the data of users’ Facebook friends with third-party app developers, even when those friends had set more restrictive privacy settings.

In May 2012, Facebook added a disclosure to its central “Privacy Settings” page that information shared with a user’s Facebook friends could also be shared with the apps used by those friends. The FTC alleges that four months after the 2012 order was finalized in August 2012, Facebook removed this disclosure from the central “Privacy Settings” page, even though it was still sharing data from an app user’s Facebook friends with third-party developers.

Additionally, Facebook launched various services such as “Privacy Shortcuts” in late 2012 and “Privacy Checkup” in 2014 that claimed to help users better manage their privacy settings. These services, however, allegedly failed to disclose that even when users chose the most restrictive sharing settings, Facebook could still share user information with the apps of the user’s Facebook friends—unless they also went to the “Apps Settings Page” and opted out of such sharing. The FTC alleges the company did not disclose anywhere on the Privacy Settings page or the “About” section of the profile page that Facebook could still share information with third-party developers on the Facebook platform about an app users Facebook friends.

Facebook announced in April 2014 that it would stop allowing third-party developers to collect data about the friends of app users (“affected friend data”). Despite this promise, the company separately told developers that they could collect this data until April 2015 if they already had an existing app on the platform. The FTC alleges that Facebook waited until at least June 2018 to stop sharing user information with third-party apps used by their Facebook friends.

In addition, the complaint alleges that Facebook improperly policed app developers on its platform. The FTC alleges that, as a general practice, Facebook did not screen the developers or their apps before granting them access to vast amounts of user data. Instead, Facebook allegedly only required developers to agree to Facebook’s policies and terms when they registered their app with the Facebook Platform. The company claimed to rely on administering consequences for policy violations that subsequently came to its attention after developers had already received data about Facebook users. The complaint alleges, however, that Facebook did not enforce such policies consistently and often based enforcement of its policies on whether Facebook benefited financially from its arrangements with the developer, and that this practice violated the 2012 order’s requirement to maintain a reasonable privacy program.

The FTC also alleges that Facebook misrepresented users’ ability to control the use of facial recognition technology with their accounts. According to the complaint, Facebook’s data policy, updated in April 2018, was deceptive to tens of
millions of users who have Facebook’s facial recognition setting called “Tag Suggestions” because that setting was turned on by default, and the updated data policy suggested that users would need to opt-in to having facial recognition enabled for their accounts.

In addition to these violations of its 2012 order, the FTC alleges that Facebook violated the FTC Act’s prohibition against deceptive practices when it told users it would collect their phone numbers to enable a security feature, but did not disclose that it also used those numbers for advertising purposes.

The Commission vote to refer the complaint and stipulated final order to the Department of Justice for filing was 3-2. The Department will file the complaint and stipulated final order in the U.S. District Court for the District of Columbia. Chairman Simons along with Commissioners Noah Joshua Phillips and Christine S. Wilson issued a statement on this matter. Commissioners Rohit Chopra and Rebecca Kelly Slaughter issued separate statements on this matter.

NOTE: The Commission files a complaint when it has “reason to believe” that the named defendants are violating or are about to violate the law and it appears to the Commission that a proceeding is in the public interest. Stipulated final orders have the force of law when approved and signed by the district court judge.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about consumer topics and file a consumer complaint online or by calling 1-877-FTC-HELP (382-4357). Like the FTC on Facebook, follow us on Twitter, read our blogs, and subscribe to press releases for the latest FTC news and resources.

PRESS RELEASE REFERENCE:
FTC Sues Cambridge Analytica, Settles with Former CEO and App Developer
FTC Approves Final Settlement With Facebook
FTC Gives Final Approval to Modify FTC's 2012 Privacy Order with Facebook with Provisions from 2019 Settlement

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Homeaway.com v. City of Santa Monica

NGUYEN, Circuit Judge: Located on the coast of Southern California, the city of Santa Monica consists of only about eight square miles but serves 90,000 residents and as many as 500,000 visitors on weekends and holidays. Similar to other popular tourist destinations, Santa Monica is struggling to manage the disruptions brought about by the rise of short-term rentals facilitated by innovative startups such as Appellants HomeAway.com, Inc. and Airbnb Inc. (the “Platforms”). Websites like those operated by the Platforms are essentially online marketplaces that allow “guests” seeking accommodations and “hosts” offering accommodations to connect and enter into rental agreements with one another.\(^1\) As of February 2018, Airbnb had approximately 1,400 listings in Santa Monica, of which about 30 percent are in the “coastal zone” covered by the California Coastal Act, while HomeAway.com had approximately 300 live listings in Santa Monica, of which approximately 40 percent are in the coastal zone.

Santa Monica’s council reported that the proliferation of short-term rentals had negatively impacted the quality and character of its neighborhoods by “bringing commercial activity and removing residential housing stock from the market” at a time when California is already suffering from severe housing shortages. In response, the city passed an ordinance regulating the short-term vacation rental market by authorizing licensed “home-sharing” (rentals where residents remain on-site with guests) but prohibiting all other short-term home rentals of 30 consecutive days or less.

The Platforms filed suit, alleging that the city ordinance is preempted by the Communications Decency Act and impermissibly infringes upon their First Amendment rights. The district court denied preliminary injunctive relief, and dismissed the Platforms’ complaints for failure to state a claim under the Communications Decency Act and the First Amendment. We affirm.

BACKGROUND

In May 2015, Santa Monica passed its initial ordinance regulating the short-term vacation rental market by authorizing licensed “home-sharing” (rentals where residents remain on-site with guests) but prohibiting all other forms of short-term rentals for 30 consecutive days or less. Santa Monica Ordinance 2484 (May 12, 2015), codified as amended, Santa Monica Mun. Code §§ 6.20.010-6.20.100. The ordinance reflected the city’s housing goals of “preserving its housing stock and preserving the quality and character of its existing single and multi-family residential neighborhoods.” Id. As originally enacted, the ordinance prohibited hosting platforms from acting to “undertake, maintain, authorize, aid, facilitate or advertise any Home-Sharing activity” that was not authorized by the city. Hosting platforms also were required to collect and remit taxes, and to regularly disclose listings and booking information to the city.

The Platforms each filed a complaint in the Central District of California challenging the initial ordinance, and the district court consolidated the cases for discovery and pretrial matters. On September 21, 2016, the parties stipulated to stay the case while the city considered amendments

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\(^1\) The Platforms do not own, lease, or manage any of the properties listed on their websites, nor are they parties to the rental agreements. Instead, the content provided alongside the listings—such as description, price, and availability—are provided by the hosts. For their services, the Platforms collect a fee from each successful booking.
to the local ordinance. During the stay period, the district court for the Northern District of California denied a preliminary injunction requested by the plaintiffs in a separate case challenging a similar ordinance in San Francisco. See Airbnb Inc. v. City & County of San Francisco, 217 F. Supp. 3d 1066 (N.D. Cal. 2016). That case ended in a settlement in which the Platforms agreed to comply with an amended version of San Francisco’s ordinance that prohibited booking unlawful transactions but provided a safe harbor wherein any platform that complies with the responsibilities set out in the Ordinance will be presumed to be in compliance with the law.

In January 2017, Santa Monica likewise amended its own ordinance. The version challenged here, Ordinance 2535 (the “Ordinance”), retains its prohibitions on most types of short-term rentals, with the exception of licensed home-shares. In addition, the Ordinance imposes four obligations on hosting platforms directly: (1) collecting and remitting “Transient Occupancy Taxes,” (2) disclosing certain listing and booking information regularly, (3) refraining from completing any booking transaction for properties not licensed and listed on the City’s registry, and (4) refraining from collecting or receiving a fee for “facilitating or providing services ancillary to a vacation rental or unregistered home-share.” If a housing platform operates in compliance with these obligations, the Ordinance provides a safe harbor by presuming the platform to be in compliance with the law. Otherwise, violations are punishable by a fine of up to $500 and/or imprisonment for up to six months.

After the district court lifted the stay, the Platforms amended their complaint to challenge the revised ordinance and moved for a preliminary injunction. Santa Monica moved to dismiss the amended complaint. The court denied the Platforms’ motion for preliminary injunctive relief and subsequently granted Santa Monica’s motion to dismiss on the ground that the Platforms failed to state a claim under federal law, including the Communications Decency Act of 1996 and the First Amendment. The district court also declined to exercise supplemental jurisdiction over their remaining state-law claims. The Platforms timely appealed these decisions, and we consolidated the appeals. ***

DISCUSSION

I. Communications Decency Act

The Communications Decency Act of 1996 (“CDA” or the “Act”), 47 U.S.C. § 230, provides internet companies with immunity from certain claims in furtherance of its stated policy “to promote the continued development of the Internet and other interactive computer services.” Id. § 230(b)(1). Construing this immunity broadly, the Platforms argue that the Ordinance requires them to monitor and remove third-party content, and therefore violates the CDA by interfering with federal policy protecting internet companies from liability for posting third-party content. Santa Monica, on the other hand, argues that the Ordinance does not implicate the CDA because it imposes no obligation on the Platforms to monitor or edit any listings provided by hosts. Santa Monica contends that the Ordinance is simply an exercise of its right to enact regulations to preserve housing by curtailing “incentives for landlords to evade rent control laws, evict tenants, and convert residential units into de facto hotels.”

We begin our analysis with the text of the CDA. Section 230(c)(1) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” Id. § 230(c)(1). The CDA explicitly preempts inconsistent state laws: “Nothing in this section shall be construed to prevent any State from enforing any State law that is consistent with this section. No cause of action may be
brought and no liability may be imposed under any State or local law that is inconsistent with this section.” Id. § 230(c)(3).

We have construed these provisions to extend immunity to “(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.” Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100-01 (9th Cir. 2009). Only the second element is at issue here: whether the Ordinance treats the Platforms as a “publisher or speaker” in a manner that is barred by the CDA. Although the CDA does not define “publisher,” we have defined “publication” in this context to “involve[] reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.” Id. at 1102 (citing Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (en banc)).

The Platforms offer two different theories as to how the Ordinance in fact reaches “publication” activities. First, the Platforms claim that the Ordinance is expressly preempted by the CDA because, as they argue, it implicitly requires them “to monitor the content of a third-party listing and compare it against the City’s short-term rental registry before allowing any booking to proceed.” Relying on Doe v. Internet Brands, 824 F.3d 846, 851 (9th Cir. 2016), the Platforms take the view that CDA immunity follows whenever a legal duty “affects” how an internet company “monitors” a website.

However, the Platforms read Internet Brands too broadly. In that case, two individuals used the defendant’s website to message and lure the plaintiff to sham auditions where she was drugged and raped. Id. at 848. We held that, where the website provider was alleged to have known independently of the ongoing scheme beforehand, the CDA did not bar an action under state law for failure to warn. Id. at 854. We observed that a duty to warn would not “otherwise affect how [the defendant] publishes or monitors” user content. Id. at 851. Though the defendant did, in its business, act as a publisher of third-party content, the underlying legal duty at issue did not seek to hold the defendant liable as a “publisher or speaker” of third-party content. Id. at 853; see 47 U.S.C. § 230(e)(3). We therefore declined to extend CDA immunity to the defendant for the plaintiff’s failure-to-warn claim. Internet Brands, 824 F.3d at 854.

We do not read Internet Brands to suggest that CDA immunity attaches any time a legal duty might lead a company to respond with monitoring or other publication activities. It is not enough that third-party content is involved; Internet Brands rejected use of a “but-for” test that would provide immunity under the CDA solely because a cause of action would not otherwise have accrued but for the third-party content. Id. at 853. We look instead to what the duty at issue actually requires: specifically, whether the duty would necessarily require an internet company to monitor third-party content. See id. at 851, 853.

Here, the Ordinance does not require the Platforms to monitor third-party content and thus falls outside of the CDA’s immunity. The Ordinance prohibits processing transactions for unregistered properties. It does not require the Platforms to review the content provided by the hosts of listings on their websites. Rather, the only monitoring that appears necessary in order to comply with the Ordinance relates to incoming requests to complete a booking transaction—content that, while resulting from the third-party listings, is distinct, internal, and nonpublic. As in Internet Brands, it is not enough that the third-party listings are a “but-for” cause of such internal monitoring. See Barnes, 824 F.3d at 853. The text of the CDA is “clear that neither this subsection nor any other declares a general immunity from liability deriving from third-party content.” 570 F.3d at 1100.

To provide broad immunity “every time a website uses data initially obtained from third parties would eviscerate [the CDA],” Barnes, 570 F.3d at 1100 (quoting Roommates.com, 521 F.3d at 1171 (9th Cir. 2008) (en banc)). That is not the result that Congress intended.
Nor could a duty to cross-reference bookings against Santa Monica’s property registry give rise to CDA immunity. While keeping track of the city’s registry is “monitoring” third-party content in the most basic sense, such conduct cannot be fairly classified as “publication” of third-party content. The Platforms have no editorial control over the registry whatsoever. As with tax regulations or criminal statutes, the Ordinance can fairly charge parties with keeping abreast of the law without running afoul of the CDA.

Second, the Platforms argue that the Ordinance “in operation and effect . . . forces [them] to remove third-party content.” Although it is clear that the Ordinance does not expressly mandate that they do so, the Platforms claim that “common sense explains” that they cannot “leave in place a website chock-full of un-bookable listings.” For purposes of our review, we accept at face value the Platforms’ assertion that they will choose to remove noncompliant third-party listings on their website as a consequence of the Ordinance. Nonetheless, their choice to remove listings is insufficient to implicate the CDA.

On its face, the Ordinance does not proscribe, mandate, or even discuss the content of the listings that the Platforms display on their websites. See Santa Monica Mun. Code §§ 6.20.010-6.20.100. It requires only that transactions involve licensed properties. We acknowledge that, as the Platforms explain in Airbnb’s complaint and in the briefing on appeal, removal of these listings would be the best option “from a business standpoint.” But, as in Internet Brands, the underlying duty “could have been satisfied without changes to content posted by the website’s users.” See 824 F.3d at 851. Even assuming that removing certain listings may be the Platforms’ most practical compliance option, allowing internet companies to claim CDA immunity under these circumstances would risk exempting them from most local regulations and would, as this court feared in Roommates.com, 521 F.3d at 1164, “create a lawless no-man’s-land on the Internet.” We hold that the Ordinance is not “inconsistent” with the CDA, and is therefore not expressly preempted by its terms. See 47 U.S.C. § 230(e)(3).

Finally, the Platforms argue that, even if the Ordinance is not expressly preempted by the CDA, the Ordinance imposes “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” See Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 372-73 (2000). Reading the CDA expansively, they argue that the Ordinance conflicts with the CDA’s goal “to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.” See § 230(b)(2). We have consistently eschewed an expansive reading of the statute that would render unlawful conduct “magically . . . lawful when [conducted] online,” and therefore “giv[ing] online businesses an unfair advantage over their real-world counterparts.” See Roommates.com, 521 F.3d at 1164, 1164-65 n.15. For the same reasons, while we acknowledge the Platforms’ concerns about the difficulties of complying with numerous state and local regulations, the CDA does not provide internet companies with a one-size-fits-all body of law. Like their brick-and-mortar counterparts, internet companies must also comply with any number of local regulations concerning, for example, employment, tax, or zoning. Because the Ordinance would not pose an obstacle to Congress’s aim to

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3 The Platforms argued below that the district court must accept as true their allegation that they would “have to” monitor and screen listings. As a matter of law, the Ordinance does not require them to do so. Courts are “not bound to accept as true a legal conclusion couched as a factual allegation.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).
encourage self-monitoring of third-party content, we hold that obstacle preemption does not preclude Santa Monica from enforcing the Ordinance.

Fundamentally, the parties dispute how broadly to construe the CDA so as to continue serving the purposes Congress envisioned while allowing state and local governments breathing room to address the pressing issues faced by their communities. We have previously acknowledged that the CDA’s immunity reaches beyond the initial state court decision that sparked its enactment. See Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) (discussing Stratton Oakmont, Inc. v. Prodigy Servs. Co., which held an internet company liable for defamation when it removed some, but not all, harmful content from its public message boards, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished)). As the Platforms correctly note, the Act’s policy statements broadly promote “the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.” See 47 U.S.C. § 230(b)(2). “[A] law’s scope often differs from its genesis,” and we have repeatedly held the scope of immunity to reach beyond defamation cases. Barnes, 570 F.3d at 1101 (quoting Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008), as amended (May 2, 2008)) (citing cases applying immunity for causes of action including discrimination, fraud, and negligence).

At the same time, our cases have hewn closely to the statutory language of the CDA and have limited the expansion of its immunity beyond the protection Congress envisioned. As we have observed, “the [relevant] section is titled ‘Protection for “good Samaritan” blocking and screening of offensive material.’” Roommates.com, 521 F.3d at 1163-64 (quoting 47 U.S.C. § 230(c)); see also Internet Brands, 824 F.3d at 852. Congress intended to “spare interactive computer services [the] grim choice” between voluntarily filtering content and being subject to liability on the one hand, and “ignoring all problematic posts altogether [to] escape liability.” Roommates.com, 521 F.3d at 1163-64. In contrast, the Platforms face no liability for the content of the bookings; rather, any liability arises only from unlicensed bookings. We do not discount the Platforms’ concerns about the administrative burdens of state and local regulations, but we nonetheless disagree that § 230(c)(1) of the CDA may be read as broadly as they advocate, or that we may ourselves expand its provisions beyond what Congress initially intended.

In sum, neither express preemption nor obstacle preemption apply to the Ordinance. We therefore affirm the district court’s dismissal for failure to state a claim under the CDA.

II. First Amendment

The Platforms also contend that the district court erred in dismissing their First Amendment claims. They argue that, even if the plain language of the Ordinance only reaches “conduct,” i.e., booking unlicensed properties, the law effectively imposes a “content-based financial burden” on commercial speech and is thus subject to First Amendment scrutiny. The district court concluded that the Ordinance “regulates conduct, not speech, and that the conduct banned . . . does not have such a ‘significant expressive element’ as to draw First Amendment protection.” We agree.

That the Ordinance regulates “conduct” is not alone dispositive. The Supreme Court has previously applied First Amendment scrutiny when “‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct.” See United States v. O’Brien, 391 U.S.
But “restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct.” Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011). While the former is entitled to protection, “the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.” Id.

To determine whether the First Amendment applies, we must first ask the “threshold question [of] whether conduct with a ‘significant expressive element’ drew the legal remedy or the ordinance has the inevitable effect of ‘singling out those engaged in expressive activity.’” Int’l Franchise Ass’n v. City of Seattle, 803 F.3d 389, 408 (9th Cir. 2015) (quoting Arcara v. Cloud Books, Inc., 478 U.S. 697, 706-07 (1986)). A court may consider the “inevitable effect of a statute on its face,” as well as a statute’s “stated purpose.” Sorrell, 564 U.S. at 565. However, absent narrow circumstances, a court may not conduct an inquiry into legislative purpose or motive beyond what is stated within the statute itself. See O’Brien, 391 U.S. at 383 n.30. Because the conduct at issue—completing booking transactions for unlawful rentals—consists only of nonspeech, nonexpressive conduct, we hold that the Ordinance does not implicate the First Amendment.

First, the prohibitions here did not target conduct with “a significant expressive element.” See Arcara, 478 U.S. at 706. Our decision in International Franchise Ass’n is analogous. There, the plaintiff challenged a minimum wage ordinance that would have accelerated the raising of the minimum wage to $15 per hour for franchise owners and other large employers. 803 F.3d at 389. In denying a preliminary injunction, the district court held that the plaintiffs were not likely to succeed on their First Amendment argument that the ordinance treated them differently based on their “speech and association” decisions to operate within a franchise relationship framework. Id. at 408-09. We agreed, concluding that the “business agreement or business dealings” were not conduct with a “significant expressive element.” Id. at 408. Instead, “Seattle’s minimum wage ordinance [was] plainly an economic regulation that [did] not target speech or expressive conduct.” Id.

Similarly, here, the Ordinance is plainly a housing and rental regulation. The “inevitable effect of the [Ordinance] on its face” is to regulate nonexpressive conduct—not speech. See Sorrell, 564 U.S. at 565. As in International Franchise Ass’n, the “business agreement or business dealings” associated with processing a booking is not conduct with a “significant expressive element.” See 803 F.3d at 408 (citation and quotation marks omitted). Contrary to the Platforms’ claim, the Ordinance does not “require” that they monitor or screen advertisements. It instead leaves them to decide how best to comply with the prohibition on booking unlawful transactions.

Nor can the Platforms rely on the Ordinance’s “stated purpose” to argue that it intends to regulate speech. The Ordinance itself makes clear that the City’s “central and significant goal . . . is preservation of its housing stock and preserving the quality and nature of residential neighborhoods.” As such, with respect to the Platforms, the only inevitable effect, and the stated purpose, of the Ordinance is to prohibit them from completing booking transactions for unlawful rentals.

As for the second prong of our inquiry, whether the Ordinance has the effect of “singling out those engaged in expressive activity,” Arcara, 478 U.S. at 706-07, we conclude that it does not. As the Platforms point out, websites like Craigslist “advertise the very same properties,” but do not process transactions. Unlike the Platforms, those websites would
not be subject to the Ordinance, underscoring that the Ordinance does not target websites that post listings, but rather companies that engage in unlawful booking transactions.

Moreover, the incidental impacts on speech cited by the Platforms raise minimal concerns. The Platforms argue that the Ordinance chills commercial speech, namely, advertisements for third-party rentals. But even accepting that the Platforms will need to engage in efforts to validate transactions before completing them, incidental burdens like these are not always sufficient to trigger First Amendment scrutiny. See Int'l Franchise Ass'n, 803 F.3d at 408 (“[S]ubjecting every incidental impact on speech to First Amendment scrutiny ‘would lead to the absurd result that any government action that had some conceivable speech inhibiting consequences . . . would require analysis under the First Amendment.’” (quoting Arcara, 478 U.S. at 708 (O'Connor, J., concurring))). Furthermore, to the extent that the speech chilled advertises unlawful rentals, “[a]ny First Amendment interest . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.” See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973).

Finally, because the Ordinance does not implicate speech protected by the First Amendment, we similarly reject the Platforms’ argument that the Ordinance is unconstitutional without a scienter requirement. In most cases, there is no “closed definition” on when a criminal statute must contain a scienter requirement. See Morissette v. United States, 342 U.S. 246, 260 (1952). However, the Supreme Court has drawn a bright line in certain contexts, such as holding that the First Amendment requires statutes imposing criminal liability for obscenity or child pornography to contain a scienter requirement. See New York v. Ferber, 458 U.S. 747, 765 (1982). Such a requirement prevents “a severe limitation on the public’s access to constitutionally protected matter” as would result from inflexible laws criminalizing “bookshops and periodical stands.” Smith v. California, 361 U.S. 147, 153 (1959).

Here, even assuming that the Ordinance would lead the Platforms to voluntarily remove some advertisements for lawful rentals, there would not be a “severe limitation on the public’s access” to lawful advertisements, especially considering the existence of alternative channels like Craigslist. Id. Such an incidental burden is far from “a substantial restriction on the freedom of speech” that would necessitate a scienter requirement. Id. at 150. Otherwise, “[t]here is no specific constitutional inhibition against making the distributors of good[s] the strictest censors of their merchandise.” Id. at 152. ***

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Because the district court properly dismissed the Platforms’ complaints for failure to state a claim, we dismiss as moot the appeals from the denial of preliminary injunctive relief.

AFFIRMED in part, DISMISSED in part.
statewide election ballot, the provisions of the other measure or measures shall be deemed to be in conflict with this act. If this act receives a greater number of affirmative votes than another measure deemed to be in conflict with it, the provisions of this act shall prevail in their entirety, and the other measure or measures shall be null and void.

**PROPOSITION 22**

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure adds sections to the Business and Professions Code and amends a section of the Revenue and Taxation Code; therefore, new provisions proposed to be added are printed in italic type to indicate that they are new.

**PROPOSED LAW**

SECTION 1. Chapter 10.5 (commencing with Section 7448) is added to Division 3 of the Business and Professions Code, to read:

**CHAPTER 10.5. APP-BASED DRIVERS AND SERVICES**

**Article 1. Title, Findings and Declarations, and Statement of Purpose**

7448. Title. This chapter shall be known, and may be cited, as the Protect App-Based Drivers and Services Act.

7449. Findings and Declarations. The people of the State of California find and declare as follows:

(a) Hundreds of thousands of Californians are choosing to work as independent contractors in the modern economy using app-based rideshare and delivery platforms to transport passengers and deliver food, groceries, and other goods as a means of earning income while maintaining the flexibility to decide when, where, and how they work.

(b) These app-based rideshare and delivery drivers include parents who want to work flexible schedules while children are in school; students who want to earn money in between classes; retirees who rideshare or deliver a few hours a week to supplement fixed incomes and for social interaction; military spouses and partners who frequently relocate; and families struggling with California’s high cost of living that need to earn extra income.

(c) Millions of California consumers and businesses, and our state’s economy as a whole, also benefit from the services of people who work as independent contractors using app-based rideshare and delivery platforms. App-based rideshare and delivery drivers are providing convenient and affordable transportation for the public, reducing impaired and drunk driving, improving mobility for seniors and individuals with disabilities, providing new transportation options for families who cannot afford a vehicle, and providing new affordable and convenient delivery options for grocery stores, restaurants, retailers, and other local businesses and their patrons.

(d) However, recent legislation has threatened to take away the flexible work opportunities of hundreds of thousands of Californians, potentially forcing them into set shifts and mandatory hours, taking away their ability to make their own decisions about the jobs they take and the hours they work.

(e) Protecting the ability of Californians to work as independent contractors throughout the state using app-based rideshare and delivery platforms is necessary so people can continue to choose which jobs they take, to work as often or as little as they like, and to work with multiple platforms or companies, all the while preserving access to app-based rideshare and delivery services that are beneficial to consumers, small businesses, and the California economy.

(f) App-based rideshare and delivery drivers deserve economic security. This chapter is necessary to protect their freedom to work independently, while also providing these workers new benefits and protections not available under current law. These benefits and protections include a healthcare subsidy consistent with the average contributions required under the Affordable Care Act (ACA); a new minimum earnings guarantee tied to 120 percent of minimum wage with no maximum; compensation for vehicle expenses; occupational accident insurance to cover on-the-job injuries; and protection against discrimination and sexual harassment.

(g) California law and rideshare and delivery network companies should protect the safety of both drivers and consumers without affecting the right of app-based rideshare and delivery drivers to work as independent contractors. Such protections should, at a minimum, include criminal background checks of drivers; zero tolerance policies for drug- and alcohol-related offenses; and driver safety training.

7450. Statement of Purpose. The purposes of this chapter are as follows:

(a) To protect the basic legal right of Californians to choose to work as independent contractors with rideshare and delivery network companies throughout the state.

(b) To protect the individual right of every app-based rideshare and delivery driver to have the flexibility to set their own hours for when, where, and how they work.

(c) To require rideshare and delivery network companies to offer new protections and benefits for app-based rideshare and delivery drivers, including minimum compensation levels, insurance to cover on-the-job injuries, automobile accident insurance, health care subsidies for qualifying drivers, protection
7453. Earnings Guarantee. (a) A network company shall ensure that for each earnings period, an app-based driver is compensated at not less than the net earnings floor as set forth in this section. The net earnings floor establishes a guaranteed minimum level of compensation for app-based drivers that cannot be reduced. In no way does the net earnings floor prohibit app-based drivers from earning a higher level of compensation.

(b) For each earnings period, a network company shall compare an app-based driver’s net earnings against the net earnings floor for that app-based driver during the earnings period. In the event that the app-based driver’s net earnings in the earnings period are less than the net earnings floor for that earnings period, the network company shall include an additional sum accounting for the difference in the app-based driver’s earnings no later than during the next earnings period.

(c) No network company or agent shall take, receive, or retain any gratuity or a part thereof that is paid, given to, or left for an app-based driver by a customer or deduct any amount from the earnings due to an app-based driver for a ride or delivery on account of a gratuity paid in connection with the ride or delivery. A network company that permits customers to pay gratuities by credit card shall pay the app-based driver the full amount of the gratuity that the customer indicated on the credit card receipt, without any deductions for any credit card payment processing fees or costs that may be charged to the network company by the credit card company.

(d) For purposes of this chapter, the following definitions apply:

(1) “Applicable minimum wage” means the state mandated minimum wage for all industries or, if a passenger or item is picked up within the boundaries of a local government that has a higher minimum wage that is generally applicable to all industries, the local minimum wage of that local government. The applicable minimum wage shall be determined at the location where a passenger or item is picked up and shall apply for all engaged time spent completing that rideshare request or delivery request.

(2) “Earnings period” means a pay period, set by the network company, not to exceed 14 consecutive calendar days.

(3) “Net earnings” means all earnings received by an app-based driver in an earnings period, provided that the amount conforms to both of the following standards:

(A) The amount does not include gratuities, tolls, cleaning fees, airport fees, or other customer pass-throughs.

(B) The amount may include incentives or other bonuses.
(4) “Net earnings floor” means, for any earnings period, a total amount that is comprised of:

(A) For all engaged time, the sum of 120 percent of the applicable minimum wage for that engaged time.

(B) (i) The per-mile compensation for vehicle expenses set forth in this subparagraph multiplied by the total number of engaged miles.

(ii) After the effective date of this chapter and for the 2021 calendar year, the per-mile compensation for vehicle expenses shall be thirty cents ($0.30) per engaged mile. For calendar years after 2021, the amount per engaged mile shall be adjusted pursuant to clause (iii).

(iii) For calendar years following 2021, the per-mile compensation for vehicle expenses described in clause (ii) shall be adjusted annually to reflect any increase in inflation as measured by the Consumer Price Index for All Urban Consumers (CPI-U) published by the United States Bureau of Labor Statistics. The Treasurer’s Office shall calculate and publish the adjustments required by this subparagraph.

(e) Nothing in this section shall be interpreted to require a network company to provide a particular amount of compensation to an app-based driver for any given rideshare or delivery request, as long as the app-based driver’s net earnings for each earnings period equals or exceeds that app-based driver’s net earnings floor for that earnings period as set forth in subdivision (b). For clarity, the net earnings floor in this section may be calculated on an average basis over the course of each earnings period.

Article 4. Benefits

7454. Healthcare Subsidy. (a) Consistent with the average contributions required under the Affordable Care Act (ACA), a network company shall provide a quarterly health care subsidy to qualifying app-based drivers as set forth in this section. An app-based driver that averages the following amounts of engaged time per week on a network company’s platform during a calendar quarter shall receive the following subsidies from that network company:

(1) For an average of 25 hours or more per week of engaged time in the calendar quarter, a payment greater than or equal to 100 percent of the average ACA contribution for the applicable average monthly Covered California premium for each month in the quarter.

(2) For an average of at least 15 but less than 25 hours per week of engaged time in the calendar quarter, a payment greater than or equal to 50 percent of the average ACA contribution for the applicable average monthly Covered California premium for each month in the quarter.

(b) At the end of each earnings period, a network company shall provide to each app-based driver the following information:

(1) The number of hours of engaged time the app-based driver accrued on the network company’s online-enabled application or platform during that earnings period.

(2) The number of hours of engaged time the app-based driver has accrued on the network company’s online-enabled application or platform during the current calendar quarter up to that point.

(c) Covered California may adopt or amend regulations as it deems appropriate to permit app-based drivers receiving subsidies pursuant to this section to enroll in health plans through Covered California.

(d) (1) As a condition of providing the health care subsidy set forth in subdivision (a), a network company may require an app-based driver to submit proof of current enrollment in a qualifying health plan. Proof of current enrollment may include, but is not limited to, health insurance membership or identification cards, evidence of coverage and disclosure forms from the health plan, or claim forms and other documents necessary to submit claims.

(2) An app-based driver shall not less than 15 calendar days from the end of the calendar quarter to provide proof of enrollment as set forth in paragraph (1).

(3) A network company shall provide a health care subsidy due for a calendar quarter under subdivision (a) within 15 days of the end of the calendar quarter or within 15 days of the app-based driver’s submission of proof of enrollment as set forth in paragraph (1), whichever is later.

(e) For purposes of this section, a calendar quarter refers to the following four periods of time:

(1) January 1 through March 31.

(2) April 1 through June 30.

(3) July 1 through September 30.

(4) October 1 through December 31.

(f) Nothing in this section shall be interpreted to prevent an app-based driver from receiving a health care subsidy from more than one network company for the same calendar quarter.

(g) On or before December 31, 2020, and on or before each September 1 thereafter, Covered California shall publish the average statewide monthly premium for an individual for the following calendar year for a Covered California bronze health insurance plan.

(h) This section shall become inoperative in the event the United States or the State of California implements a universal health care system or substantially similar system that expands coverage to the recipients of subsidies under this section.
7455. Loss and Liability Protection. No network company shall operate in California for more than 90 days unless the network company carries, provides, or otherwise makes available the following insurance coverage:

(a) For the benefit of app-based drivers, occupational accident insurance to cover medical expenses and lost income resulting from injuries suffered while the app-based driver is online with a network company's online-enabled application or platform. Policies shall at a minimum provide the following:

(1) Coverage for medical expenses incurred, up to at least one million dollars ($1,000,000).

(2) (A) Disability payments equal to 66 percent of the app-based driver's average weekly earnings from all network companies as of the date of injury, with minimum and maximum weekly payment rates to be determined in accordance with subdivision (a) of Section 4453 of the Labor Code for up to the first 104 weeks following the injury.

(B) “Average weekly earnings” means the app-based driver's total earnings from all network companies during the 28 days prior to the covered accident divided by four.

(b) For the benefit of spouses, children, or other dependents of app-based drivers, accidental death insurance for injuries suffered by an app-based driver while the app-based driver is online with the network company's online-enabled application or platform that result in death. For purposes of this subdivision, burial expenses and death benefits shall be determined in accordance with Section 4701 and Section 4702 of the Labor Code.

(c) For the purposes of this section, “online” means the time when an app-based driver is utilizing a network company's online-enabled application or platform and can receive requests for rideshare services or delivery services from the network company, or during engaged time.

(d) Occupational accident insurance or accidental death insurance under subdivisions (a) and (b) shall not be required to cover an accident that occurs while online but outside of engaged time where the injured app-based driver is in engaged time on one or more other network company platforms or where the app-based driver is engaged in personal activities. If an accident is covered by occupational accident insurance or accidental death insurance maintained by more than one network company, the insurer of the network company against whom a claim is filed is entitled to contribution for the pro-rata share of coverage attributable to one or more other network companies up to the coverages and limits in subdivisions (a) and (b).

(e) Any benefits provided to an app-based driver under subdivision (a) or (b) of this section shall be considered amounts payable under a worker's compensation law or disability benefit for the purpose of determining amounts payable under any insurance provided under Article 2 (commencing with Section 11580) of Chapter 1 of Part 3 of Division 2 of the Insurance Code.

(f) (1) For the benefit of the public, a DNC as defined in Section 7463 shall maintain automobile liability insurance of at least one million dollars ($1,000,000) per occurrence to compensate third parties for injuries or losses proximately caused by the operation of an automobile by an app-based driver during engaged time in instances where the automobile is not otherwise covered by a policy that complies with subdivision (b) of Section 11580.1 of the Insurance Code.

(2) For the benefit of the public, a TNC as defined in Section 7463 shall maintain liability insurance policies as required by Article 7 (commencing with Section 5430) of Chapter 8 of Division 2 of the Public Utilities Code.

(3) For the benefit of the public, a TCP as defined in Section 7463 shall maintain liability insurance policies as required by Article 4 (commencing with Section 5391) of Chapter 8 of Division 2 of the Public Utilities Code.

Article 5. Antidiscrimination and Public Safety

7456. Antidiscrimination. (a) It is an unlawful practice, unless based upon a bona fide occupational qualification or public or app-based driver safety need, for a network company to refuse to contract with, terminate the contract of, or deactivate from the network company's online-enabled application or platform, any app-based driver or prospective app-based driver based upon race, color, ancestry, national origin, religion, creed, age, physical or mental disability, sex, gender, sexual orientation, gender identity or expression, medical condition, genetic information, marital status, or military or veteran status.

(b) Claims brought pursuant to this section shall be brought solely under the procedures established by the Unruh Civil Rights Act (Section 51 of the Civil Code) and will be governed by its requirements and remedies.

7457. Sexual Harassment Prevention. (a) A network company shall develop a sexual harassment policy intended to protect app-based drivers and members of the public using rideshare services or delivery services. The policy shall be available on the network company's internet website. The policy shall, at a minimum, do all of the following:

(1) Identify behaviors that may constitute sexual harassment, including the following: unwanted sexual advances; leering, gestures, or displaying sexually suggestive objects, pictures, cartoons, or posters; derogatory comments, epithets, slurs, or jokes;
graphic comments, sexually degrading words, or suggestive or obscene messages or invitations; and physical touching or assault, as well as impeding or blocking movements.

(2) Indicate that the network company, and in many instances the law, prohibits app-based drivers and customers utilizing rideshare services or delivery services from committing prohibited harassment.

(3) Establish a process for app-based drivers, customers, and rideshare passengers to submit complaints that ensures confidentiality to the extent possible; an impartial and timely investigation; and remedial actions and resolutions based on the information collected during the investigation process.

(4) Provide an opportunity for app-based drivers and customers utilizing rideshare services or delivery services to submit complaints electronically so complaints can be resolved quickly.

(5) Indicate that when the network company receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation to reach reasonable conclusions based on the information collected.

(6) Make clear that neither app-based drivers nor customers utilizing rideshare services or delivery services shall be retaliated against as a result of making a good faith complaint or participating in an investigation against another app-based driver, customer, or rideshare passenger.

(b) Prior to providing rideshare services or delivery services through a network company’s online-enabled application or platform, an app-based driver shall do both of the following:

(1) Review the network company’s sexual harassment policy.

(2) Confirm to the network company, for which electronic confirmation shall suffice, that the app-based driver has reviewed the network company’s sexual harassment policy.

(c) Claims brought pursuant to this section shall be brought solely under the procedures established by the Unruh Civil Rights Act (Section 51 of the Civil Code) and will be governed by its requirements and remedies.

7458. Criminal Background Checks. (a) A network company shall conduct, or have a third party conduct, an initial local and national criminal background check for each app-based driver who uses the network company’s online-enabled application or platform to provide rideshare services or delivery services. The background check shall be consistent with the standards contained in subdivision (a) of Section 5445.2 of the Public Utilities Code. Notwithstanding any other provision of law to the contrary, an app-based driver’s consent is obtained by a network company for an initial background check, no additional consent shall be required for the continual monitoring of that app-based driver’s criminal history if the network company elects to undertake such continual monitoring.

(b) A network company shall complete the initial criminal background check as required by subdivision (a) prior to permitting an app-based driver to utilize the network company’s online-enabled application or platform. The network company shall provide physical or electronic copies or summaries of the initial criminal background check to the app-based driver.

(c) An app-based driver shall not be permitted to utilize a network company’s online-enabled application or platform if one of the following applies:

(1) The driver has ever been convicted of any crime listed in subparagraph (B) of paragraph (2) of subdivision (a) of Section 5445.2 of the Public Utilities Code, any serious felony as defined by subdivision (c) of Section 1192.7 of the Penal Code, or any hate crime as defined by Section 422.55 of the Penal Code.

(2) The driver has been convicted within the last seven years of any crime listed in paragraph (3) of subdivision (a) of Section 5445.2 of the Public Utilities Code.

(d) (1) The ability of an app-based driver to utilize a network company’s online-enabled application or platform may be suspended if the network company learns the driver has been arrested for any crime listed in either of the following:

(A) Subparagraph (B) of paragraph (2), or paragraph (3), of subdivision (a) of Section 5445.2 of the Public Utilities Code.

(B) Subdivision (c) of this section.

(2) The suspension described in paragraph (1) may be lifted upon the disposition of an arrest for any crime listed in subparagraph (B) of paragraph (2), or paragraph (3), of subdivision (a) of Section 5445.2 of the Public Utilities Code that does not result in a conviction. Such disposition includes a finding of factual innocence from any relevant charge, an acquittal at trial, an affidavit indicating the prosecuting attorney with jurisdiction over the alleged offense has declined to file a criminal complaint, or an affidavit indicating all relevant time periods described in Chapter 2 (commencing with Section 799) of Title 3 of Part 2 of the Penal Code have expired.

(e) Nothing in this section shall be interpreted to prevent a network company from imposing additional standards relating to criminal history.

(f) Notwithstanding Section 1786.12 of the Civil Code, an investigative consumer reporting agency may furnish an investigative consumer report to a network company about a person seeking to become an app-based driver, regardless of whether the app-based...
driver is to be an employee or an independent contractor of the network company.

7459. Safety Training. (a) A network company shall require an app-based driver to complete the training described in this section prior to allowing the app-based driver to utilize the network company's online-enabled application or platform.

(b) A network company shall provide each app-based driver safety training. The safety training required by this section shall include the following subjects:

(1) Collision avoidance and defensive driving techniques.

(2) Identification of collision-causing elements such as excessive speed, DUI, and distracted driving.

(3) Recognition and reporting of sexual assault and misconduct.

(4) For app-based drivers delivering prepared food or groceries, food safety information relevant to the delivery of food, including temperature control.

(c) The training may, at the discretion of the network company, be provided via online, video, or in-person training.

(d) Notwithstanding subdivision (a), any app-based driver that has entered into a contract with a network company prior to January 1, 2021, to provide rideshare services or delivery services shall have until July 1, 2021, to complete the safety training required by this section, and may continue to provide rideshare services or delivery services through the network company's online-enabled application or platform until that date. On and after July 1, 2021, app-based drivers described in this subdivision must complete the training required by this section in order to continue providing rideshare services and delivery services.

(e) Any safety product, feature, process, policy, standard, or other effort undertaken by a network company, or the provision of equipment by a network company, to further public safety is not an indicia of an employment or agency relationship with an app-based driver.

7460. Zero Tolerance Policies. (a) A network company shall institute a “zero tolerance policy” that mandates prompt suspension of an app-based driver’s access to the network company’s online-enabled application or platform in any instance in which the network company receives a report through its online-enabled application or platform, or by any other company-approved method, from any person who reasonably suspects the app-based driver is under the influence of drugs or alcohol while providing rideshare services or delivery services.

(b) Upon receiving a report described in subdivision (a), a network company shall promptly suspend the app-based driver from the company's online-enabled application or platform for further investigation.

(c) A network company may suspend access to the network company’s online-enabled application or platform for any app-based driver or customer found to be reporting an alleged violation of a zero tolerance policy as described in subdivision (a) where that driver or customer knows the report to be unfounded or based the report on an intent to inappropriately deny a driver access to the online-enabled application or platform.

7460.5. A network company shall make continuously and exclusively available to law enforcement a mechanism to submit requests for information to aid in investigations related to emergency situations, exigent circumstances, and critical incidents.

7461. App-based Driver Rest. An app-based driver shall not be logged in and driving on a network company's online-enabled application or platform for more than a cumulative total of 12 hours in any 24-hour period, unless that driver has already logged off for an uninterrupted period of 6 hours. If an app-based driver has been logged on and driving for more than a cumulative total of 12 hours in any 24-hour period, without logging off for an uninterrupted period of 6 hours, the driver shall be prohibited from logging back into the network company's online-enabled application or platform for an uninterrupted period of at least 6 hours.

7462. Impersonating an App-Based Driver. (a) Any person who fraudulently impersonates an app-based driver while providing or attempting to provide rideshare or delivery services shall be guilty of a misdemeanor, and is punishable by imprisonment in a county jail for up to six months, or a fine of up to ten thousand dollars ($10,000), or both. Nothing in this subdivision precludes prosecution under any other law.

(b) In addition to any other penalty provided by law, any person who fraudulently impersonates an app-based driver while providing or attempting to provide rideshare services or delivery services in the commission or attempted commission of an offense described in Section 207, 209, 220, 261, 264.1, 286, 287, 288, or 289 of the Penal Code shall be sentenced to an additional term of five years.

(c) In addition to any other penalty provided by law, any person who fraudulently impersonates an app-based driver while providing or attempting to provide rideshare services or delivery services in the commission of a felony or attempted felony and in so doing personally inflicts great bodily injury to another person other than an accomplice shall be sentenced to an additional term of five years.

(d) In addition to any other penalty provided by law, any person who fraudulently impersonates an app-based driver while providing or attempting to provide rideshare services or delivery services in the
commission of a felony or attempted felony and in so doing causes the death of another person other than an accomplice shall be sentenced to an additional term of 10 years.

Article 6. Definitions

7463. For purposes of this chapter, the following definitions shall apply:

(a) “App-based driver” means an individual who is a DNC courier, TNC driver, or TCP driver or permit holder; and for whom the conditions set forth in subdivisions (a) to (d), inclusive, of Section 7451 are satisfied.

(b) “Average ACA contribution” means 82 percent of the dollar amount of the average monthly Covered California premium.

(c) “Average monthly Covered California premium” equals the dollar amount published pursuant to subdivision (g) of Section 7454.

(d) “Covered California” means the California Health Benefit Exchange, codified in Title 22 (commencing with Section 100500) of the Government Code.

(e) “Customer” means one or more natural persons or business entities.

(f) “Delivery network company” (DNC) means a business entity that maintains an online-enabled application or platform used to facilitate delivery services within the State of California on an on-demand basis, and maintains a record of the amount of engaged time and engaged miles accumulated by DNC couriers. Deliveries are facilitated on an on-demand basis if DNC couriers are provided with the option to accept or decline each delivery request and the DNC does not require the DNC courier to accept any specific delivery request as a condition of maintaining access to the DNC's online-enabled application or platform.

(g) “Delivery network company courier” (DNC courier) means an individual who provides delivery services through a DNC’s online-enabled application or platform.

(h) “Delivery services” means the fulfillment of delivery requests, meaning the pickup from any location of any item or items and the delivery of the items using a passenger vehicle, bicycle, scooter, walking, public transportation, or other similar means of transportation, to a location selected by the customer located within 50 miles of the pickup location. A delivery request may include more than one, but not more than 12, distinct orders placed by different customers. Delivery services may include the selection, collection, or purchase of items by a DNC courier provided that those tasks are done in connection with a delivery that the DNC courier has agreed to deliver. Delivery services do not include deliveries that are subject to Section 26090, as that section read on October 29, 2019.

(i) “Engaged miles” means all miles driven during engaged time in a passenger vehicle that is not owned, leased, or rented by the network company.

(j) (1) “Engaged time” means, subject to the conditions set forth in paragraph (2), the period of time, as recorded in a network company’s online-enabled application or platform, from when an app-based driver accepts a rideshare request or delivery request to when the app-based driver completes that rideshare request or delivery request.

(2) (A) Engaged time shall not include the following:

(i) Any time spent performing a rideshare service or delivery service after the request has been cancelled by the customer.

(ii) Any time spent on a rideshare service or delivery service where the app-based driver abandons performance of the service prior to completion.

(B) Network companies may also exclude time if doing so is reasonably necessary to remedy or prevent fraudulent use of the network company’s online-enabled application or platform.

(k) “Local government” means a city, county, city and county, charter city, or charter county.

(l) “Network company” means a business entity that is a DNC or a TNC.

(m) “Passenger vehicle” means a passenger vehicle as defined in Section 465 of the Vehicle Code.

(n) “Qualifying health plan” means a health insurance plan in which the app-based driver is the subscriber, that is not sponsored by an employer, and that is not a Medicare or Medicaid plan.

(o) “Rideshare service” means the transportation of one or more persons.

(p) “Transportation network company” (TNC) has the same meaning as the definition contained in subdivision (c) of Section 5431 of the Public Utilities Code.

(q) “Transportation network company driver” (TNC driver) has the same meaning as the definition of driver contained in subdivision (a) of Section 5431 of the Public Utilities Code.

(r) “Charter-party carrier of passengers” (TCP) shall have the same meaning as the definition contained in Section 5360 of the Public Utilities Code, provided the driver is providing rideshare services using a passenger vehicle through a network company’s online-enabled application or platform.

Article 7. Uniform Work Standards

7464. (a) The performance of a single rideshare service or delivery service frequently requires an app-based driver to travel across the jurisdictional boundaries of multiple local governments. California has over 500 cities and counties, which can lead to
overlapping, inconsistent, and contradictory local regulations for cross-jurisdictional services.

(b) In light of the cross-jurisdictional nature of the rideshare services and delivery services, and in addition to the other requirements and standards established by this chapter, the state hereby occupies the field in the following areas:

(1) App-based driver compensation and gratuity, except as provided in Section 7453.

(2) App-based driver scheduling, leave, health care subsidies, and any other work-related stipends, subsidies, or benefits.

(3) App-based driver licensing and insurance requirements.

(4) App-based driver rights with respect to a network company’s termination of an app-based driver’s contract.

(c) Notwithstanding subdivision (b), nothing in this section shall limit a local government’s ability to adopt local ordinances necessary to punish the commission of misdemeanor and felony crimes or to enforce local ordinances and regulations enacted prior to October 29, 2019.

Article 8. Income Reporting

7464.5 (a) A network company that is acting as a third-party settlement organization shall prepare an information return for each participating payee who is an app-based driver with a California address that has a gross amount of reportable payment transactions equal to or greater than six hundred dollars ($600) during a calendar year, irrespective of the number of transactions between the third-party settlement organization and the payee. A third-party settlement organization must report these amounts to the Franchise Tax Board and furnish a copy of the information return to the participating payee.

The information return shall include the following:

(1) The name, address, and tax identification number of the participating payee.

(2) The gross amount of the reportable payment transactions with respect to the participating payee.

(b) Within 30 days following the date such an information return would be due to the Internal Revenue Service, a network company shall file a copy of any information return required by subdivision (a) with the Franchise Tax Board and shall provide a copy to the participating payee.

(c) A network company may fulfill this requirement by submitting a copy of Internal Revenue Service Form 1099-K or by submitting a form provided by the Franchise Tax Board that includes the same information as that on Cal-1099-K.

(d) For purposes of this section:

1. “Participating payee” has the same meaning as provided in Section 6050W(d)(1)(A)(ii) of Title 26 of the United States Code.

2. “Reportable payment transaction” has the same meaning as provided in Section 6050W(c)(1) of Title 26 of the United States Code.

3. “Third-party settlement organization” has the same meaning as provided in Section 6050W(b)(3) of Title 26 of the United States Code.

(e) This section shall not apply in instances where the gross amount of reportable payment transactions for a participating payee in a calendar year is less than six hundred dollars ($600) or where the participating payee is not an app-based driver.

(f) This section shall apply to reportable payment transactions occurring on or after January 1, 2021.

Article 9. Amendment

7465. (a) After the effective date of this chapter, the Legislature may amend this chapter by a statute passed in each house of the Legislature by rollcall vote entered into the journal, seven-eighths of the membership concurring, provided that the statute is consistent with, and furthers the purpose of, this chapter. No bill seeking to amend this chapter after the effective date of this chapter may be passed or ultimately become a statute unless the bill has been printed and distributed to members, and published on the internet, in its final form, for at least 12 business days prior to its passage in either house of the Legislature.

(b) No statute enacted after October 29, 2019, but prior to the effective date of this chapter, that would constitute an amendment of this chapter, shall be operative after the effective date of this chapter unless the statute was passed in accordance with the requirements of subdivision (a).

(c) (1) The purposes of this chapter are described in Article 1 (commencing with Section 7448).

(2) Any statute that amends Section 7451 does not further the purposes of this chapter.

(3) Any statute that prohibits app-based drivers from performing a particular rideshare service or delivery service while allowing other individuals or entities to perform the same rideshare service or delivery service, or otherwise imposes unequal regulatory burdens upon app-based drivers based on their classification status, constitutes an amendment of this chapter and must be enacted in compliance with the procedures governing amendments consistent with the purposes of this chapter as set forth in subdivisions (a) and (b).

(4) Any statute that authorizes any entity or organization to represent the interests of app-based drivers in connection with drivers’ contractual relationships with network companies, or drivers’ compensation, benefits, or working conditions, constitutes an amendment of this chapter and must
be enacted in compliance with the procedures governing amendments consistent with the purposes of this chapter as set forth in subdivisions (a) and (b).

(d) Any statute that imposes additional misdemeanor or felony penalties in order to provide greater protection against criminal activity for app-based drivers and individuals using rideshare services or delivery services may be enacted by the Legislature by rollcall vote entered into the journal, a majority of the membership of each house concurring, without complying with subdivisions (a) and (b).

Article 10. Regulations

7466. (a) Emergency regulations may be adopted by Covered California in order to implement and administer subdivisions (c) and (g) of Section 7454.

(b) Any emergency regulation adopted pursuant to this section shall be adopted in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and, for purposes of that chapter, including Section 11349.6 of the Government Code, the adoption of the regulation is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health and safety, and general welfare. Notwithstanding any other provision of law, the emergency regulations adopted by Covered California may remain in effect for two years from the date of adoption.

Article 11. Severability

7467. (a) Subject to subdivision (b), the provisions of this chapter are severable. If any portion, section, subdivision, paragraph, clause, sentence, phrase, word, or application of this chapter is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision shall not affect the validity of the remaining portions of this chapter. The people of the State of California hereby declare that they would have adopted this chapter and each and every portion, section, subdivision, paragraph, clause, sentence, phrase, word, and application not declared invalid or unconstitutional without regard to whether any other portion of this chapter or application thereof would be subsequently declared invalid.

(b) Notwithstanding subdivision (a), if any portion, section, subdivision, paragraph, clause, sentence, phrase, word, or application of Section 7451 of Article 2 (commencing with Section 7451), as added by the voters, is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision shall apply to the entirety of the remaining provisions of this chapter, and no provision of this chapter shall be deemed valid or given force of law.

SEC. 2. Section 17037 of the Revenue and Taxation Code is amended to read:

17037. Provisions in other codes or general law statutes which are related to this part include all of the following:

(a) Chapter 20.6 (commencing with Section 9891) of Division 3 of the Business and Professions Code, relating to tax preparers.

(b) Part 10.2 (commencing with Section 18401), relating to the administration of franchise and income tax laws.

(c) Part 10.5 (commencing with Section 20501), relating to the Property Tax Assistance and Postponement Law.

(d) Part 10.7 (commencing with Section 21001), relating to the Taxpayers’ Bill of Rights.

(e) Part 11 (commencing with Section 23001), relating to the Corporation Tax Law.

(f) Sections 15700 to 15702.1, inclusive, of the Government Code, relating to the Franchise Tax Board.

(g) Article 8 (commencing with Section 7464.5) of Chapter 10.5 of Division 3 of the Business and Professions Code.

SEC. 3. Conflicting Measures.

(a) In the event that this initiative measure and another ballot measure or measures dealing, either directly or indirectly, with the worker classification, compensation, or benefits of app-based drivers shall appear on the same statewide election ballot, the other ballot measure or measures shall be deemed to be in conflict with this measure. In the event that this initiative measure receives a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and the provisions of the other ballot measure or measures shall be null and void.

(b) If this initiative measure is approved by the voters but superseded in whole or in part by any other conflicting ballot measure approved by the voters at the same election, and such conflicting measure is later held invalid, this measure shall be self-executing and given full force and effect.

SEC. 4. Legal Defense.

The purpose of this section is to ensure that the people’s precious right of initiative cannot be improperly annulled by state politicians who refuse to defend the will of the voters. Therefore, if this act is approved by the voters of the State of California and thereafter subjected to a legal challenge which attempts to limit the scope or application of this act in any way, or alleges this act violates any local, state, or federal law in whole or in part, and both the Governor and Attorney General refuse to defend this act, then the following actions shall be taken:

(a) Notwithstanding anything to the contrary contained in Chapter 6 (commencing with Section 12500) of Part 2 of Division 3 of Title 2 of the Government Code or any other law, the Attorney
General shall appoint independent counsel to faithfully and vigorously defend this act on behalf of the State of California.

(b) Before appointing or thereafter substituting independent counsel, the Attorney General shall exercise due diligence in determining the qualifications of independent counsel and shall obtain written affirmation from independent counsel that independent counsel will faithfully and vigorously defend this act. The written affirmation shall be made publicly available upon request.

(c) In order to support the defense of this act in instances where the Governor and Attorney General fail to do so despite the will of the voters, a continuous appropriation is hereby made from the General Fund to the Controller, without regard to fiscal years, in an amount necessary to cover the costs of retaining independent counsel to faithfully and vigorously defend this act on behalf of the State of California.

SEC. 5. Liberal Construction.

This act shall be liberally construed in order to effectuate its purposes.

**PROPOSITION 23**

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure adds sections to the Health and Safety Code; therefore, new provisions proposed to be added are printed in italic type to indicate that they are new.

**PROPOSED LAW**

SECTION 1. Name.

This act shall be known as the “Protect the Lives of Dialysis Patients Act.”

SEC. 2. Findings and Purposes.

This act, adopted by the people of the State of California, makes the following findings and has the following purposes:

(a) The people make the following findings:

(1) Kidney dialysis is a life-saving process in which blood is removed from a person’s body, cleaned of toxins, and then returned to the patient. It must be done at least three times a week for several hours a session, and the patient must continue treatment for the rest of their life or until they can obtain a kidney transplant.

(2) In California, at least 70,000 people undergo dialysis treatment.

(3) Just two multinational, for-profit corporations operate or manage nearly three-quarters of dialysis clinics in California and treat more than 75 percent of dialysis patients in the state. These two multinational corporations annually earn billions of dollars from their dialysis operations, including more than $350 million a year in California alone.

(4) The dialysis procedure and side effects from the treatments present several dangers to patients, and many dialysis clinics in California have been cited for failure to maintain proper standards of care. Failure to maintain proper standards can lead to patient harm, hospitalizations, and even death.

(5) Dialysis clinics are currently not required to maintain a doctor on site to oversee quality, ensure the patient plan of care is appropriately followed, and monitor safety protocols. Patients should have access to a physician on site whenever dialysis treatment is being provided.

(6) Dialysis treatments involve direct access to the bloodstream, which puts patients at heightened risk of getting dangerous infections. Proper reporting and transparency of infection rates encourages clinics to improve quality and helps patients make the best choice for their care.

(7) When health care facilities like hospitals and nursing homes close, California regulators are able to take steps to protect patients from harm. Likewise, strong protections should be provided to vulnerable patients when dialysis clinics close.

(8) Dialysis corporations have lobbied against efforts to enact protections for kidney dialysis patients in California, spending over $100 million in 2018 and 2019 to influence California voters and the Legislature.

(b) Purposes:

(1) It is the purpose of this act to ensure that outpatient kidney dialysis clinics provide quality and affordable patient care to people suffering from end-stage renal disease.

(2) This act is intended to be budget neutral for the state to implement and administer.

SEC. 3. Section 1226.7 is added to the Health and Safety Code, to read:

1226.7. (a) Chronic dialysis clinics shall provide the same quality of care to their patients without discrimination on the basis of who is responsible for paying for a patient’s treatment. Further, chronic dialysis clinics shall not refuse to offer or to provide care on the basis of who is responsible for paying for a patient’s treatment. Such prohibited discrimination includes, but is not limited to, discrimination on the basis that a payer is an individual patient, private entity, insurer, Medi-Cal, Medicaid, or Medicare. This section shall also apply to a chronic dialysis clinic’s governing entity, which shall ensure that no discrimination prohibited by this section occurs at or among clinics owned or operated by the governing entity.

(b) Definitions:
BY AUTHORITY VESTED IN THE COMMISSIONER OF THE DEPARTMENT OF BUSINESS AFFAIRS AND CONSUMER PROTECTION PURSUANT TO CHAPTERS 2-25 AND 4-276 OF THE MUNICIPAL CODE OF CHICAGO, THE FOLLOWING RULES REGARDING THIRD-PARTY FOOD DELIVERY SERVICES ARE HEREBY ADOPTED.

By Order of the Commissioner:

[Signature]

Commissioner Rosa Escareño

Date: May 11, 2020

Published: May 12, 2020
Effective: May 22, 2020
SECTION I. PURPOSE OF RULES

The Commissioner finds that the complexity of the third-party food delivery marketplace poses challenges to consumers in understanding a party’s fee structure. A diversity of third-party delivery services and companies encourages competition and innovation in the marketplace. However, third-party delivery companies offer a diversity of fee structures to the restaurants whose products they deliver. These structures include commissions, subscription fees, and other fees to varying degrees. These structures and fees may not be obvious or transparent to the consumer.

The Commissioner also finds that consumers may have the option of purchasing food for carry-out, delivery by the restaurant, or delivery through a third-party delivery service. The menu price may be the same for all three options, with a disclosed delivery charge. However, the third-party delivery services may charge a commission or other fee to the restaurant, so that the restaurant does not receive the full menu price of the food from the customer. In many cases this commission is a substantial percentage of the menu price. And this commission is usually not disclosed to the consumer.

Consumers have an interest in understanding how the third-party delivery services they use impact the local restaurants they patronize in their communities. A material factor in the decision-making process for many consumers is the desire to support local businesses, or “Shop Local,” an interest that is heightened amidst the current COVID-19 pandemic, which has forced restaurants to cease in-house dining operations and thereby imperils their existence. And a material fact to such consumers is how much of their money is going to the local business, as opposed to other entities. Given the choice between carry-out, delivery by the restaurant, or delivery by a third-party, the consumer may wish to choose the method that maximizes the amount of the consumer’s money that is retained by the local restaurant.

Without the information that the local restaurant does not receive the full menu price for food purchased through a third-party delivery service, however, the consumer cannot make an informed choice, and such information is a therefore a material fact to the consumer. Moreover, showing a menu price without disclosing that the local restaurant does not receive the full menu price on an order through a third-party delivery service, when the restaurant would receive the full menu price when it delivers the food itself or the food is carried-out, causes consumer confusion and misunderstanding as to the value of the purchase that is received by the local restaurant. Additional consumer confusion is caused by the fact that these third-party services frequently add a service charge to the transaction that is explicitly disclosed to the consumer, suggesting to the consumer that the disclosed service charge fully covers the cost of the third-party service and omitting the material fact that there may be additional fees being taken out of the revenue received by the local restaurant.
Therefore, the Commissioner finds that, to avoid consumer confusion and misunderstanding and to ensure that all material facts are disclosed to the consumer in transactions through third-party delivery services so that consumers may make informed choices as to whether and how they wish to support local restaurants, these services must disclose commissions or other fees that are charged to the restaurant in connection with the transaction through the third-party service but are not otherwise disclosed by the third-party service to consumers during their transactions.

SECTION II. DEFINITIONS.

As used in these rules, the following terms have the following meanings:

“Commission” means any fee or any other monetary payment, under whatever name, that is charged by the third-party food delivery service to the covered establishment for the covered establishment’s use of the third-party food delivery service to effect a sale and same-day delivery of food to customers from the covered establishment, and that is not otherwise explicitly disclosed to the customer as part of the transaction. “Commission” includes any portion of any annual fee imposed in part or in whole for the provision of these services and attributable to the delivery transaction. “Commission” does not include any fee that is charged by the third-party food delivery service for services provided as a general or indirect cost of doing business, unrelated to delivery, including but not limited to, fees for order-taking and credit card processing that also apply to in-house and carry-out orders, or for advertising in a restaurant directory.

“Covered establishment” means any food dispensing establishment that offers, in a single commercial transaction over the internet, whether directly or through a third-party application, the sale and same-day delivery of food to customers from one or more retail locations within the city.

“Food dispensing establishment” has the same meaning as in Municipal Code of Chicago Section 4-8-010.

“Third-party food delivery service” means any website, mobile application or other internet service that offers or安排s via internet or telephone for the sale and same-day delivery or same-day pickup of food and beverages from no fewer than twenty separately owned and operated food dispensing establishments.

SECTION III. GENERAL RULES

Rule 1.01 Commission disclosure

When a final price is disclosed to a customer, and before a transaction occurs, for the purchase and delivery of food from a covered establishment through a third-party food delivery service,
the third-party food delivery service shall disclose to the customer, in plain and simple language and in a conspicuous manner:

(1) the menu price of the food;
(2) any sales or other tax applied to the transaction;
(3) any delivery charge or service fee, imposed on or collected from the customer by the third-party food delivery service or by the covered establishment, in addition to the menu price of the food;
(4) any tip that will be paid to the person delivering the food, and not to the third-party food delivery service, to be added into the transaction when it occurs, and
(5) any commission associated with the transaction.

**Rule 1.02 Receipts**

After a transaction occurs for the purchase and delivery of food from a covered establishment through a third-party food delivery service, and when the food is delivered to the customer, if the third-party food delivery service provides a printed receipt to the customer, the receipt shall disclose, in plain and simple language and in a conspicuous manner:

(1) the menu price of the food;
(2) any sales or other tax applied to the transaction;
(3) any delivery charge or service fee, imposed on or collected from the customer by the third-party food delivery service or by the covered establishment, in addition to the menu price of the food;
(4) any tip that will be paid to the person delivering the food, and not to the third-party food delivery service, that was added into the transaction when it occurred, and
(5) any commission associated with the transaction.

**Rule 1.03 Requirements for commission disclosure**

The commission disclosure required in Rules 1.01 and 1.02 shall substantially conform to the following:

(1) The disclosure shall indicate that it is a commission to be paid by the covered establishment to the third-party food delivery service in connection with the transaction.
(2) A single aggregate number shall be provided for the total of all commissions applicable to the transaction.
(3) If feasible, the total commission actually attributable to the specific transaction should be disclosed.
(4) The total commission may be indicated as a dollar amount or as a percentage of the transaction. If the total commission is indicated as a percentage of the transaction, it shall

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be indicated whether it is a percentage of the menu price, the menu price plus tax, the menu price plus tax plus disclosed delivery charge. Examples of such disclosure include

a. “[Third-Party Food Delivery Service] will charge [Covered Establishment] a commission of $x.xx for this delivery”
b. “[Third-Party Food Delivery Service] will charge [Covered Establishment] a commission xx% of the total price for this delivery”
c. “[Third-Party Food Delivery Service] will charge [Covered Establishment] a commission of xx% of the menu price for this delivery”

(5) If it is not feasible for the third-party food delivery service to calculate the total commission actually attributable to the specific transaction, because that information is not available in real time or because the commission depends on factors such as sales volume, dollar volume, distance travelled, or periodic fixed charges such as an annual fee, the third-party food delivery service may disclose a good-faith estimate of the commission, as a dollar amount, a percentage, an average percentage or a range of percentages, based on the most recent periodic payout from the third-party food delivery service to the covered establishment. It shall not be required that the third-party food delivery service specify what period is covered by the disclosure. Examples of such disclosure include:

a. “It is estimated that [Third-Party Food Delivery Service] will charge [Covered Establishment] a commission of $x.xx for this delivery”
b. “It is estimated that [Third-Party Food Delivery Service] will charge [Covered Establishment] a commission xx% of the total price for this delivery”
c. “Based on previous history it is estimated [Third-Party Food Delivery Service] will charge [Covered Establishment] a commission of xx% to xx% of the menu price for this delivery”

(6) If it is not feasible for the third-party food delivery service to calculate and disclose the commission by any of the foregoing methods, the third-party food delivery service may calculate and disclose the commission in an alternative manner approved by the Commissioner.

Rule 1.04 Additional disclosures

Nothing in these Rules prohibits or restricts a third-party food delivery service from including other information, or a link to other information, in addition to the disclosures required by Rules 1.01, 1.02 and 1.03.

Rule 1.05 Implementation

Third-party food delivery services shall comply with these rules no later than ten days after they are promulgated.
Rule 1.06 Violation

Failure to comply with these rules is declared to be a deceptive practice under Municipal Code of Chicago Sections 2-25-090 and 4-276-470.
NOTICE OF NEW REGULATIONS FOR THIRD-PARTY FOOD DELIVERY SERVICES EFFECTIVE SEPTEMBER 24, 2021

Please be advised that on July 28, 2021, the Chicago City Council passed Ordinance 2021-2862, which establishes new regulations for Third-Party Food Delivery Services, which will take effect September 24, 2021. Beginning on that date, Food Dispensing Establishments will have the option to obtain services from Third-Party Food Delivery Services with fees, commissions and costs exceeding the current 15% limit of each online order, provided that the Food Dispensing Establishment also has the option to obtain delivery services from the Third-Party Food Delivery Service that do not exceed the 15% limit.

Under current City regulations, it is:

1. Unlawful for a Third-Party Food Delivery Service to charge a Food Dispensing Establishment a Delivery Fee of more than 10% of the purchase price of each online order.
2. Unlawful for a Third-Party Food Delivery Service to charge a Food Dispensing Establishment any amount designated as a Delivery Fee for an Online Order that does not involve the delivery of food or beverages.
3. Unlawful for a Third-Party Food Delivery Service to charge a Food Dispensing Establishment any combination of fees, commissions, or costs for the Food Dispensing Establishment’s use of the Third-Party Delivery Service in excess of 15% of the restaurant’s monthly net sales through the Third-Party Delivery Service. This includes any delivery fees.
4. Unlawful for a Third-Party Food Delivery Service to charge a Food Dispensing Establishment any fee, commission, or cost other than as permitted in 1 through 3 above.
5. Unlawful for a Third-Party Food Delivery Service to charge a customer any Purchase Price for a food or beverage item that is higher than the price set by the Food Dispensing Establishment on the Third-Party Food Delivery Service. If no price is set by the Food Dispensing Establishment on the Third-Party Food Delivery Service, the price listed on the Food Dispensing Establishment’s own menu shall stand.
6. Unlawful for a Third-Party Food Delivery Service to reduce the compensation rates paid to the Third-Party Food Delivery Service drivers, or to garnish gratuities, as a result of any fee limitations instituted by this Ordinance.

Under new regulations, beginning September 24, 2021:

1. It will be unlawful for a Third-Party Food Delivery Service to charge a Food Dispensing Establishment a Delivery Fee of more than 15% of the purchase price of each online order.
2. It will be unlawful for a Third-Party Food Delivery Service to charge a Food Dispensing Establishment any amount designated as a Delivery Fee for an Online Order that does not involve the delivery of food or beverages.
3. It will be unlawful for a Third-Party Food Delivery Service to charge a Food Dispensing Establishment any fee, commission, or cost other than a delivery fee, other than as permitted in 1 through 3 above.
4. The limits on fees, commissions and costs in 1 through 3 above will not apply to a Third-Party Food Delivery Service that offers Food Dispensing Establishments the option to obtain delivery services for a total fee, commission or cost that does not exceed 15% of the purchasing price of each online order. This will allow Third-Party Food Delivery Services to provide services to a Food Dispensing Establishment with fees, commissions or costs that exceed the 15% limit, provided that they also give the Food Dispensing Establishment the option of obtaining delivery services that do not exceed the 15% limit. Third-Party Delivery Services are prohibited from refusing to provide service to a Food Dispensing Establishment based solely on the Food Dispensing Establishment’s decision to select the 15% option.

These regulations do not apply to any Chain Restaurant, defined as any group of businesses licensed as a Food Dispensing Establishment in the City with ten or more locations and operating under a common business name.

All Third-Party Food Delivery Service Fee Cap regulations will expire on October 31, 2021.

Complaints about violations of the Third-Party Food Delivery Service Fee Cap regulations can be submitted to the Department of Business Affairs and Consumer Protection (BACP) by calling 3-1-1, on the CHI 311 app or online at 311.chicago.gov. Violations of any of these provisions can lead to fines of $1,000 to $2,000 per offense. Each day that a violation continues shall constitute a separate and distinct offense.

Key definitions:

- “Third-Party Food Delivery Service” means any website, mobile application, or other internet service that offers or arranges for the sale of food and beverages prepared by, and the delivery or pick-up of food and beverages from, no fewer than 20 Food Dispensing Establishments located in the City that are each owned and operated by different persons.

- “Food dispensing establishment” means any fixed location where food or drink is routinely prepared and served or provided for the public for consumption on or off the premises with or without charge. Such establishments include, but are not limited to, restaurants, coffee shops, cafeterias, short order cafes, luncheonettes, grills, tearooms, sandwich shops, soda fountains, taverns, bars, cocktail lounges, nightclubs, industrial feeding establishments, take-out establishments, private institutions or organizations routinely serving food, catering kitchens, commissaries or any other eating or drinking establishment or operation.

- “Delivery fee” means a fee charged by a Third-Party Food Delivery Service for providing a Food Dispensing Establishment with a service that delivers food and beverages from such establishment to customers. The term does not include any other fee or cost that may be charged by a Third-Party Food Delivery Service to a Food Dispensing Establishment, such as fees for listing or advertising the Food Dispensing Establishment on the Third-Party Food Delivery Service platform or fees related to processing the Online Order.

- “Delivery Service” means facilitating the delivery of an online order from a Food Dispensing Establishment to a customer by an employee or independent contractor of the Third-Party Food Delivery Service.
ORDINANCE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO

SECTION 2.

(a) Definitions. For purposes of this Article, the following definitions apply:

"City" means the City of Chicago.

"Delivery fee" means a fee charged by a Third-Party Food Delivery Service for providing a Food Dispensing Establishment with a service that delivers food and beverages from such establishment to customers. The term does not include any other fee, commission or cost that a Food Dispensing Establishment has agreed to pay a Third-Party Food Delivery Service, such as fees for listing, marketing or advertising the Food Dispensing Establishment on the Third-Party Food Delivery Service platform, fees for access to customer subscription programs or fees related to processing the Online Order.

"Food Dispensing Establishment" has the same meaning as ascribed to this term in Section 4-8-010 of the Municipal Code of Chicago.

"Online Order" means an order placed by a customer through or with the assistance of a platform provided by a Third-Party Food Delivery Service, including a telephone order, for delivery or pick-up within the City.

"Purchase Price" means the price, as listed on the menu of the Food Dispensing Establishment, for the items contained in an Online Order, minus any applicable coupon or promotional discount provided to the customer by the Food Dispensing Establishment through the Third-Party Food Delivery Service. This definition does not include taxes, gratuities, and any other fees or costs that may make up the total amount charged to the customer of an Online Order.

"Third-Party Food Delivery Service" means any website, mobile application, or other internet service that offers or arranges for the sale of food and beverages prepared by, and the delivery or pick-up of food and beverages from, no fewer than 20 Food Dispensing Establishments located in the City that are each owned and operated by different persons.

(b) Prohibitions. It shall be unlawful for a Third-Party Delivery Service to:

(1) charge a Food Dispensing Establishment a Delivery Fee that totals more than 15 percent of the Purchase Price of each Online Order on an individual or cumulative basis.

(2) charge a Food Dispensing Establishment any amount designated as a Delivery Fee for an Online Order that does not involve the delivery of food or beverages.

(3) charge a Food Dispensing Establishment any fee, commission, or cost other than as permitted in Subsections 1 through 2, above.
(4) The limits on fees, commissions, and costs in Subsections 1 through 3, above, do not apply to a Third-Party Delivery Service that offers Food Dispensing Establishments, excluding Chain Restaurants as defined in Section 3, the option to obtain delivery service for a total fee, commission, or cost not to exceed 15% of the Purchase Price of each Online Order. For purposes of this Subsection "delivery service" means facilitating the delivery of an Online Order from a Food Dispensing Establishment to a customer by an employee or independent contractor of the third-party food delivery service. This Subsection does not prohibit a Third-Party Delivery Service from refusing to provide service to a Food Dispensing Establishment, so long as the refusal is not based solely on the Food Dispensing Establishment’s decision to select the 15% option.

(5) charge a customer any Purchase Price for a food or beverage item that is higher than the price set by the Food Dispensing Establishment on the Third-Party Food Delivery Service or, if no price is set by the Food Dispensing Establishment on the Third-Party Food Delivery Service, the price listed on the Food Dispensing Establishment’s own menu.

(6) reduce the compensation rates paid to the Third-Party Delivery Service drivers, or to garnish gratuities, as a result of any fee limitations instituted by this section.

(e) Enforcement and Rules. The Commissioner of Business Affairs and Consumer Protection is authorized to: (i) administer and enforce this Article, and (ii) promulgate rules necessary or useful to assist in the implementation and administration of this Article.

(d) Violation Penalty. Any person who violates this section shall be fined not less than $1,000.00 nor more than $2,000.00 for each offense. Each day that a violation continues shall constitute a separate and distinct offense.

SECTION 3. This Article shall not apply to any Chain Restaurant. For purposes of this Article only, the term "Chain Restaurant" means any group of businesses licensed as a Food Dispensing Establishment in the City with ten or more locations and operating under a common business name.

SECTION 4. This Article shall be repealed of its own accord, without further action of the City Council, on October 31, 2021.

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Matthew J. O'Shea
Alderman, 19th Ward