

Date of Hearing: April 22, 2021

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 1444 (Lee) – As Amended March 22, 2021

SUBJECT: Food delivery platforms: call routing

SUMMARY: This bill would prohibit a food delivery platform from charging a food facility a fee for a forwarded call, as defined, unless that call directly resulted in a paid order from that food facility that will be delivered by the platform, and would prohibit a listing website, as defined, from posting on their app or website a telephone number that the listing website knows will result in a forwarded call. Specifically, **this bill would:**

- 1) Prohibit a food delivery platform from charging a food facility a fee for a forwarded call unless that forwarded call directly resulted in a paid order, or an order paid for with a coupon or other promotional offer provided by the food delivery platform, from that food facility that will be delivered to the consumer by the food delivery platform.
- 2) Prohibit a listing website from posting on their internet website or application a telephone number that the listing website knows will result in a forwarded call.
- 3) Define “forwarded call” to mean a communication made by a consumer and intended for a food facility, by telephone call or other means of communication, that has been routed by a food delivery platform, or a routing service under the direction of the food delivery platform, to the intended food facility.
- 4) Define “listing website” to mean an internet website or application that lists, or produces through search results, telephone numbers associated with food facilities, and that has 100,000,000 or more unique monthly visitors.
- 5) Make various Legislative findings and declarations.

EXISTING LAW:

- 1) Prohibits a food delivery platform, as defined, from arranging for the delivery of an order from a food facility, as defined, without first obtaining an agreement with the food facility expressly authorizing the food delivery platform to take orders and deliver meals prepared by the food facility. (Bus. & Prof. Code Sec. 22599.)
- 2) For purposes of 1), above, defines “food delivery platform” to mean an online business that acts as an intermediary between consumers and multiple food facilities to submit food orders from a consumer to a participating food facility, and to arrange for the delivery of the order from the food facility to the consumer. (Bus. & Prof. Code Sec. 22598(a).)
- 3) For purposes of 1), above, defines “food facility” to mean an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level, including, but not limited to the following: (1) an operation where food is consumed on or off the premises, regardless of whether there is a charge for the food; and (2) a place used in conjunction with the operations described in this definition, including but not limited to

storage facilities for food-related utensils, equipment, and materials; and provides several specified inclusions and exclusions. (Health & Safety Code Sec. 113789.)

- 4) Establishes the Unfair Competition Law, which, among other things, provides for specific or preventive relief to enforce a penalty, forfeiture, or penal law in the case of unfair competition; and defines unfair competition to mean any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, and untrue or misleading advertising. (Bus. & Prof. Code Sec. 17200, et seq.)
- 5) Permits actions for relief pursuant to 4), above, to be prosecuted exclusively by the Attorney General, a district attorney, a county counsel as specified, a city attorney as specified, or a city prosecutor as specified, in the name of the people of the State of California, or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition. (Bus. & Prof. Code Sec. 17204.)
- 6) Permits any person specified in 5), above, to seek injunctive relief and actual damages, and permits any person specified in 5) except for a person who has suffered injury in fact to pursue civil penalties, as specified, for violations of the provisions of the Unfair Competition Law. (Bus. & Prof. Code Secs. 17204 and 17206.)
- 7) Provides that it is unlawful for any person, firm, corporation or association, or any employee thereof with intent to directly or indirectly dispose of real or personal property or to perform services, or as otherwise specified, to make or disseminate any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading; and provides that any violation of this provision is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding \$2,500, or by both that imprisonment and fine. (Bus. & Prof. Code Sec. 17500.)

FISCAL EFFECT: None. This bill has been keyed nonfiscal by the Legislative Counsel.

COMMENTS:

- 1) **Purpose of this bill:** This bill seeks to ensure consumers are not misled to believe a phone number belongs to a restaurant when the phone number actually belongs to a food delivery platform, by prohibiting listing websites from posting phone numbers that they know will result in forwarded calls and prohibiting food delivery platforms from charging restaurants for calls that do not result in orders delivered by the platform. This bill is author sponsored.
- 2) **Author's statement:** According to the author:

When consumers use listing services such as Yelp to contact restaurants, many are under the impression that their call is going directly to the restaurant. However, these calls may be routed through a third-party platform, such as Grubhub, who then charges the restaurant a referral commission of 20% of the total cost of the order and an additional 10% for physical delivery service, along with an another 3% processing fee for good measure. While the Yelp app has started labeling which phone numbers are “fulfilled by Grubhub” on the platform, consumers are not informed that the call is being monitored by Grubhub or rerouted through a specialized number that can result in referral fees to the restaurants, whereas calls made directly to the restaurant do not. An unaware consumer

may end up doing business with both Grubhub and the restaurant, while under the impression they are solely doing business with the restaurant.

Another pressing issue is the fact that restaurants are being charged for calls that do not result in orders. Grubhub claims it analyzes call recordings to determine if an order was placed, but there are instances of restaurants being charged marketing commissions when no phone order has been placed. After a restaurant is charged for these calls, the onus is on the restaurant owner to review and dispute whether these charges are legitimate. This results in additional time and resources for businesses already struggling during the pandemic. It is imperative upon the legislature to ensure small businesses, already suffering from the pandemic and racism, are not taken advantage of by big tech monopolies and are equipped with the proper tools to thrive in our new economic reality.

AB 1444 requires that listing services provide clear and accurate information about contacting a food facility so that customers know how to connect with the business directly and small businesses are able to interact with their customers without a tech company rerouting the call. This bill will also ensure that restaurant owners are only charged for calls that result in orders, and not oversight errors.

- 3) **Food delivery platforms, generally:** According to the California Restaurant Association, the restaurant industry has suffered the most significant sales and job losses of any industry since the COVID-19 outbreak began.¹ More than 8 million restaurant employees had been laid off or furloughed, and the industry lost approximately \$80 billion in sales, as of the end of April 2020.¹ Coincident with the hardship faced by the restaurant industry, the use of food delivery platforms, which facilitate food orders, pick-up, and delivery from restaurants and other food facilities, has seen a marked increase as food delivery continues to accommodate a population that is either sheltering-in-place or wary of in-person dining.

Though accelerated by COVID-19 pandemic, the transition away from in-person dining and to digital ordering for take-out or delivery long preceded the pandemic's limitations on dining-in. According to a report by NPD Group, a market research firm, from 2013-2019, restaurant digital orders grew at an average annual rate of 23%, and were expected to triple in volume by the end of 2020 even before any knowledge of the impending pandemic.² However, often operating on razor-thin margins, and now facing severe economic hardship, many small restaurants lack the staff capacity and logistical resources to transition from primarily dine-in operations to in-house managed delivery services.

Restaurants without the capacity to develop the costly information technology infrastructure and delivery logistics to keep pace with the rapid transition to digital dining are at constant risk of losing their customer base to those who do. To remain solvent, many such restaurants have little choice but to enter into contracts with food delivery platforms to provide these services on their behalf. These contracts typically stipulate that in exchange for the use of their digital interface, and in most cases their delivery services, the food delivery platform

¹ California Restaurant Association, "Coronavirus Information and Resources," Apr. 30, 2020, <https://restaurant.org/Covid19>.

² NPD Group, "Mobile Apps Now Represent the Bulk of Restaurant Digital Orders and Restaurant Branded Apps Dominate," Press Release, Feb. 4, 2019, <https://www.npd.com/wps/portal/npd/us/news/press-releases/2019/mobile-apps-now-represent-the-bulk-of-restaurant-digital-orders-and-restaurant-branded-apps-dominate/>.

receives from the restaurant a certain percentage of the purchase price for purchases facilitated by their services.

Because restaurants in many cases are existentially reliant on their services, the disparity in bargaining power between the platforms and restaurants often results in exploitative or unfair contracts that can be harmful to the restaurants, including by charging them extremely high commissions on deliveries and otherwise charging delivery fees to the food facility when a delivery is not actually carried out.

Despite growing competition in the food delivery platform space, the industry is primarily controlled by only four companies, compounding this bind. As of March 2021, Uber Eats, Postmates, DoorDash, and Grubhub together controlled a 99% share of sales in the food delivery market, and a May 2020 article in *Bloomberg* reported that Uber and Grubhub have discussed a possible merger, potentially further reducing the already meager options for restaurants when faced with suboptimal contract terms and untoward business practices.³

In 2020, this Legislature passed AB 2149 (Gonzalez, Ch. 125, Stats. 2020), which required a food delivery platform to contract with a food facility before arranging for the delivery of an order from that food facility, and was the first California law explicitly regulating the food delivery platform industry. AB 1444 seeks to expand on that law by addressing one type of problematic practice engaged in by some food delivery platforms at the expense of the restaurants they serve.

- 4) **Forwarded calls:** Despite its success, AB 2149 did not fully eliminate the practices through which these platforms capitalize on consumer relationships with restaurants without the knowledge of the restaurant or the consumer. One practice through which consumers may be unwittingly supporting food delivery platforms at the expense of restaurants is the use of forwarded calls. According to a 2019 *Vice* article, as part of their “marketing services” some of these food delivery platforms often create new phone numbers that automatically forward to the restaurant of interest in order to more effectively track the calls that resulted from their marketing. As the article describes:

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

Yelp has historically functioned like an enhanced Yellow Pages, listing direct phone numbers for restaurants along with photos, information about the space, menus, and user

³ Liyin Yeo, “Which company is winning the restaurant food delivery war?” *Bloomberg Second Measure*, Apr. 14, 2021, <https://secondmeasure.com/datapoints/food-delivery-services-grubhub-uber-eats-door-dash-postmates/>; Ed Hammond, “Uber Approaches Grubhub With Takeover Offer,” *Bloomberg*, May 12, 2020, <https://www.bloomberg.com/news/articles/2020-05-12/uber-is-said-to-approach-grubhub-with-takeover-offer>.

reviews. But Yelp began prompting customers to call Grubhub phone numbers in October 2018 after the two companies announced a “long-term partnership.”⁴

A result of this practice is that many consumers who have no intention of doing business with a food delivery platform place an order from a restaurant that has no knowledge of the intervention of the platform, and the platform ultimately charges the restaurant a sizable fee for that order. Though the platforms argue that the purchase was made due to the marketing provided by their posting of the phone number, that is not discernably true, since the consumer would have presumably called whichever number was listed on Yelp, where they were browsing to begin with. Additionally, some consumers will call a restaurant with the intention of ordering, but will not ultimately place an order. Even so, in these circumstances, the restaurant is often charged the same referral fee, and the onus is on them to dispute it, a costly and time consuming endeavor. As the Consumer Federation of California explains in support of the bill:

Despite what many consumers believe, online directories like Yelp often list phone numbers that do not go directly to the restaurant, but instead are routed through a third party platform like Grubhub. These platforms then charge the restaurants a referral commission of up to 30%, an often unsustainable amount. These platforms even boost these nefarious practices by buying up domain names that are similar to their client’s restaurants, all in an attempt to boost referral commissions. Consumers are completely unaware that they are actually doing business with both Grubhub and their chosen restaurant.

Worse still, restaurants are being charged referral commissions for calls that do not result in orders. Despite Grubhub’s claims that they analyze recordings to determine if an order was placed, some restaurants are still being falsely charged. Restaurant owners are forced to individually review and dispute these charges, taking up time and energy that these establishments cannot afford.

Ensuring consumers have adequate information to support businesses they want to support, and not those they do not, is a significant consumer protection issue. That consumers are misled by these postings on listing websites such as Yelp and Google to believe they are calling the restaurant directly, when they are actually unknowingly facilitating fee payment to a food delivery platform, is anathema to this objective of consumer choice. AB 1444 seeks to address this issue by prohibiting a food delivery platform from charging a fee for a call that does not result in an order, and by prohibiting a listing website from posting a phone number that they know will result in a forwarded call.

- 5) **AB 1444 would provide useful protections for consumers and restaurants, but the bill in print may raise First Amendment concerns:** AB 1444 would provide that a food delivery platform shall not charge a food facility a fee for a forwarded call unless that call directly resulted in a paid order from that food facility that will be delivered to the consumer by the food delivery platform. The bill would also prohibit a listing website from posting on their internet website or app a phone number that the listing website knows will result in a

⁴ Adrienne Jeffries, “Yelp is Screwing Over Restaurants By Quietly Replacing Their Phone Numbers,” *Vice*, Aug. 6, 2019, <https://www.vice.com/amp/en/article/wjwebw/yelp-is-sneakily-replacing-restaurants-phone-numbers-so-grubhub-can-take-a-cut>, [as of Apr. 20, 2021].

forward call. The bill would define “forwarded call” to mean a communication made by a consumer and intended for a food facility, by telephone call or other means of communication, that has been routed by a food delivery platform, or a routing service under the direction of the food delivery platform, to the intended food facility. The bill would also define “listing website” to mean an internet website or application that lists, or produces through search results, telephone numbers associated with food facilities, and that has 100,000,000 or more unique monthly visitors. Staff notes that this definition would include Yelp and Google, among others.

As the Hispanic Chamber of Commerce Silicon Valley argue in support of the bill:

AB 1444 requires that listing services provide clear and accurate information about contacting a food facility so that customers know how to connect with the business directly and small businesses are able to interact with their customers without a tech company rerouting the call.

This bill will also ensure that restaurant owners are only charged for calls that result in orders, and not oversight errors. It is imperative upon the legislature to ensure small businesses, already suffering from the pandemic and racism, are not taken advantage of by big tech monopolies and are equipped with the proper tools to thrive in our new economic reality.

The approach taken in AB 1444 seems to directly address the issue the author seeks to resolve, i.e. the misleading of consumers to believe that they are contacting a restaurant directly, when in reality their call is forwarded through, and they are thus inadvertently supporting, a food delivery platform. Prohibiting platforms from charging fees for calls that do not result in orders to be delivered by that platform protects both consumers and restaurants alike, ensuring the customer is patronizing only the business they hope to patronize, and keeping restaurants from being charged fees for orders for which no particular service was provided by the platform.

The prohibition on listing websites posting phone numbers that will result in a forwarded call aims to accomplish the laudable goal of preventing listing websites from misleading consumers to believe they are calling a restaurant directly, when they are actually forwarding through a platform. However, the specific approach taken, i.e. a blanket prohibition on any posting by a listing website of a phone number that will result in a forwarded call, may be unconstitutional for violating First Amendment protections for commercial speech.

The First Amendment of the U.S. Constitution provides that “Congress shall make no law [...] abridging the freedom of speech [...]” (U.S. Const., 1st Amend.), and courts have consistently held that this prohibition on legislation abridging speech applies to state and local governments. (*See, e.g., Gitlow v. New York* (1925) 268 U.S. 652.) Courts have further established the contours of First Amendment protection of speech to include prohibitions against government compulsion of speech.

Generally speaking, the regulation of commercial speech is typically afforded some leniency relative to individual speech. Rather than facing strict scrutiny, regulation of commercial speech is generally subjected to a four-part test, as prescribed by *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n* (1980) 447 U.S. 557, in order to determine whether it passes constitutional muster:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. (*Id.* at p. 566.)

Case law consistently supports the notion that disclosure requirements tread less heavily on speech rights than blanket bans on content of that speech. As was held in *Zauderer v. Office of Disciplinary Counsel of Supreme Court* (1985) 471 U.S. 626:

[I]n virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "[warnings] or [disclaimers] might be appropriately required...in order to dissipate the possibility of consumer confusion or deception." [Citation.]

We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. (*Id.* at p. 651.)

With this in mind, one must weigh the prohibition in AB 1444 on posting phone numbers that will result in forwarded calls against the four-part test provided by *Cent. Hudson*, above, in order to determine its constitutionality. The question of whether the practice of posting these phone numbers is "not misleading" can be debated, but it is certainly lawful, and unless the consumer believes the phone number will not result in a forwarded call, the practice of posting the number in and of itself is arguably not misleading. Rather, the misleading act occurs when the number is provided in association with a given food facility, leading the consumer to believe that the phone number belongs to that food facility, and not the platform. The governmental interest AB 1444 seeks to achieve with this provision is likely to be considered substantial, as the protection of consumers from deception is one of many governmental interests this State consistently seeks to uphold. Prohibiting the posting of forwarded numbers would directly address that governmental interest, since it would in effect eliminate the possibility of one such number being paired with a food facility in a manner that would mislead the consumer to believe the number belongs to the food facility.

However, when considering whether the regulation is more extensive than is necessary to serve the interest of ensuring consumers are not deceived, the prohibition arguably fails. Rather than targeting the specific misleading act of pairing forwarded phone numbers with businesses instead of their direct phone numbers, it instead introduces a content-based blanket prohibition on the posting of those phone numbers at all. Furthermore, since courts have consistently held that disclosures infringe less substantially on speech rights relative to prohibitions, it is possible that a disclosure that indicates a call will be forwarded and that a commission may be received by the platform for calls made through that number would be a less restrictive approach to ensure the consumer is adequately informed. In other words, the

bill in print, with respect to this prohibition, is arguably more extensive than is necessary to further its intended interest. Prudently, the author has offered amendments to this provision that appear to resolve these concerns.

- 6) **Author's amendments:** To address First Amendment concerns and ensure the bill captures all intended circumstances, the author has offered three amendments.

Amendment 1: As discussed in Comment 5, though a listing website posting a phone number that it knows will result in a forwarded call is not inherently a misleading act, the listing website presenting that phone number in a manner that leads the consumer to believe it is the direct phone number of the food facility may very well be. Additionally, by limiting the prohibition imposed on listing websites to the particular circumstances that may be misleading, it is far less likely that the provision would be found unconstitutional, since it could be reasonably argued that it is not more extensive than is necessary to ensure consumers are not misled. Accordingly, the author has offered the following amendment, which targets the prohibition specifically to circumstances in which the listing website associates the forwarded number with the food facility:

Author's amendment:

On page 3, line 6: strike "(2)" and insert "**22599.4 (a)**"; strike "post" and insert "***associate a telephone number with a food facility***".

On page 3, line 7: strike "a telephone number that" and insert "***if***"; after the word "knows", insert "***the use of that telephone number***".

Amendment 2: Though generally forwarding calls is the mechanism used by food delivery platforms to determine when to levy a charge on a food facility, other online mechanisms may be used. For instance, a listing website could, rather than posting a different phone number, inform the food delivery platform of the number of mobile clicks on the phone number link used to dial, which the platform would then use as a means to charge the food facility for referral. To avoid these types of mechanisms, which can similarly lead consumers to inadvertently support businesses they may not intend to, the author has offered the following amendment, which requires clear and conspicuous disclosure of any phone number or other interface used to contact a food facility that may result in a commission or fee paid to a party other than the food delivery platform.

Author's amendment:

On page 3, after line 8, insert "***(b) A listing website shall clearly and conspicuously disclose if an order placed through a telephone number or other interface on their internet website or application may result in a commission or fee paid to a party other than the food facility, and shall identify the party to which that commission or fee may be paid.***"

Staff notes that the author does not include a definition for "clear and conspicuous" in this amendment. However, that phrase is defined in several existing statutes. Should the author wish to include a definition for this term, the author may consider borrowing the definition from Section 17601(c) of the Business and Professions Code.

Amendment 3: Amendment 1 appears to resolve the constitutional issues that the bill in print may raise, and Amendment 2 employs a disclosure rather than a prohibition to ensure that it is not more extensive than necessary, and thereby passes constitutional muster. Regardless, in the event any provision of the bill is found to be unconstitutional or otherwise invalid, the author has offered the following amendment, which includes a severability clause so that if any provision is held invalid, the rest of the protections included would still remain:

Author's amendment:

On page 3, after line 8 and after Amendment 2, insert “**22599.8. *The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.***”

REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Attorneys of California
Consumer Federation of California
Hispanic Chamber of Commerce Silicon Valley
Silicon Valley Chamber of Commerce

Opposition

None on file

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