



# GEORGIA STATE SENATE

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## THE FINAL REPORT OF THE SENATE STUDY COMMITTEE ON FOOD DELIVERY APPS

### COMMITTEE MEMBERS

**Senator Elena Parent – Committee Chairman**  
**District 42**

**Senator John Albers**  
**District 56**

**Senator Frank Ginn**  
**District 47**

**Senator Sally Harrell**  
**District 40**

**Senator Harold Jones, II**  
**District 22**

**Prepared by the Senate Research Office**

**2022**

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## SECTION I -

### STUDY COMMITTEE FOCUS, CREATION, AND DUTIES

The Senate Study Committee on Food Delivery Apps (the “Study Committee”) was created with the adoption of Senate Resolution 428 during the 2022 legislative session.<sup>1</sup> Senate Resolution 428 was sponsored by Senator Elena Parent of the 42nd, Hatchett of the 50th, Goodman of the 8th, Jackson of the 41st, and Sims of the 12th.

Senate Resolution 428 establishes that food delivery apps have increased significantly in recent years and this demand has had an economic impact on restaurants and workers, and often the food delivery app business practices, contracts, commissions, and fees are not transparent to restaurants or consumers resulting in a negative impact on restaurants and workers. As stated in the resolution, the Study Committee was charged with undertaking a study of the conditions, needs, issues, and problems related to these circumstances.

The following individuals were appointed by the President of the Senate, Lieutenant Governor Geoff Duncan, to serve as members of the Study Committee:

- Senator Elena Parent of the 42nd;
- Senator John Albers of the 56th;
- Senator Frank Ginn of the 47th;
- Senator Sally Harrell of the 40th; and
- Senator Harold Jones, II of the 22nd.

The following legislative staff members were assigned to the Study Committee: Katherine Russell of the Senate Research Office; Sophie Stepakoff of the Senate Press Office; Sarah U. Crittenden of Legislative Counsel; and Stephanie Tanner, Legislative Assistant to Senator Parent.

The Study Committee held meetings on August 23, 2022 and October 6, 2022 at the State Capitol. The Final Report and Recommendations were discussed and adopted at the final meeting on November 1, 2022.

The Study Committee heard testimony from the following individuals: Katherine Russell, Senate Research Office; Peter Dale, Maepole & Condor Chocolates; Brian Husky, Gaslight Group; Ryan Pernice, RO Hospitality; Karen Bremer, Georgia Restaurant Association; Joe Rheinstein, Digital Restaurant Association; Galen Baxter, State Environmental Health Director for the Georgia Department of Public Health; Giovanni Castro, Southeast Public Affairs Manager for Uber Eats; and Chad Horrell, Senior Manager of Government Relations for Door Dash.

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<sup>1</sup> 2022 Senate Resolution 428 available online at: <https://www.legis.ga.gov/legislation/61638>.

SECTION II-  
STUDY COMMITTEE MEETINGS

Meeting #1: August 23, 2022

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To open the meeting, Senator Parent explained why she filed Senate Resolution 428 to create the Study Committee.<sup>2</sup> She mentioned concerns she had heard from the restaurant industry, such as food safety, unequal leveraging power, and a challenging economy. She further explained that the Study Committee was created to determine what action, if any, could be taken to address these concerns. This meeting focused on the restaurants' perspective.

The following individuals provided testimony:

- Katherine Russell, Senate Research Office;
- Peter Dale, Maepole & Condor Chocolates;
- Brian Husky, Gaslight Group;
- Ryan Pernice, RO Hospitality;
- Karen Bremer, Georgia Restaurant Association; and
- Joe Rheinstein, Digital Restaurant Association.

*Senate Research Background*

Katherine Russell, a Senior Policy Analyst with the Senate Research Office, provided a brief presentation explaining that the origins of the Study Committee were derived from SB 205, which Senator Elena Parent introduced in 2021. After a brief overview of the bill, Mrs. Russell summarized that the crux of the matter appeared to be concerns about the inequity in leverage between contracting parties in this emerging market. Particularly that the restaurants feel they are at a disadvantage when dealing with third party delivery apps.

*Maepole Restaurant and Condor Chocolates*

Peter Dale, representing the Maepole Restaurant and Condor Chocolates, provided an overview of how the third party delivery apps affect his restaurants. He explained that prior to the COVID-19 pandemic, there was some delivery activity through the apps but that activity has significantly increased. Currently, about 50 percent of their business is online orders. A small portion of those orders are made directly to the restaurant while the majority come through third party delivery apps.

Food purchased through the third party delivery apps is often priced much higher than food purchased directly from the restaurant. Mr. Dale testified that Uber Eats charges food at a 30 percent markup and DoorDash at about a 25 percent markup. He estimated that on average, customers pay about 20 percent more for food delivered by the third party delivery

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<sup>2</sup> The August 23, 2022 Study Committee was livestreamed, and the video of the meeting is available online at: <https://vimeo.com/showcase/2022sencs-fooddelivery>.

apps. Additionally, Uber Eats will allow a customer to pick up food ordered through the app at a 20 percent markup for virtually no service, but customers purchase food this way because they like the convenience of using the app.

Mr. Dale expressed concern at the lack of accountability and described the business climate as an uneven playing field. He further explained his concerns stem from the lack of: (1) food safety rules; (2) oversight of delivery vehicle conditions; (3) oversight of delivery times; and (4) uniform requirements for food temperature controls.

Study Committee members discussed a variety of questions and provided some recommendations, including: who in the contractual agreements are considered the actual customer; who (if anyone) has had success reaching customer service departments with the apps; how payments are delivered; and concern over maintaining the delicate balance between the free market and protecting businesses.

#### *Gaslight Group*

Brian Husky, with Gaslight Group, first focused on the positive aspects of cooperating with third party food delivery apps. He explained that they were a lifeline during the pandemic when dining rooms were closed.

However, he also explained some of the difficulties his restaurant, 5 Spot, had with coordinating their point of sale (“POS”) system with apps. Mr. Husky elaborated by explaining that customer allergies are not readily apparent on orders sent to the kitchen.

He further elaborated that working with Postmates was problematic. Drivers would often show up with a preloaded gift card specific for a placed order. If there was any inconsistency, the restaurant would have to take the loss of not fulfilling the order or selling a meal at a decreased price.

He explained that Uber Eats often fills pick-up orders at the wrong location, resulting in a loss to the restaurants. For one of his restaurants, the Uber Eats map was inaccurate and directed drivers to a location about four blocks away from the restaurant, resulting in delayed service and canceled orders. He explained that support from the delivery app for his restaurant was nonexistent. Showing drivers where the restaurant was actually located became very difficult.

Ultimately, his biggest concern was that the restaurant has no control over the customer’s experience once the food leaves. Their restaurant has implemented new strategies to help, such as requiring drivers to sign a document verifying that the order was correct when it was retrieved by the driver.

Senator Albers expressed concerns about the condition of the food as it is being delivered and the cost. Further discussions centered on concerns that customers are getting used to the convenience of delivered food and the unfair playing field. Senator Parent asked how customers react when there is something wrong with their order—if they contact the restaurant or the delivery service. Mr. Husky explained that he has seen both, and that the sign out process has helped to abate some of the quality issues.

### *RO Hospitality*

Ryan Pernice, with RO Hospitality, explained that prior to the pandemic approximately 2 percent of their orders were take-out but that rose during the pandemic to 100 percent. The percent of take-out orders has leveled out to approximately 8 percent. He further explained that the restaurants had to change their entire POS system to better accommodate online ordering.

He expressed three major areas of concern:

1. *Food Safety and Allergies.* The third party delivery app's online ordering systems do not make customer food allergies readily apparent for kitchen staff on order forms. He explained that food delivery apps don't carry the liability, so they don't make elevated warnings a priority. He further expressed concern over the cleanliness of delivery vehicles. He recognized that Uber Eats customers may ask for food to be delivered directly to them rather than carpooling with multiple orders. This option helps to ensure that food is delivered at a reasonable temperature. He also explained that he has not seen any apparent consistency in how drivers transport food.
2. *Incorrect Orders.* He explained that customers blame the restaurant, not the drivers for incorrect orders. He has seen drivers consistently leave parts of orders behind at the restaurant. He also explained that once a customer complains, the restaurateur feels obligated to remove the charges for undelivered food resulting in a loss to the restaurant.
3. *Cost or Losses to the Restaurant.* He expressed that the fees to work with these third party apps are exorbitant but restaurants feel obligated to pay the fees for fear of loss of their market share. He further expressed that there are peripheral concerns regarding real time menu updates to prevent out of stock options from being ordered through an app. This requires the restaurant to pay for services to incorporate their POS with the delivery app.

Further, his experience has been that between five to 10 percent of the time, an app will be unable to assign a driver due to lack of availability. The cancellation notification may come after the restaurant has already made the food, forcing the restaurateur to chase down a refund from the app.

Mr. Pernice voiced frustration that Postmates will add a restaurant to their application without the restaurant's consent or knowledge. Drivers will appear to pick up an order that a restaurant did not even know had been placed. Mr. Pernice further explained that Postmates has a reputation for adding old or inaccurate menus.

Senator Parent asked if Mr. Pernice thought Postmates could legally advertise that they are in contract with a restaurant when they are not. Mr. Pernice shared that he believes there is a lawsuit on that matter.

### *Georgia Restaurant Association*

Karen Bremer, with the Georgia Restaurant Association, explained that the delivery apps have created controversy and disruption within the industry. She explained how devastated the restaurant industry was by the pandemic, stating that 58 percent of restaurants closed either permanently or temporarily, and that over 200,000 employees were laid off. She

indicated that restaurants margins are typically only between five and nine percent, but currently are averaging around one percent. Ms. Bremer attributed this one percent margin primarily to inflation which is hovering at about 11 percent.

She expressed that restaurants are facing frustrations and concerns such as:

- How third party apps are using the likeness or intellectual property of restaurants without written consent;
- Lack of disclosures on how much tax and tip is being paid by third party delivery apps;
- Confusion about taxation remittance; and
- Contracting with third party delivery apps and absolving them of liabilities.

She further expressed concern over seeing food being delivered with dogs and cats in the car, and that the delivery vehicles are not being held to the same standards that apply to food preparation areas. She started mentioning home kitchens, accessible through an app called Shef, and the inconsistent food vetting preparation requirements. It was later noted that Shef is not being delivered anywhere in Georgia.

#### *Public Comment*

Joe Rhienstein, Executive Director with the Digital Restaurant Association, echoed the concerns presented by earlier testimony. The Digital Restaurant Association is made up of brick and mortar restaurants who rely on third party delivery apps to market their businesses. Mr. Rhienstein noted that, unlike the travel industry that often uses third party intermediaries, the restaurants are not able to collect any data on who their customers are when they use third party delivery apps.

#### Meeting #2: October 6, 2022

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The second meeting was opened by Senator Parent, who provided a brief summary of the previous meeting's testimony. She explained that the Study Committee was briefed on concerns that the restaurant industry has surrounding the current practices of food delivery apps, and that questions around food sanitation were brought up. In response, the Study Committee's second meeting included testimony from the Department of Public Health and from a few of the food delivery app companies.

The following individuals provided testimony:

- Galen Baxter, State Environmental Health Director for Georgia Department of Public Health;
- Giovanni Castro, Southeast Public Affairs Manager for Uber, Uber Eats;
- Chad Horrell Senior Manager of Government Relations for DoorDash; and
- Karen Bremer, Georgia Restaurant Association.

#### *Georgia Department of Public Health*

Galen Baxter, the State Environmental Health Director for the Georgia Department of Public Health ("DPH"), gave a presentation addressing concerns and challenges from the regulatory

perspective. He mentioned that the third party delivery services are not currently regulated by anyone within his agency.

DPH's concerns included: (1) lack of federal or consistent oversight; (2) that delivery drivers are moving across state lines; (3) lack of operation in a way related to retail food service establishments; (4) the existing patchwork of regulations for different municipalities which focus on fair labor practices and caps on fees; (5) lack of accountability and enforcement; and (6) the variety and inconsistency of delivery methods.

Mr. Baxter provided information about a recent Iowa law that regulates third party delivery applications. He said the law focuses on: regulating holding temperatures for food; a requirement that food containers must be sealed; and regulating who and what can be present in the delivery vehicle. The law also forbid smoking or vaping. Mr. Baxter mentioned regulations in New Jersey and Tennessee concerning the delivery of alcohol. Articles and additional information was provided to the committee members.

Mr. Baxter provided the Study Committee with a guidance document issued by the Conference for Food Protection. The Conference included members like DoorDash, Uber Eats, and Instacart. Questions from Senator Ginn highlighted that the Department of Agriculture regulates the grocery industry, but it was not clear if that regulation extends to delivery.

Mr. Baxter continued by highlighting the differences that DPH considers when comparing third party delivery apps and restaurants.

## Differences Between TPDA's and Restaurant Delivery

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### **TPDA's:**

- Employees are "hired" by the consumer to pick up their food for them
- Employees work for the TPDA company/contractors
- The employee for the TPDA is considered the end consumer by the restaurant
- TPDA company takes control of the food for the consumer
- No delivery radius determined/required

### **Restaurants:**

- Consumer orders directly from the restaurant
- Employees work directly for the restaurant
- Restaurant maintains control over food until given to consumer
- Restaurant can determine delivery radius
- DPH has jurisdiction over restaurant employees and transport method
- Caterers are required to maintain food at specific temperatures during transport

Mr. Baxter explained that when food is under the control of a restaurant, certain foods must be maintained "safe" using proper time or temperature controls (typically 135 degrees



Fahrenheit or higher or, at a temperature less than or equal to 41 degrees Fahrenheit). Additionally, food must be protected from contamination at all times, the restaurant's employees must meet certain health and hygiene requirements, and food must be kept in containers designed for food.

### *Uber Eats*

Giovanni Castro, Southeast Public Affairs Manager for Uber, presented on behalf of Uber Eats. Mr. Castro expressed that Uber Eats is an online marketplace connecting restaurants and end consumers. Uber Eats believes in the importance of keeping the public safe while accomplishing its important role of connecting about 400,000 business partners (including grocery, convenience, and retail merchants) across 50 states. In Georgia, Uber Eats partners with 14,000 merchants and restaurants in 155 cities and municipalities. Georgia business partners have earned about \$420,000,000 through the Uber Eats application. In addition to providing an online marketplace, Uber Eats has provided independently owned restaurants in the United States and Canada \$20,000,000 in support efforts. They also supported different grants and other initiatives. Some local beneficiaries in Georgia include Hoodlicious, and Off the Hook Fish Co.

Mr. Castro explained that Uber Eats provides a list of guiding principles for food delivery to all delivery personnel. He expressed a willingness to provide those to the committee members and delivered them to members.<sup>3</sup> He further explained the relationship between Uber Eats and its business partners including details of their pricing options and pricing plans.

Mr. Castro indicated that Uber Eats takes food safety very seriously and all their practices are in line with recommendations from third party experts. In fact, Uber Eats participated in the development of the Guidance Document for Direct-to-Consumer and Third-Party Delivery Service Food Delivery from the Conference for Food Protection, which was made available to members of the Study Committee.<sup>4</sup>

He explained that Uber Eat's practices include encouraging the use of insulated bags to transport food, encouraging restaurants to seal food containers, and using an algorithm to maintain temperature controls on food. Further, restaurants are expected to meet the standards required for all licenses and permits. Any deviation from those standards is a violation of their agreement.

Upon being questioned by Study Committee members, Mr. Castro stated that Uber Eats encourages the use of thermal equipment but claims that the company does not have control over what delivery drivers do to maintain the temperature of food. There are some exceptions where local jurisdictions have requirements about how food is transported; in those cases, Uber Eats expects the drivers to abide by those standards.

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<sup>3</sup> These can be found in the Appendices of this report or at: <http://www.senate.ga.gov/committees/en-US/2022StudyCommittees.aspx>.

<sup>4</sup> These can be found in the Appendices of this report or at : <http://www.senate.ga.gov/committees/en-US/2022StudyCommittees.aspx>.

He further provided that the delivery vehicles are inspected and follow specified safety standards.

#### *DoorDash*

Chad Horrell, Senior Manager of Government Relations for DoorDash, explained that the company was founded with the goal of empowering small businesses and local communities. He provided supporting statistics, explaining that the company has made over 1,390,000,000 deliveries worldwide, with over 321,000 Dashers (delivery personnel) who earn an average of \$20 an hour making deliveries. Mr. Horrell mentioned that DoorDash also offers grants to support small business restaurants and developed a program called the Local Accelerator which supports local food banks, and Project Dash, a program which uses the already established network to deliver food to those in need.

He explained a little about the workings of DoorDash and how they address some of the issues previously brought up by the Study Committee members. For instance, Dashers must pass background checks and meet specified standards. Restaurants have the ability to enter into agreements with DoorDash, some of the agreements allow changes to DoorDash's algorithm so restaurants are able to promote or highlight their business. He explained that the commission fees charged by DoorDash are used to support insurance coverage and that customer service is available for both restaurants and customers. Additionally, DoorDash has supported restaurants by paying for canceled orders or any other order prepared and not picked up by a Dasher. They also allow restaurants to avoid using Dashers whose service they were not pleased with.

Mr. Horrell and Senator Parent had a discussion about contracting. Mr. Horrell explained that DoorDash offers four kinds of contractual agreements. One type of agreement, Drive, described by Mr. Horrell as a "commission free storefront" does not offer delivery services but provides a way for customers to purchase food from restaurants. However, the Marketplace options, which are essentially three tiers of the same services, vary in commission percentages, delivery radiuses, minimum sales requirements, and access to Dash Pass customers. Additionally, individual restaurants can negotiate their own contracts. Mr. Horrell noted that restaurants who do more business are in a better position to negotiate.

Mr. Horrell mentioned that DoorDash has guidelines that Dashers must agree to adhere to, and if an issue arises, DoorDash investigates. The committee requested copies of these guidelines.

#### *Public Comment*

Karen Bremer, with the Georgia Restaurant Association, explained that the issues with third party delivery apps is not a recent occurrence and that they have been trying to educate elected officials along the way. She presented a map of the country indicating which states have passed third party consent laws. She also echoed comments made by DPH about legislation in other states.

Mrs. Bremer reiterated her concerns from the previous meeting about restaurants not having control over which third party app lists them, food safety, and concerns about self-attestation from home kitchens.

Mrs. Bremer added that she believes the comments from Uber Eats to be disingenuous, and she is 99 percent sure that the inspections of delivery cars is not currently occurring. Instead, she believes that drivers are self-attesting that the vehicles are safe.

She further explained that none of the third party delivery apps are part of the Georgia Restaurant Association because the membership does not allow it. This is because of regular failed business practices and frustrations on the part of the restauranteurs. She further explained that some of her members were fearful of testifying before the Study Committee because they did not want to face retaliation from the third party delivery apps.

#### Meeting #3: November 1, 2022

The final meeting of the Study Committee was held on November 1, 2022 at the State Capitol in Room 450. The Study Committee discussed and voted upon this Report and Recommendations, which received unanimous approval from the Study Committee members present. This included Senator Elena Parent of the 42nd, Senator Sally Harrell of the 40th, Senator John Albers of the 56th, and Senator Harold Jones, II of the 22nd (via Zoom).

### SECTION III -

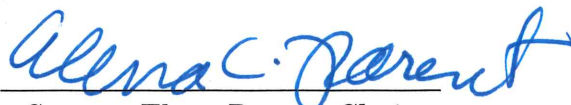
#### STUDY COMMITTEE RECOMMENDATIONS

1. The Study Committee recommends legislative action requiring third party food delivery platforms to be under contract or to have a written agreement with a restaurant before advertising that such relationship exists.
2. The Study Committee recommends legislative action requiring the use of thermal containers to transport food by third party delivery platforms.
3. The Study Committee recommends legislative action prohibiting smoking or vaping in a delivery vehicle operated by third party delivery platforms.
4. The Study Committee recommends continuing discussion concerning a prohibition on the transportation of dogs, cats, and other pets during transport of food, excluding the use of service animals.

SECTION IV -  
SIGNATURE PAGE

Respectfully submitted,

THE FINAL REPORT OF THE SENATE STUDY COMMITTEE ON FOOD  
DELIVERY APPS  
(SENATE RESOLUTION 428)



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Senator Elena Parent, Chair  
District 42

APPENDIX  
TO THE FINAL REPORT OF THE SENATE STUDY COMMITTEE ON FOOD  
DELIVERY APPS  
(SENATE RESOLUTION 428)

# SENATE STUDY COMMITTEE ON FOOD DELIVERY APPLICATIONS

A brief explanation of origin.

# STUDY COMMITTEE PURPOSE

The Senate Study Committee on Food Delivery Applications was created by Senate Resolution 428.

The resolution creates and tasks the committee with undertaking a study of the conditions, needs, issues, and problems centered around or related to the delivery of food using computer and phone applications.

The resolution explains that food delivery app business practices, contract liabilities, commissions and fees are not transparent to restaurants and consumers, and should therefore be the subject of a study committee.



# PREVIOUS LEGISLATIVE ACTION

- In 2021, Senator Elena Parent introduced SB 205.
- This bill prohibited a third-party food delivery platform (or app) from:
  - charging a covered establishment fee totaling more than 15 percent of the purchase price of an online order, during a public health state of emergency; or
  - reducing the compensation paid to a third party food delivery person as a result of the required cap on covered establishment fees. \* See bill summary for further details.

# SENATE COMMITTEE REVIEW OF SB 205

SB 205 was assigned the Senate Committee on Agriculture and Consumer Affairs. The bill was presented on February 25, 2021 and there was significant discussion by the committee members and attendees.

The committee expressed interest in the various topics that surfaced and recommended that a study committee be established for further researching the topics that emerged.

Some of the concerns raised included:

- Cancelled or delayed orders are often times the result of the apps functionality, but the restaurants are almost always blamed;
- Delivery personnel consuming orders (especially deserts), which results in losses/chargebacks to the restaurants;
- Delivery personnel choosing not to delivery certain orders because the preassigned tips were low;
- Misrepresentation of which restaurants coordinate with 3<sup>rd</sup> party apps.

# ANTICIPATED STUDY COMMITTEE SCHEDULE

August 23 – First Meeting, Georgia State Capital

Georgia Restaurant Association Members, Public Comment

October 6 – Second Meeting, Georgia State Capital

Third Party Platforms/Apps, Public Comment

November 1- Third Meeting, Georgia State Capital,

Final Meeting/Vote, No testimony or public comment

## FURTHER CONTACT

If you are interested in giving testimony or receiving meeting notifications please contact [Stephanie.Tanner@senate.ga.gov](mailto:Stephanie.Tanner@senate.ga.gov) or [Katherine.Russell@senate.ga.gov](mailto:Katherine.Russell@senate.ga.gov).

# Third-Party Delivery Applications (TPDAs) Environmental Health Program

Senate Study Committee  
Presentation

Galen C. Baxter, REHS / EH Section Director / October 6<sup>th</sup>, 2022

# Challenges

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- No Federal/consistent regulatory oversight
- Could cross state lines
- Do not operate in a way related to retail food service establishments
- State and local jurisdictions have patchwork regulations
  - Fair labor practices for delivery drivers
  - Caps on fees charged
  - Listing restaurants on platform without consent
- Accountability/enforcement
- Different methods of delivery (vehicle, scooter, bicycle, walking)

# Recent Developments

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- Iowa passed a law regulating food safety for TPDA companies (Senate File 2374), including holding temperatures of food, sealed containers, passengers, smoking/vaping, and liability. This bill took effect June 7, 2022.
- New Jersey and Tennessee have laws regulating delivery of alcohol through Department of Revenue
- Conference for Food Protection released a guidance document for TPDA's but not enforceable

# Differences Between TPDAs and Restaurant Delivery

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## **TPDAs:**

- Employees are “hired” by the consumer to pick up their food for them
- Employees work for the TPDA company/contractors
- The employee for the TPDA is considered the end consumer by the restaurant
- TPDA company takes control of the food for the consumer
- No delivery radius determined/required

## **Restaurants:**

- Consumer orders directly from the restaurant
- Employees work directly for the restaurant
- Restaurant maintains control over food until given to consumer
- Restaurant can determine delivery radius
- DPH has jurisdiction over restaurant employees and transport method
- Caterers are required to maintain food at specific temperatures during transport



# Food Service Establishment Safety Requirements

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While food is under the control of the restaurant:

- Certain foods must be maintained safe using time or temperature control for safety ( $\geq 135^{\circ}\text{F}$  or  $\leq 41^{\circ}\text{F}$ )
- Food must be protected from contamination at all times
- Employee health and hygiene requirements
- Food must be kept in containers designed for food



# **Guidance Document for Direct-to-Consumer and Third-Party Delivery Service Food Delivery**

**Prepared by the  
Direct to Consumer Delivery Committee  
2018-2020 Conference for Food Protection**

Don Schaffner, Chair  
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Linda Zaziski

**based on an earlier draft from  
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2016-2018 Conference for Food Protection**

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Davene Sarrocco-Smith  
Keith Jackson

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# *1. Preface*

Council III of the 2018 Conference for Food Protection (CFP) formed the Direct to Consumer Delivery Committee, in response to Issue 2018-III-006, which was charged to:

1. Identify current recommended practices and existing guidance documents that relate to shipment directly to a consumer of perishable food items and for the safe delivery of food by Third Party Delivery Services (TPDS) entities.
2. Revise the Guidance Document for Mail Order Food Companies that includes recommended practices for transportation directly to a consumer of perishable products, to include proper packaging; temperature control during shipping, receiving, and storage; return of compromised and abused products; and other food safety related topics. Current guidance document to be revised to include food safety training for the TPDS entities, and information on all food delivery practices from food production, distribution, or retail food service facilities.
3. Determine appropriate methods of sharing the committee's work, including but not limited to a recommendation that a letter be sent to FDA requesting that the Food Code, Annex 2 (References, Part 3-Supporting Documents) be amended by adding references to the new guidance document as well as any existing guidance documents that the committee recommends, and the posting of information on the CFP website.
4. Report the committee's findings and recommendations to the 2020 Biennial Meeting of the Conference for Food Protection.

This guidance replaces the 2016 “Guidance Document for Mail Order Food Companies”, which was produced by the former Mail Order Food Safety Committee in response to Issue 2016-III-037.

The 2016 Guidance was informed by “Industry Guide to Good Hygiene Practice: MAIL ORDER” in support of Regulation (EC) No 852/2004 on the Hygiene of Foodstuffs and the temperature control requirements of the Food Hygiene (England/ Scotland/ Wales/ Northern Ireland) Regulations 2006.”

## *2. Introduction and Scope*

This guidance document provides food safety best practices for managing or performing Direct to Consumer (DTC) or third-party delivery (TPD) services. This document includes parameters critical to preventive controls, mechanisms to assess risk, validation and verification practices, recommendations for proper packaging, temperature control, receiving and storage, physical and chemical contamination control, allergen control, general food safety information, and suggestion for return of compromised and abused products. The intent of the guide is primarily to provide best practices for preventing biological, physical and chemical contamination as well as the growth of harmful bacteria and/or the formation of toxins within the food being transported.

The methods by which foods reach the final consumer can vary significantly, and this guidance is not intended to provide a “one-size-fits-all” approach. This guidance aims to review some of the essential parameters that any company should consider in providing safe foods to the consumer. Companies should research, understand, and test the methods best suited to their specific operation.

This guidance recommends best practices and provides references that may help in this process. The use of this guidance is voluntary. It is not a regulatory document. Food companies, including food manufacturers and food establishments where food is held or prepared for DTC or TPD are subject to applicable federal, state and local food safety statutes and regulations. It is important that DTC and TDP companies understand all legal and regulatory requirements, as well as industry guidelines, governing the safety of food throughout production and distribution.

This guide does not specifically address (a) the delivery of foods intended for immediate consumption from food establishments where the delivery is under the control of the food establishment who prepared and delivered the food by the food establishment’s employee, since these companies are already regulated by state and local codes or (b) export requirements, tariffs or customs aspects of international deliveries. Although not covered by this document, the information provided here may contain useful advice for delivery of foods intended for immediate consumption from restaurants where the delivery is under the control of the restaurant who prepared the food and delivered by a restaurant employee.

### ***3. Definitions***

**Active Managerial Control:** The purposeful incorporation of specific actions or procedures by industry management into the operation of their business to attain control over foodborne illness risk factors.

**Best Practices:** Those practices that represent the “state of the art” or current best approaches of assuring food safety and quality based on state of the science and technology.

**Broker:** A food broker is an independent sales agent that works in negotiating sales for food manufacturers. Food brokers work for both manufacturers and buyers of food as they help “broker” deals to sell food products to a variety of buyers.

**Common Carrier:** A person or company that transports goods for any person or company.

**Coolant:** A coolant (also called a refrigerant) is defined in this document as a time-limited source of temperature reduction, such as an ice or gel pack. Coolants are often better used to maintain cold food at temperature rather than bring warm food down to a cold temperature.

**Direct to Consumer (DTC) Food Delivery:** Food that may be ordered through any non-face-to-face communication (e.g., via mail, phone, fax, email, or internet) and delivered to consumers through various channels (e.g., mail, common carrier, internal company logistics). DTC Food Delivery companies are generally not limited by specific geographic radii, unlike third-party delivery services which are defined below.

**Direct to Consumer (DTC) Food Delivery Company:** A business organized to promote, receive, prepare, fulfil, and transport orders of food directly to consumers. This term reflects an evolution of the term “Mail Order” used in prior versions of this document.

**Feed:** The Food, Drug, & Cosmetics Act (FD&C) defines feed as an article which is intended for use for food for animals other than man. Feed is intended for use as a substantial source of nutrients in the diet of the animal and is not limited to a mixture intended to be the sole ration of the animal. Feed safety (and thus pet food safety) is not specifically within the scope of the charge addressed by this document.

**First in First out (FIFO):** A method of inventory accounting in which the oldest remaining items are assumed to have been the first sold.

**Food Deliverer:** A person or unmanned transportation device (e.g. drone, robot, driverless car, etc.) which receives a food order that was placed via a Food Ordering Platform, retrieves the food order from a Food Establishment, and transports the order to the consumer’s designated location.



**Food Employee/Handler:** An individual working with unpackaged food, food equipment or utensils, or who handles open/exposed, wrapped or packaged food, packaging and other food equipment, including food contact surfaces.

**Food Establishment:** As per the Food and Drug Administration's (FDA) model Food Code an operation that (a) stores, prepares, packages, serves, vends food directly to the consumer, or otherwise provides food for human consumption such as a restaurant; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer (b) relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

**Food for Home Preparation:** Food that is delivered to a consumer where the consumer is expected to prepare/cook the food.

**Food for Immediate Consumption:** Prepared food that is delivered to a consumer where the expectation is that the food is going to be consumed without extensive preparation and consumed shortly after arrival.

**Food for Later Consumption:** Food that is delivered to a consumer where the expectation is that the food is going to be consumed without extensive preparation and may be stored for some time and/or consumed shortly after arrival.

**Food Ordering Platform:** An online marketplace that connects food establishments with consumers and food deliverers. The Food Ordering Platform does not manufacture or otherwise prepare the food, which is delivered, but instead facilitates the delivery of those items.

**Food Safety Plan:** This document uses the phrase food safety plan in a generic sense. This is not to be confused with a food safety plan that is required for compliance with the Food Safety Modernization Act (FSMA). The business entities discussed in this document may or may not be subject to compliance with FSMA.

**Food Shopper:** A person who receives an order that was placed on a Food Ordering Platform, selects food and/or non-food products from a Food Establishment on behalf of a consumer, bags/boxes the products for shipment/delivery, and places the bagged/boxed products in a staging area for future delivery to the consumer. A food shopper may also be a food deliverer and transport the order to the consumer's designated location.

**Food:** As noted in the FDA model Food Code and Code of Federal Regulations, "Food" means a raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption or chewing gum.

**HACCP:** Hazard analysis and critical control points is a systematic preventive approach to manage risks from biological, chemical, and physical hazards in food processing or preparation. In some (but not all) cases HACCP is part of a regulatory framework (i.e. FDA Juice HACCP).

**Hazard:** A biological, chemical, or physical substance in a food that may cause an unacceptable consumer health risk.

**Mechanical Refrigeration:** The use of powered refrigerator units to cold-hold and/or cool foods to their required safe food temperatures, and often simply called refrigeration.

**Monitoring:** Defined as conducting a planned sequence of observations or measurements of control parameters to assess whether a process is under control.

**Passive Refrigeration:** A method of maintaining perishable foods at safe temperatures without the use of electrical-powered refrigerator units.

**Pathogen:** A microorganism of public health significance.

**Perishable Foods:** Foods that are required by law to remain at specific refrigerated food temperatures for product safety. See definition below for time/temperature control for safety foods or TCS foods. They have been historically called potentially hazardous foods (PHF). Guidance on applicable food products can be found later in this document.

**Preventive Controls:** Risk-based, reasonably appropriate procedures, practices, and processes that a person knowledgeable about the safe manufacturing, processing, packing, or holding of food would use to minimize or prevent the hazards identified under the hazard analysis. These controls should be consistent with the current scientific understanding of safe food manufacturing, processing, packing, or holding at the time of the analysis.

**Provisioning System:** The means by which a third-party delivery service is connected with a food establishment.

**Ready-to-Eat (RTE):** Food in a form that is edible without additional preparation to render it safe for consumption.

**Records:** Documentation of actions taken or parameters recorded. Records may be hard copy or electronic in form. The appropriate record form may be impacted by the regulatory jurisdiction. Record retentions requirements are often related to the shelf life of the food and may also be subject to regulatory requirements.

**Regulatory Authority:** The local, state, or federal enforcement body or authorized representative having jurisdiction over the food establishment.

**Risk Control Plan:** A risk control plan is a systematic approach to identify and manage food safety risks.

**Risk:** The likelihood that an adverse health effect will occur within a population as a result of a hazard in a food.

**Shippers:** Parcel delivery services available in the United States, such as the US Postal Service (USPS), FedEx, or United Parcel Service (UPS).

**Slacking:** The process of moderating the temperature of a food such as allowing a food to gradually increase from a temperature of -23 to -4°C (-10 to 25°F) prior to cooking. Thawing is different from slacking and details on thawing can be found in section 3-501.13 of the FDA Model Food Code.

**Staging:** Period of time after preparation and before pickup. May or may not include hot or cold holding.

**Standard Operating Procedures (SOP):** This term refers to standardized written procedures for performing various tasks. When used in a food safety context SOP's are designed to ensure food safety by following appropriate practices each time a given task is performed.

**Third-Party Delivery Service:** A food delivery where a consumer uses a Food Ordering Platform to place an order from a selection of Food Establishments and receives delivery of that order from a Food Deliverer. Third party delivery service is generally defined as offering consumers the option to place an order from Food Establishments within a defined geographic radius.

**Time/Temperature Control for Safety (TCS) Food:** A food that requires specific time and/or temperature requirements to limit pathogenic microorganism growth or toxin formation.

**Validate:** Obtaining and evaluating scientific and technical evidence that a control measure, combination of control measures, or the food safety plan as a whole, when properly implemented, is capable of effectively controlling the identified hazards.

**Verify:** The application of methods, procedures, tests and other evaluations, in addition to monitoring, to determine whether a control measure or combination of control measures is or has been operating as intended and to establish the validity of the food safety plan.

## ***4. Foundational concepts***

### **A. Regulatory Requirements**

There are requirements in federal, state and local laws and regulations that are relevant to the transportation and delivery of food. For example, state, territorial and local regulations modeled after the FDA model Food Code require retail food establishments to follow practices that prevent food from becoming adulterated or unsafe. These include establishing the maximum temperature at which TCS foods must be held during storage and display. For most TCS foods, the FDA model Food Code establishes a maximum cold-holding temperature of 5°C (41°F) to limit the growth of pathogenic bacteria during storage and display. For TCS foods prepared for hot holding, the FDA model Food Code establishes a minimum storage and display temperature of 57°C (135°F). Other temperature limits may be appropriate for foods that do not require temperature control for safety but that are kept cold to preserve quality and limit the growth of spoilage organisms.

While retail food establishments are generally governed by local regulations, food processing and manufacturing companies are also subject to a variety of food safety authorities, depending on the nature of their operations. For example, food facilities that are required to register with FDA must generally comply with the Preventive Controls for Human Food Rule under the FDA Food Safety Modernization Act (FSMA) as well as applicable Current Good Manufacturing Practices (CGMPs). DTC food companies subject to this rule are required to implement a food safety plan that addresses hazards and risk-based preventive controls for minimizing or preventing those hazards.

Any approach to controlling risk in DTC or TPD foods should be consistent with the federal, state, and/or local food safety laws and regulations that may apply to the various organizations involved in a particular food delivery model. Further resources regarding potentially applicable laws and regulations are provided in Appendix A.

### **B. Risk Management Overview**

#### **Identifying, assessing, and controlling risk in DTC or TPD foods**

DTC or TPD models can be complex and often involve several parties in the production and distribution chain. To ensure that food is delivered safely to the end consumer, the parties involved should work together to identify when food safety risks are reasonably likely to arise, what measures are needed to control those risks, and who is responsible for implementing those measures.

We encourage organizations involved in DTC and TPD to manage risk using a HACCP-based approach that accounts for all steps of a business model, including storage; packaging; repackaging; labeling; preparation; physical retail sale; selection (such as by a grocery delivery

service); transport and delivery by employees, independent contractors, third parties, or others; and consumer communication. The approach should reflect food safety parameters and controls for risks that may arise throughout the DTC or TPD processes. Delivery parameters may include delivery time, travel distance, number of orders per delivery, and take into consideration unplanned events such as gas, flat tires, and authorized breaks.

The various parties involved in a DTC or TPD operation may determine that existing approaches, such as a HACCP plan or a Food Safety Plan under the FSMA Preventive Controls Rule, are adequate to control risk. Alternatively, some parties may determine that they need to adopt new protocols for implementing the risk-control measures agreed upon by the various parties. Regardless, the parties should clearly communicate the necessary risk-control measures and agree upon who will implement each (see Section 5.H for further discussion).

### **Validation and verification**

Validation and verification are two critical but distinct elements of any food safety program. Validation involves obtaining and evaluating scientific and technical evidence that relevant risks have been detected and controlled. A validated control measure or a combination of control measures when properly implemented will effectively control identified risks. Examples of validation activities include identifying food safety parameters in scientific journals and/or regulatory guidance or rules and conducting studies using the company's products and packaging. A company should conduct validation before launching operations. Verification occurs after validation has been conducted and is intended to demonstrate whether validated measures are working as intended and are being effectively carried out. Validation is conducted before operations begin and perhaps annually thereafter. Verification should be conducted periodically as operations continue. Verification will occur more frequently than validation. Both validation and verification records should be maintained according to any applicable regulatory requirements.

*Validation.* Any business that intends to engage in DTC or TPD operations should identify and validate controls for the food safety risks it has identified. A company may perform validation activities in-house or may choose to have validation conducted by a reputable external entity. Given that multiple parties may be involved in processing, holding, handling, or transporting DTC or TPD food, these parties should work together to determine that end-to-end risk-control requirements are met. Risk-control requirements may include inputs that will enable control (e.g. thickness and insulative ability delivery packaging, number and positioning of gel packs, gel melting point) as well as outputs that demonstrate control (e.g. product inner temperature below 41°F upon delivery).

Validation data for DTC or TPD foods should be obtained both before launch and any time an essential component of the delivery model is modified, such as when the delivery area is expanded, or a packaging element is changed. Deliveries should not begin until the validation demonstrates that identified risks will be adequately controlled and deliveries do not exceed the validation parameters. Upon identification of chill chain systemic gaps or in the event previous validation records are no longer available, the company should perform a validation or re-validation as soon as possible.

Temperature controls may be the most important element in DTC or TPD to validate, but validation may also need to be conducted for other food safety measures. Companies should identify any other food safety risks that should be controlled in their operations and should determine the appropriate measures for controlling such risks.

*Verification.* Verification activities may include implementing and reviewing logs or checklists to ensure that validated food safety measures are implemented as required or conducting periodic internal or external audits of the company's food safety program. When verification shows that risk-control measures are not being adequately carried out, corrective actions should be identified and implemented. Corrective actions will vary and should be tailored to the identified deviation; examples may include conducting additional training, revising existing procedures, or developing new protocols. The parties involved in a DTC or TPD food operations should establish clear responsibilities for identifying and implementing corrective actions. Please refer to Section 5.H for a detailed discussion of best practices, including monitoring and strategies for managing noncompliance.

### **Risk Management Resources**

Both internal and/or external resources can be useful in managing risk, and each has its own specific attributes.

*Internal resources.* Dedicated internal staff provide a company with the flexibility to adjust food safety programs, conduct self-assessments, respond to food safety complaints/inquiries, and respond to emergencies (e.g., equipment failures, severe weather events potentially impacting transportation and product safety).

*External resources.* Employing external resources, such as a third-party auditing firm to assess food safety risks, can offer a number of benefits. Subject matter experts with food safety credentials and experience can offer added credibility. Professional evaluators dedicated to evaluating food safety risks typically can have specialized training in inspection techniques and root cause investigations. External experts can offer objectivity during assessments and consultations. External experts can offer an enhanced ability to collect data, generate insights, and make recommendations for improved food safety practices. Such experts can serve as important resources during emergencies (e.g., natural disasters, weather events, recalls, and outbreaks) when existing internal resources are saturated. External experts may offer services that are available more broadly, either locally, throughout the country or globally. Finally, external resources may supplement internal resources by helping with program design and updates to educational materials and SOPs.

## ***5. Direct to Consumer guidance***

### **A. Considerations Prior to Delivery**

A DTC food delivery company should implement procedures to ensure that food is produced under safe and sanitary conditions and address the food safety risks relevant to its operations. A starting place for this is to ensure the food is made by a company registered and/or approved by the appropriate regulatory authority. Company may also verify (with a documentation review or a physical audit performed internally or by a third party) additional qualifications such as implementation of Good Manufacturing Practices and HACCP. While this guidance focuses primarily on food safety considerations specific to DTC food delivery, a company should be familiar with general best practices and requirements relevant to receiving, storage, processing, and holding foods intended for delivery. For example, any DTC delivery food safety program must meet the regulatory requirements applicable to the company's operations, e.g., the state and local food codes, CGMPs, or the Preventive Controls for Human Food Rule under FSMA. Certain foods, including eggs, juice, milk products, meat, poultry, seafood, and low-acid canned foods, may be subject to specific regulatory requirements. Further resources are provided in Appendix A.

*Consumer information and notifications.* Companies should have systems in place to help ensure consumer names and delivery addresses are accurate because delivery delays may impact food safety. Depending on their product(s) and delivery model, companies may consider providing consumers with guidance on handling deliveries (e.g., refrigerating perishable food promptly if it is not intended to be used immediately). Companies may also develop protocols for notifying consumers of unanticipated disruptions, such as delays caused by labor shortages or extreme weather, and what to do if packages arrive late or if they have concerns regarding their deliveries.

### **B. Temperature Control During Transportation and Delivery**

Maintaining food at proper temperatures is critical to limiting the growth of pathogenic bacteria or the formation of microbial toxins in food. Thus, proper temperature control throughout production and delivery to the consumer should be an integral part of any DTC delivery operation. A DTC delivery company should identify required time and temperature parameters, validate and implement controls to meet these parameters, and verify that these controls are working effectively.

A DTC delivery company should identify the temperature requirements throughout transport and delivery based on regulatory requirements as well as the company's evaluation of its products, including their unique characteristics and uses. For example, a company that sells and delivers a variety of food types may require that its perishable refrigerated products remain at or below 41°F (5°C) and that its RTE hot-held foods remain at 135°F (57°C) or above to be consistent with the standards specified in the FDA Model Food Code. The company would then conduct validation activities to identify measures that will adequately maintain required

temperatures and control the microbiological risks posed by the product during all stages of production, transport, and delivery.

### **Conducting temperature-control validation**

Temperature requirements can be met using a combination of different controls at various stages of a company's operation. These controls can include limiting the maximum delivery time, using appropriate types and amounts of refrigerants or coolants, and requiring a specific initial product temperature. These controls can interact together to affect temperature, and it is critical that these controls be validated.

In conducting validation activities, a company should account for all possible variables that may compromise temperature control. With respect to transportation and delivery, for example, some businesses conduct same-day or overnight delivery and can control the longest possible delivery time (e.g., by restricting delivery ZIP code). Companies with less control over delivery times should account for this variability. Validation studies should also take into consideration the type of food, the organism(s) of concern, and the growth limit targeted. DTC delivery companies should also consider validating contingency measures for emergency situations that may compromise temperature control, such as power outages, refrigeration equipment breakdowns, or delivery-route disruptions. For further discussion of potential emergency considerations, see *Emergency Action Plan for Retail Food Establishment*, CFP 2014 (providing guidance for addressing emergency situations, including interruption of electrical service, floods and fire).

Examples of potential approaches for verifying temperature controls include testing temperature profiles and packaging configurations in a simulation chamber and conducting periodic shipment tests using data loggers and trained participants in various geographical areas. One recommended best practice is to simulate "worst-case scenarios" and show that product temperatures are lower than the targeted temperature at the end of the longest possible time to receipt by the final customer. A worst-case scenario should be based on the farthest, warmest locations to which food is shipped, accounting for historical temperature data and depending on where the food originates.

- *Example:* a company manufactures a variety of perishable, refrigerated products and delivers to consumers in all states and zip codes. The company determines that these products must not exceed 41°F at any time throughout transportation and delivery. In designing a study, the company identifies Phoenix, AZ; Dallas, TX; and Miami, FL; as the farthest, warmest locations from each of its respective distribution centers. The company then conducts a study to identify the packaging configurations and maximum delivery times that will maintain the required product temperature throughout delivery to each of these cities. This company conducts in-house testing and also elects to engage an external food safety laboratory to conduct several additional simulations to confirm its findings.

A company may determine that limited periods outside of required temperature parameters do not result in an increase in risk, but any such acceptable periods will depend upon the



combination of time and temperature and may require a variance from the regulatory authority. In establishing product temperature limits and any durations during which those limits may be exceeded, a DTC food delivery company should assess the microbiological risks posed by the product and ensure they are adequately controlled until delivery to the final consumer within the delivery period.

Validation studies should be supported by relevant scientific or technical literature, pathogen predictive growth models or actual pathogen growth experiments. Resources regarding temperature control and pathogen growth risk can be found in Appendix B.

### **C. Choosing Packaging**

A DTC delivery company should determine appropriate packaging elements based on the specific details of its products and delivery models.

While a company should consider all packaging possibilities that are appropriate for its products, in this section, we focus on three primary packaging elements: outer (i.e. tertiary) packaging, refrigerants/coolants, and dunnage.

#### **Outer packaging**

Outer packaging can function as an insulator, keeping cold air in and warm air out. Any damage to the outer packaging could expose the contents to contamination or to loss of temperature control, so a company should ensure that the outer packaging maintains its integrity during transit and protects the contents from damage. A company may choose to conduct specific crush tests and may consider providing carriers with instructions for handling packages in transit.

Where a company determines that more sophisticated outer packaging is needed, solutions combining packaging and refrigerant systems are available. Before purchasing a solution, the company should ensure that their needs are covered by the validation of that solution, i.e. that the parameters (e.g. time, external temperature) used for the validation exceed those of the use case. Alternatively, the solution provider may have a computerized simulator to demonstrate the suitability of the solution for the company use case. In either case third-party validation is recommended.

*Reusable packaging.* Outer packaging can be disposable or re-usable. If re-usable, the collection logistics should be defined and communicated to consumers. Re-usable packaging should also be inspected, cleaned and/or sanitized before re-use to prevent contamination. Whatever contamination prevention process is chosen should be validated and verified to ensure effectiveness and suitability to the type of products carried.

#### **Coolants**

The need for a coolant and the type/quantity used will depend on a variety of factors, including the outer packaging material, the presence of insulation or dunnage, the food's initial temperature at time of packing, transit time to consumer, and the temperature during transit. Coolant selection should be based on validated scientific principles and data. For example, a company may consider seasonality or temperature fluctuations in choosing a coolant (see Section 5.B for further discussion of considerations in temperature validation).

Coolant options include, but are not limited to, simple ice contained in plastic, frozen gel packs, plastic packs containing a freezable solution, or dry ice. The efficacy of a coolant depends in part on the temperature at which it changes physical state as well as the mass and coolant type.

- **Ice packs.** Only potable (drinking) water should be used to make ice packs or provide the liquid in gel packs. Ice packs thaw at 0°C (32°F) and thus may not always be able to maintain appropriate temperatures compared to frozen gel packs. If ice packs are reused or recycled, they should be adequately cleaned and sanitized.
- **Frozen gel packs.** Depending on their composition, gel packs can thaw at temperatures below 0°C (32°F). When considering such products, a company should ensure suitability for use with food. Companies may consider testing gel packs for quality and/or integrity before use. As above, reused or recycled gel packs should be adequately cleaned and sanitized.
- **Dry ice.** Dry ice is commonly used as a coolant in packages containing frozen food and sublimates at -79°C (-109°F). It may produce colder temperatures than ice or gel packs; however, since dry ice is so cold, it may also affect the quality of certain sensitive foods (e.g., produce). The use of dry ice requires extreme care for several reasons, including safety and environmental concerns, so companies using dry ice should inform workers of potential risks and best practices for handling dry ice. Companies may also consider including warnings for consumers related to the safe handling of dry ice. Shipping dry ice may be subject to specific regulatory requirements.

Companies should verify coolant packs will maintain their integrity and avoid compromising food safety. For example, if ice packs melt and leak, this may cause food to be submerged in water, potentially leading to cross-contamination or cross-contact.

Coolant packs are generally not appropriate for cooling of product but instead can be used to maintain product temperature at the time of packaging. Initial cold food temperature should ensure required temperatures are maintained throughout the transportation and delivery process. The placement of coolants within the packaging is equally important to ensure all parts of the food are kept at appropriate temperatures throughout the entire delivery process (see the discussion of validating temperature controls in Section 5.B).

## **Dunnage**

Dunnage refers to the extra packing materials used to fill the voids in the package and secure and protect its contents during transportation. Use of dunnage may be critical in packaging

foods for delivery because it replaces air in the package and may help with insulation. Food in a package containing a refrigerant and air will generally heat up faster than a similar package where dunnage (e.g., paper, bubble wrap) replaces much of the air. Dunnage should be placed so it does not insulate the food from the refrigerant and should be of adequate sanitary quality.

## **D. Preventing Contamination**

Preventing cross-contamination is a key aspect of food safety whether these are biological, physical, or chemical contamination risks. Biological risks are discussed elsewhere in this document in detail. Physical risks include materials that can injure the consumer such as glass fragments, metal shards or rocks. Chemical contamination risks include toxins and allergens as well as intentional contaminants. Individual components of a delivery need to be packaged so cross-contamination does not occur during transport. The outer container of the delivery must be able to maintain integrity during transport. Sealing may be a useful means to prevent intentional adulteration. Items being delivered need to be transported in a clean and sanitary manner and transported so the food product does not become contaminated.

Any materials used for wrapping and packaging should not to be a source of contamination. These materials should be stored so they do not become contaminated. Any wrapping and packaging operations should be carried out in a manner where contamination of the food is prevented. Where pre-packaged foods are delivered to the consumer, integrity of the container's construction should be assured (e.g. no dents in metal cans, no breakage of glass jars). When raw meats are present in a package, appropriate measures should be taken to prevent leakage and cross-contamination to other foods or packaging materials.

Proper packing also serves to prevent chemical and physical contamination of foods. Food delivery companies should be aware of the chemical and physical risks posed by delivering non-food items together with food items. Food delivery companies should be aware allergens constitute a chemical hazard to be managed. Companies should provide a mechanism for the consumer to identify any food allergies during ordering. Care should be taken by the company to ensure unpackaged food items do not come into contact with any potential allergen sources prior to, during, or after packaging the food items for delivery. More details on allergens and their risks can be found in the FDA model Food Code, Appendix 3 Food Allergen Labelling and Appendix 4, Food Allergens as Food Safety Hazards.

## **E. Other Delivery Considerations**

*Choice of carrier.* This will depend on a range of factors, including the size and weight of packages, availability of service, general reliability, historic performance, and commercial viability. Specialized delivery services utilizing refrigerated transport may be appropriate. Since some carriers may not deliver 7 days a week, some companies may choose to ship only certain days of the week to ensure timely delivery.

A DTC delivery company should be aware its packages are typically treated the same as any other package transported by the chosen carrier and will be stored and transported at the prevailing ambient temperatures. The DTC delivery company should not expect their package

to receive any “special treatment” unless it is part of their agreement with the carrier. The DTC delivery company should verify any enhanced level of service promised by a carrier before relying upon it or modifying any established temperature-control requirements, including packaging and cooling.

*Signature requirements.* Some carriers offer the option of signature release (i.e., requiring a signature for delivery). This has the advantage of ensuring someone is immediately available to receive and refrigerate the food upon receipt. It presents the challenge of delaying delivery in the case a signatory is not available.

*Non-delivery.* A non-delivery may occur if the carrier cannot find the delivery address or if other problems occur. Any process for non-deliveries should be agreed to by the carrier. Some carriers may have specific requirements regarding packaging and labeling related to non-deliveries.

## **F. Food Safety Training**

Food safety is a responsibility shared by everyone involved in handling, processing, storing, packing, or distributing foods for DTC delivery. A DTC delivery company should ensure adequate food safety training and supervision for all personnel handling food. A DTC delivery company should ensure personnel handling food are adequately supervised and instructed to ensure they work in sanitary conditions and in accordance with proper food safety procedures. Continuous supervision is critical to ensure compliance. Such supervision is typically performed by an individual designated as the Person in Charge (PIC) in a retail environment. The PIC should always be appropriately trained according to applicable regulations or internal requirements so as to ensure good food safety practices. Where an operation employs only one or two people, supervision may not be applicable.

Training involves an overview of food safety principles as well as specific instructions, commensurate with the trainee’s responsibilities, for promoting food safety in day-to-day operations. Companies should also ensure those responsible for developing and maintaining a company’s written food safety program have the necessary qualifications and experience (e.g., food protection manager certification).

### **General principles**

Training should be given by qualified and competent persons or provided using online or other resources. Companies should have a plan to (a) identify the training needed for everyone whose activities may impact food safety and (b) keep records which confirm this training was completed satisfactorily. These records can help a company demonstrate it has a satisfactory food safety management system, and evidence of training in personal hygiene and food safety management may be very important for substantiating compliance.

Training needs and effectiveness should be assessed regularly. Certain food safety training may need to be implemented annually and ongoing training may also be necessary. A training program should also be updated to reflect operational or business changes (e.g., new products

or packaging methodology which may raise new food safety issues and concerns). A company can develop its own program or incorporate existing established curricula. These curricula often have documented course instruction notes, which can help to ensure consistency.

A company may also determine personnel other than those who handle food may need to undergo training. For example, personnel such as custodians, sanitation crews, maintenance workers, and others with access to a company's operations may need training in certain food safety practices.

### **Conducting training**

DTC food delivery companies should ensure personnel handling food and packaging for direct food contact receive training in the food safety practices appropriate to their duties. The training provided should ensure that such personnel have appropriate knowledge to handle food safely. This knowledge can be obtained in various ways, including on-the-job training, self-study with recognized guidance materials, formal training courses, and prior experience. Arrangements should be made for persons whose first language is not English and/or persons with learning or literacy difficulties.

A training program should be based on the food safety practices relevant to a company's operations, e.g., preventing cross-contamination, using appropriate packaging, implementing temperature-control requirements, and managing health and hygiene.

A DTC delivery company should contact the relevant regulatory authorities to determine any applicable training requirements. For example, see Section 2-103.11 Person in Charge and Annex 3, Section 2-103.11 of FDA model Food Code for a discussion of the training requirements for a person in charge. The FDA model Food Code also requires the person in charge must be a Certified Food Protection Manager (CFPM). A CFPM is an individual who has demonstrated by passing a food safety certification examination from an accredited certifying organization that he or she has the knowledge, skills and abilities required to protect the public from foodborne illness.

## **G. Consumer Communication**

A DTC delivery company should identify the food safety information which should be included within a package and/or in other communication channels, including on a product website or via email. This may include product information as well as consumer instructions for communicating feedback and concerns.

If food safety labeling is included on the outside of a package, a DTC delivery company should ensure it is not obscured, including by any labels a third-party carrier may affix to the package.

### **Product information**

Products for DTC delivery should be labeled according to applicable regulatory requirements. This includes following federal, state, and local regulations for nutrition information and

allergen disclosure. All partners should work together to ensure all relevant food safety information provided at the point of sale, including on product websites or mobile applications where orders may be placed, is accurately communicated.

Companies should advise consumers of when to expect their orders and what to do upon delivery. If directions are not already specified on the product label, the company should advise the recipient that such contents are perishable and should be refrigerated or frozen upon receipt if not used immediately. This is especially important if the package is sent as a gift, if the recipient may not be aware of the contents, or if the outer packing obscures the product label.

Companies may also need to provide consumers with updated information relevant to food safety after their orders have been placed. For example, a delivery may arrive late due to unexpected transportation delays. Depending on the extent of the delay and the nature of the food, a company may decide to inform the consumer that certain perishable items should be discarded. Sourcing challenges may also require changes to the allergen information required for a product, so companies should ensure they have processes in place to communicate updated allergen information to consumers when needed.

Product information may also include instructions for safe use, such as information about any raw product or raw ingredients that may pose a health risk and are intended to be consumed raw (e.g., raw milk cheeses or sushi-grade fish). Companies may also choose to provide consumers with guidance on safe food storage, handling, and preparation.

### **Instructions for consumer feedback and concerns**

We recommend DTC delivery companies also provide consumers with information about what to do if they are concerned about the safety of the product, such as when a delivery appears to have been tampered with or if the packaging has otherwise been compromised. In most cases, consumers should be informed of how to contact the company directly to resolve concerns. Consumers also have the right to contact the appropriate regulatory agency if they have a concern. In such circumstances, companies can prepare to respond to any concerns by having standard operating procedures, process records, and other appropriate documentation in hand. These records will assist with reported alleged foodborne illness and potential regulatory investigations.

Some companies may choose to label certain items with the date and time packaged and/or the shipping date. If a product's package has been manipulated in any way, the label should be updated to reflect the repackaging date.

## **H. Best Practices for Managing a DTC Delivery Food Safety Program**

### **Responsibilities for implementing food-safety control**

To promote the implementation of food safety controls, a DTC company should assess its business model and supply chain, including partnerships and agreements with other parties. The parties involved at each stage of the production and distribution chain should collaborate

closely, and companies should also consider defining food safety responsibilities in formal agreements between parties. Clear procedures for communication between the DTC company and its partners will be helpful for sharing compliance information, food safety concerns, and relevant operational changes in a timely manner.

Examples of expectations that can be reflected in agreements include:

- Responsibility for conducting validation and/or verification
- Managing non-conformances, including communication and escalation requirements
- Conducting training
- Complying with applicable food safety laws/regulations
- Implementing various food safety measures (e.g., meeting time/temperature limits, preventing contamination)
- Implementing employee health policies
- Emergency protocols or contingency plans
- Personnel standards (e.g., selection criteria, health and hygiene requirements, background checks)

## **Monitoring**

As discussed in Section 4.B, a DTC delivery company should validate the measures necessary to control any food safety risks arising in the company's operations. The company should then conduct verification activities to demonstrate whether the validated measures are being effectively implemented.

As a critical component of a food safety program, a comprehensive monitoring system helps verify food safety policies and systems are being applied in a consistent and sustainable manner and identify continuous improvements or corrective actions.

In designing its monitoring approach, a DTC delivery company should consider the following:

- Which validated food safety measures should be monitored
- Where monitoring will occur, whether in production, transportation, and/or upon delivery
- How monitoring will be conducted for each food safety measure
- How the monitoring system will be described and communicated (e.g., in written policies and procedures)
- How often each monitoring tactic will be implemented
- Who will be responsible for conducting monitoring
- How deviations will be addressed
- How monitoring results will be recorded (e.g., including the signature of the person completing the monitoring)
- What consumer inquiries and complaints have been received

### *Developing a Monitoring Approach*

A monitoring system should be based on the validated measures a DTC delivery company has identified are needed to control its food safety risks. A company should evaluate each validated risk-control measure to determine the best approach for monitoring, considering the type of data to be gathered, how the data will be used, how frequently the control measure should be evaluated, who should gather and/or interpret data, which key performance indicators should be used, and how monitoring results should be reported.

There are multiple tools which DTC delivery companies can consider incorporating into a monitoring system. Examples include:

- *Process Self-assessments.* Regular internal assessments can help a company’s personnel to proactively address food safety risks and prepare for external audits and regulatory inspections. These assessments can include daily checklists, shift-based logs, internal reviews, and third-party audits. The type and frequency of such assessments should be appropriate for the complexity of the company’s operations and products.
- *Process Audits.* A process audit is a formal inspection usually conducted by a third party. A DTC company can partner with a food safety auditing firm to design and implement an audit to determine if food safety risks are being controlled throughout the supply chain and delivery.
- *Inspection upon delivery.* A DTC company can employ its own personnel or third parties to confirm whether delivery parameters are met. For example, a company may consider assigning an individual or group (e.g., company employees or third-party “mystery shoppers”) to replicate the consumer experience and provide feedback on the delivered product. This person or group can examine parameters such as product labeling, temperature controls, transportation times, package integrity, and the effectiveness of packaging in preventing cross-contamination.

### **Using Internal and External Resources**

A DTC delivery company should consider the complexity and risks associated with its operations when using internal and/or external resources for monitoring its food safety system. Depending on the scope of the business, both options may be useful, and a DTC company should weigh the benefits of employing these resources when making decisions based on their program needs. Regardless of whether they are employees or third parties, all personnel selected should have the expertise and proper training necessary to correctly and consistently carry out their assigned tasks.

### **Technical Tools**

A variety of monitoring tools are available to help DTC delivery companies monitor compliance. Companies should identify the most current technologies available to aid with capturing and maintaining data. Companies may choose to use equipment, such as temperature monitoring devices for food products, hot and cold holding equipment, refrigerated compartments, insulated carriers, and other packages; geo-tracking devices, cameras, video recording devices, web platforms/portals, and other technological solutions.



Companies should ensure measurement methodology is precise and the correct tools are being used for both food products and equipment. For example, probe thermometers should be used to measure internal product temperatures, and appropriate equipment thermometers should be used to measure ambient temperatures of refrigeration and hot holding equipment. Waterproof thermometers are also available for dishwashing machines. Temperature indicators can also be used for packages during transport and delivery. For accuracy, thermometers should also be regularly calibrated, either daily or per the manufacturer's directions. For further resources, see Appendix A.

Companies should consider systematic approaches to assist with compiling data. Software programs can be custom designed to include a variety of hierarchies and data fields, such as menu items, delivery types, delivery times, product and equipment temperature readings, and regulatory checklists. Food safety experts and analysts can use the data to gain insights, evaluate root causes, determine if corrective action plans are effective, or make program adjustments as necessary.

### **Managing noncompliance and continuous improvement**

Once a system is in place to monitor the key components of a food safety program, companies should establish processes to address noncompliance and improve risk management. These processes should include expectations for communicating non-conformances and performance metrics (e.g., temperatures at various critical control points). For example, including an escalation process to relay non-conformances to the appropriate individuals and departments can help ensure issues are addressed promptly. Companies should ensure qualified individuals have the authority to take corrective actions.

As part of its efforts towards continuous improvement, a DTC company should also continually research the most current food safety innovations and technologies in the manufacturing and retail food industry. Remaining up-to-date on industry trends can assist an organization in having awareness of the best available food safety tools can help it be more efficient, more quickly respond to alerts, take corrective actions, and adjust food safety procedures.

### **Traceability and recalls**

In the case of a foodborne outbreak or recall, DTC companies should have processes that allow public health officials to request relevant traceback and trace forward information that would aid in their investigation. This information should be shared in accordance with relevant privacy laws. For more information of traceability and recalls see Appendix A.

### **Corrective and Preventive Action Plans**

Incorporating corrective and preventive action plans into food safety monitoring is essential for controlling food safety risks and preventing repeat occurrences. Corrective and preventive action plans are applicable regardless of whether internal and/or external personnel are involved in monitoring. The action steps and urgency assigned should be appropriate to the level of risk.

When SOPs are developed, a DTC company should identify 1) corrective actions for the disposition of the affected items and 2) separate preventive actions, tailored to potential root causes, to ensure the problem does not recur. For example, a company may determine a perishable food must remain at 41°F or below but finds an instance in which the food exceeds this temperature for several hours due to equipment failure. The company may decide the corrective action is to discard the food, and the preventive action is to install monitoring and alert sensors for refrigerated delivery equipment. An alert is used to notify appropriate parties when the air temperature exceeds 41°F for a designated period. The organization is then able to eliminate a food safety risk to the consumer and prevent product loss.

When developing corrective and preventive control plans, companies should consider the following:

- Engaging stakeholders (e.g., representatives from food manufacturer/food establishment, product delivery/transportation company, or external auditing firm)
- Establishing requirements for communicating non-conformances, including timing protocols based on potential risk
- Determining what parties must be notified and level of escalation based on risk
- Identifying who is responsible for implementing the plan
- Monitoring corrective and preventive actions to ensure they are effectively implemented
- Incorporating root cause analyses to assist with corrective actions and adjustment of protocols as needed
- Conducting targeted training for personnel to identify and correct errors in the food safety management program
- Using accountability models (e.g., number of higher risk occurrences triggering escalation)
- Reassessing studies or procedures to determine if improvements are needed to resolve operational or behavior-related occurrences (may be part of recurring re-validation activities)

## ***6. Third-Party Delivery guidance***

### **A. Food Safety Responsibilities**

All parties engaging in Third-Party Delivery Service should understand the relevant food safety risks and define roles for such parties to help minimize those risks. The parties to the business agreement should clearly identify the responsible party during each stage of the flow of food, from preparation, staging, and delivery.

### **B. Preventing Contamination**

Food contamination refers to the presence of biological, chemical, and/or physical contaminants in food which can cause foodborne illness or injury. Biological contamination can occur through improper food storage and lack of temperature control during preparation, packaging, and delivering of food. Chemical contamination can occur when non-food products, such as household cleaners, personal hygiene items, etc., are packaged with food products in the same delivery bag during packaging. Physical contamination can occur if food products are not packaged appropriately or protected from the external environment.

Preventing contamination is a key aspect of food safety. Food establishments and food shoppers should minimize contamination risks by determining which items will be segregated and how items should be packaged. An added challenge in third-party delivery from food establishments is that various food and non-perishable food products may be delivered together. Best practice is to (a) separate ready-to-eat foods from raw proteins; (b) separate chemicals and non-food products from food products; and (c) separate glass and other fragile food products to reduce breakage risks. Separation options may include separate bags or the use of another barrier.

The food establishment should have processes to determine whether food deliverers may prepare beverages, collect accompanying utensils, napkins, straws, or condiments, or package foods.

### **Time/Temperature Control**

Temperature control should be considered when delivering food to the consumer through the use of a food deliverer. However, time as a public health control is also acceptable for limiting pathogenic bacterial growth. A wide variety of transportation vehicles are used to provide delivery services. A refrigerated or freezer vehicle may be ideal in maintaining temperature control. If the transport vehicle does not have a mechanism to control the ambient temperature of the vehicle, food deliverers should address all relevant food safety concerns and hazards when transporting the food. Food deliverer procedures may include the use of insulated delivery bags, containers, or coolers, or use of coolants to keep foods hot or cold.

Food ordering platforms should issue guidelines to food deliverers to deliver orders safely and in accordance with relevant safety standards, and to follow any food establishment delivery guidelines that are meant to promote food safety and compliance with applicable regulations.

The food ordering platform, food deliverer, and food establishments should work together to develop appropriate procedures to prevent pathogen growth during handling, transport, and delivery. Whereas time may be an appropriate control measure during short delivery periods, additional control measures should be considered for longer delivery periods or when food is not handed directly to the consumer to ensure perishable items remain at proper temperatures.

### **Temperature Monitoring for Staging Foods at Food Establishments**

Foods held in a staging area should be maintained by food establishments at proper product temperatures prior to pick-up and delivery by a food deliverer. A temperature monitoring process for staging foods at food establishments may be needed to ensure food is maintained at the proper temperature until ready for pick-up and delivery to the consumer.

### **Packaging**

Packaging protects and separates products from contamination, the external environment, and physical damage. Packaging design and using multiple layers of packaging, including primary, secondary, and tertiary, minimizes the risks associated with contaminants and food safety hazards. Primary and secondary packaging, such as foil wraps, direct food contact containers, and plastic bags, directly protect the food. Tertiary packaging or outer packaging, such as delivery bags or coolers, provide protection from the external environment including extreme temperatures, direct sunlight, weather (e.g. rain, snow), road debris, and animals and pests.

The primary and secondary packaging should not be re-used by food establishments. The tertiary or outer packaging should be constructed of durable and easily cleanable materials for re-use to transport food during deliveries.

Food establishments and food deliverers should determine correct storage (e.g. upright) and amount of food to be packaged during transportation to avoid crushing of food or damage to primary food containers that could potentially contaminate other food or lead to unclean delivery bags.

### **Food Tampering**

Prevention of food tampering activities occurs through packaging design and tamper-evident devices. Food establishments may utilize primary packaging that cannot be resealed, such as tear strips, and secondary packaging, such as bags or boxes, with tamper-evident tape, stickers, or seals to deter food tampering activities during food delivery and maintain food safety and integrity.

Food deliverers should not remove food products from the secondary or tertiary packaging until delivered to the consumer. Food deliverers and food shoppers should not open, alter, tamper with, or change the primary or secondary packaging.

### **Delivery Bag Usage, Maintenance, and Cleanliness**

Food deliverers may use insulated delivery bags that help minimize food temperature fluctuations and/or help maintain food temperatures during delivery to the consumer. In addition to insulated delivery bags, food deliverers can add other refrigerants or coolants, such

as ice and/or gel packs, which may help reduce the rise in product temperatures during extended delivery times.

Delivery durations, ambient temperatures and conditions, and intended food temperatures at delivery may assist food deliverers with identifying the need to use insulated delivery bags. Delivery bags can be designed and manufactured to support a variety of business needs. The materials, construction, and design of the delivery bag can be customized to maintain food hot or cold and can be designed with pouches to separate cold food from hot food.

Food ordering platforms or food establishments may set guidelines for food deliverer delivery bags, especially for extended delivery times, which may help maintain the food at safe temperatures during delivery to the consumer. Guidelines may include the appropriate choice of delivery bag or other packaging, as well as who will provide the bag or packaging, how to obtain new or replacement materials (e.g. methods, costs, etc.), and whether these materials are mandatory or whether food deliverers can choose to use alternative options.

Delivery bag durability and lifespan will vary depending on construction, materials, usage, and maintenance; however, delivery bags should be easily cleanable, kept clean, and maintained in good repair. Delivery bags should be cleaned daily, or more frequently if needed. Food deliverers should check the delivery bag condition for rips, tears, holes, and food debris that could lead to contamination and entry points for pests, etc. Recommended best practice is to check delivery bag condition after each consumer drop-off and prior to the next food delivery and to remove food debris and clean up spills or leaks. The food deliverer should be responsible in ensuring delivery bag condition and maintenance.

Some third-party delivery service entities offer personal shopping services in addition to delivery services. Food shoppers might also utilize bags during selection and packing of products and should ensure bags are clean and in good repair.

### **Vehicle Cleanliness and Inspections**

A variety of vehicles or transportation methods (e.g. walkers, cars, motorcycles, bicycles, autonomous vehicles, or drones) may be used to transport food depending upon the delivery location and accessibility. Vehicles should be clean and free from odors, pests, animals, and any other materials that could adversely impact food safety. Food deliverers should inspect vehicles frequently to ensure that vehicle interiors are clean and free from debris. Food ordering platforms should provide food deliverers with information on maintaining their vehicles in safe conditions, such as vehicle cleanliness and maintenance.

## **C. Food Safety Education and Training**

Food ordering platforms should make available or provide relevant food safety education or training to food deliverers and food shoppers. Food safety education or training may be offered internally or externally through an outside education or training program.

Food deliverers and food shoppers should have appropriate knowledge of basic food safety principles through the completion of a food safety education or training program. Food safety education and training programs for food deliverers and food shoppers may cover topics

including: (a) contamination prevention; (b) product segregation; (c) temperature management; (d) health, hygiene, and hand washing; (e) product tampering prevention; (f) allergens; (g) vehicle transportation cleanliness; and (h) proper selection and use of clean, insulated delivery bags.

Food shopper's education or training may also cover additional topics including: (a) proper order of product selection, such as picking shelf-stable items first, frozen items second, cold refrigerated items third, and hot, prepared items last; (b) proper selection of products with the farthest use-by-date code and intact packaging; and (c) final product handling and packaging.

Additional knowledge areas may include, but should not be limited to: (a) when to pick/pull perishable and non-perishable food products; (b) preparation time needed for food products to be assembled; (c) staging food products utilizing dry storage shelves, refrigerators/coolers, and/or freezers; (d) instructions on foods for delivery (e.g. perishable vs non-perishable); and (e) modes of transportation to be used for delivery (e.g. personal vehicle, bicycle, motorcycle, commercial vehicle, etc.).

### **Education and Training Topics**

Prevention of contamination, temperature control, and personal health and hygiene should be areas of focus for food safety education and training to prevent foodborne illness and minimize food safety risks.

#### *Contamination*

Food deliverers and food shoppers should be aware of any sources of potential contamination. Food contamination could occur from various sources, including but not limited to: (a) food deliverer or food shopper themselves; (b) bags, coolers, or other methods used to transport the food; (c) external environment; (d) animals and pests; and (e) mode of transportation.

#### *Temperature Control*

Food deliverers and food shoppers should know the correct hot and cold holding temperatures for food and understand the food safety implications of holding time temperature controlled food for safety (e.g. TCS foods) in the temperature danger zone for an extended period of time. Food deliverers and food shoppers should also have knowledge of the necessary equipment, such as insulated bags, coolers, and/or coolants that may be needed to safely hold food at proper product temperatures or help with temperature control. Familiarity with temperature measuring devices is also recommended when relevant.

#### *Personal Health*

Food deliverers and food shoppers should not work while ill. Viruses, bacteria, and parasites can all be potentially transmitted from an ill individual to food and/or the recipient of the food via direct contact and packaging. Food deliverers and food shoppers should not work with food if any of the following symptoms are present, including: (a) vomiting; (b) diarrhea; (c) jaundice (yellowing of the eyes and skin); (d) sore throat and fever; (e) infected skin lesion; or (f) have been diagnosed with Norovirus, Hepatitis A, *Shigella* spp., Shiga Toxin-Producing *Escherichia coli*, Typhoid fever (caused by *Salmonella* Typhi), or *Salmonella* (nontyphoidal). Food

deliverers and food shoppers who have been exposed to a foodborne pathogen from a household member with symptoms or diagnosis above should also not handle food.

### *Personal Hygiene*

Food deliverers and food shoppers should understand the importance of good personal hygiene, including wearing clean attire. Food deliverers and food shoppers should: (a) practice good personal hygiene; (b) know when hand washing is needed and how to effectively wash hands; (c) know how to avoid bare hand contact with ready-to-eat foods; and (d) know how to use provided utensils to handle food when necessary.

Food ordering platforms should have standards to address food deliverers and food shopper's behaviors that may pose food safety risks, such as eating, drinking, chewing gum, or utilizing tobacco and similar products during food selection and deliveries.

## **D. Management of Non-Compliance**

Food ordering platforms should have processes developed to address consumer feedback and issues of non-compliance as further described herein. Agreements between the parties and food ordering platforms can be used to outline the expectations of each party. Issues of non-compliance may include potential food safety concerns (e.g. reported incorrect food temperatures, allergens, foodborne illness, product adulteration, etc.), food quality concerns (e.g. broken, damaged, spoiled, etc.), wrong products (e.g. reported allergens), and delivery concerns (e.g. reports that deliveries were not delivered within specified timeframe). While product quality is outside the scope of this document, some consumers may perceive product quality issues as relating to food safety.

Food ordering platforms should determine (a) how issues of non-compliance and consumer feedback will be handled; (b) what guidance is provided to the consumer regarding any food products in question; (c) who receives the notification and/or feedback; and (d) who reviews reports and provides resolution.

Food ordering platforms may issue guidance to food deliverers for handling various logistical situations, including appropriate next steps, such as whether the food product can still be delivered, returned, or discarded. Some examples of situations that should be considered include (a) the food deliverer arrives to drop off the food order at the correct delivery time and location, but the consumer is not present for the delivery drop-off; (b) food products show evidence of tampering or alteration by someone other than the deliverer (e.g. loss of package integrity or seal); or (c) food products are damaged, spilled/leaked, or otherwise contaminated (e.g. hair, dirt, debris).

Processes should also include a mechanism for the consumer to contact the food ordering platform and provide feedback on the food order(s) or delivery service. The food ordering platform should monitor consumer reports and non-compliance issues as needed to determine whether their process is effective or if they should consider revisiting their process.

## **E. Other Food Safety Considerations**

### **Food Allergens**

Food establishments typically do not make claims or guarantees that their kitchen or prep areas are allergen-free environments or that cross-contact with allergens will not occur as food establishments may prepare products that contain allergens on similar surfaces and equipment. The food establishment may consider providing allergen awareness information through the food ordering platform. Food ordering platforms may include features to suggest substitutions when an ordered product is no longer available. When such features exist, consumers should be reminded about the allergen potential risk created by substitution options.

### **Traceability and recalls**

In the case of a foodborne outbreak or recall, food ordering platforms should have processes that allow public health officials to request relevant traceback and trace forward information that would aid in their investigation. This information should be shared in accordance with relevant privacy laws. For more information on traceability and recalls see Appendix A.

### **Technology and Innovation**

Incorporating and leveraging technology may be advantageous to provide notifications to consumers if deliveries have encountered unexpected or excessive delivery delays.



## ***7. Appendices***

### **A. Food regulation overview, labeling, and recalls**

#### **Regulatory overview**

Federal, state, and local agencies oversee the regulation of retail and manufactured food products. Most products sold in interstate commerce, or across state lines, will be regulated by both state or local and federal food regulatory agencies, with a few state-specific exceptions. Most products sold in intrastate commerce, or made and sold within the same state, will be regulated by state or local food regulatory agencies. Most facilities which handle food are licensed in some manner. DTC food delivery companies should contact the agency which issues their license or permit if they have questions about the food safety regulations which apply to their operation. If a DTC food delivery company is unsure who issues their license or permit or if one is required at all, the company should contact their state or local health department. The health department can assist or direct the company to the appropriate agency. DTC food delivery companies can also follow this link for state health department information: <https://www.foodsafety.gov/about/state/index.html>.

Food establishments and food ordering platforms may contact state, local, tribal, territorial or federal food regulatory agencies if questions or issues arise about food safety regulations which apply to their operation.

For additional information regarding the food products that federal agencies oversee, follow the links provided below:

Food and Drug Administration – What does FDA regulate?  
<https://www.fda.gov/aboutfda/transparency/basics/ucm194879.htm>

U.S. Department of Agriculture Food Safety Inspection Service  
<https://www.fsis.usda.gov/wps/portal/fsis/home>

#### **Food laws**

There are many laws which provide the basic framework for ensuring safety of foods in the US, including DTC delivery foods. These laws include but are not limited to the Food Drug and Cosmetic Act (FDCA), the Federal Meat Inspection Act (FMIA), and the Poultry Products Inspection Act (PPIA). These laws prohibit the sale or distribution of adulterated foods. Foods can be deemed adulterated for many reasons including:

(4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health; (FDCA 21 USC §342(a)(4), FMIA 21 USC §601(m)(4), PPIA 21 USC §453 (g)(4))

The FMIA specifically prohibits adulteration during transportation:

... any act while they are being transported in commerce or held for sale after such transportation, which is intended to cause or has the effect of causing such articles to be adulterated or misbranded.

Therefore, DTC delivery foods must always be transported in a way which minimizes the risk of contamination and potential adulteration of the food.

## **Food regulations**

Federal regulations also address sanitary situations which apply to transportation of foods. Some (but not all) of these regulations are provided below for reference.

The FDA Good Manufacturing Practice Regulations address warehousing and distribution as follows:

§117.93 Warehousing and distribution.

Storage and transportation of food must be under conditions which will protect against allergen cross-contact and against biological, chemical (including radiological), and physical contamination of food, as well as against deterioration of the food and the container.

The USDA FSIS Sanitation Rules address shipping as follows:

9 CFR 416.4 Sanitary operations.

(d) Product must be protected from adulteration during processing, handling, storage, loading, and unloading at and during transportation from official establishments.

There is also the FDA Sanitary Transportation of Human and Animal Foods rule. See the following links for more information:

<https://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm383763.htm>

<https://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM553930.pdf>

The Sanitary Transportation of Human and Animal Food is designed to prevent transportation practices which create food safety risks (e.g. failure to properly refrigerate food, inadequate cleaning of vehicles between loads, etc.). The new FSMA Sanitary Transportation rule builds on the 2005 Sanitary Food Transportation Act (SFTA) and establishes requirements for shippers, loaders, carriers by motor or rail vehicle, and receivers involved in transporting human and animal food. These requirements mandate a company to use sanitary practices to ensure the safety of food. The FSMA requirements do not apply to transportation by mail, air, or third-party delivery service because of limitations in the law.

For more information on FSMA Final Rule on Sanitary Transportation of Human and Animal Food, look here: <https://www.federalregister.gov/documents/2016/04/06/2016-07330/sanitary-transportation-of-human-and-animal-food>.

FDA has indicated several waivers from the Sanitary Transportation rule, which are detailed here: <https://www.federalregister.gov/documents/2017/04/06/2017-06854/waivers-from-requirements-of-the-sanitary-transportation-of-human-and-animal-food-rule>. DTC food delivery companies should contact the proper regulatory authority to determine if they are covered by the waiver. For specific questions regarding the Final Rule on Sanitary Transportation of Human and Animal Food or the waivers, contact the FDA Outreach and Information Center <https://cfsan.secure.force.com/Inquiry> or the FDA Center for Food Safety and Applied Nutrition: <https://www.fda.gov/Food/ResourcesForYou/ucm334249.htm>

FDA's Food Code is a model for safeguarding public health and ensuring food is unadulterated and honestly presented when offered to the consumer. It represents FDA's best advice for a uniform system of provisions which address the safety and protection of food offered at retail and in food service. Most state and local codes are based on the FDA Model Food Code and provides rules which may be relevant to packing and shipping of DTC delivery foods. The FDA Food Code can be obtained here: <https://www.fda.gov/foodcode>.

USDA provides the following consumer information on Mail Order Food Safety (<https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/safe-food-handling/mail-order-food-safety/>) to help consumers determine if their perishable foods have been handled properly:

- Make sure your company sends perishable items, like meat or poultry, cold or frozen and packed with a cold source. Items should be packed in an appropriate container to ensure temperature control and protect the food(s) from contamination.
- The food should be mailed as planned, using mailing plans which have been validated to deliver appropriate temperature control. Make sure perishable items and the outer package are labelled appropriately (e.g. "keep refrigerated") to alert the recipient as to proper handling.
- The company should inform their consumers on how to handle foods on receipt. Your company may wish to include information on how to measure product temperature and what to do if foods are received outside the delivery window, at unacceptable temperatures, or in a damaged condition.
- The company should be aware of situations where a consumer is ordering food for another individual (e.g. as a gift). Your company should develop and implement a notification system appropriate for these situations.

## **Labeling**

As part of their obligations to comply with general legal requirements, proprietors of DTC food delivery companies need to ensure the labeling of food is correct and not misleading and the food's chemical composition and any materials and articles which come into contact with the food are not harmful to health.

Where a DTC food delivery company receives pre-packed foods (i.e. already in their primary packaging), such as canned, vacuum packed or pouch packed goods, from another company, the food should be correctly labelled by other business. Depending on the product, the labeling required can be extensive. However, where the proprietor of a mail order food company operation repackages individual items, they may have more limiting mandatory labeling to perform but should take care to ensure the requirements have been satisfied.

If a DTC food delivery company wishes to make a claim concerning its products, whether these claims relate to the origin, species or nature of the product, e.g. Alaskan salmon, vegan or organic, it would be advisable to take steps to substantiate these claims.

Some companies may choose to label certain items with the date and time packaged and/or the shipping date. If a product's package has been manipulated in any way, the label should be updated to reflect the repackaging date.

### **Traceability and recalls for direct to consumer and third-party delivery services parties**

A detailed discussion of the complexities of food recalls is beyond the scope of this document. However, an awareness of, and preparation for recalls is an important part of a food safety plan for all DTC food delivery companies and third-party delivery services (e.g. food ordering platforms and retail food establishments). Any DTC food delivery company and third-party delivery services should have four key aspects of their food safety system in place which relate to recalls:

- Means for tracking all recalls relevant to their business. The company should not rely upon their suppliers to inform them about the need for a recall but should actively seek out relevant information.
- Means to stop online sales once they learn of a relevant recall.
- Method to notify any consumers who have purchased a recalled product and inform them the product they purchased has been recalled.
- System to manage recalled inventory, to ensure any recalled product is appropriately tracked, controlled, and ultimately destroyed or reconditioned, and does not re-enter commerce.

DTC food delivery companies and third-party delivery services (e.g. food ordering platforms and retail food establishments) should be able to (a) provide trace-forward information to track where recalled product delivered to (e.g. consumer information) and (b) provide traceback information to track where recalled product originated from (e.g. distributor, supplier, manufacturer, farm).

Best practices for DTC food delivery companies and third-party delivery services (e.g. food ordering platforms and retail food establishments) are to have processes related to trace-forward and traceback actions developed and to have appropriate records to manage potential recalls.

More information regarding recalls is available on both FDA and USDA FSIS websites. A brief description of this information follows below.

### **FDA recalls**

Recalls are actions taken by a firm to remove a product from the market. Recalls may be conducted on a firm's own initiative, by FDA request, or by FDA order under their statutory authority. FDA divides recalls into four categories:

- Class I recall: a situation in which there is a reasonable probability that the use of or exposure to a violative product will cause serious adverse health consequences or death.
- Class II recall: a situation in which use of or exposure to a violative product may cause temporary or medically reversible adverse health consequences or where the probability of serious adverse health consequences is remote.
- Class III recall: a situation in which use of or exposure to a violative product is not likely to cause adverse health consequences.
- Market withdrawal: when a product has a minor violation that would not be subject to FDA legal action it may be withdrawn from commerce. The firm removes the product from the market or corrects the violation.

For additional recall information, see recall Regulations in 21 CFR Part 7:

<https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfCFR/CFRSearch.cfm?CFRPart=7&showFR=1>

### **USDA FSIS recalls**

FSIS recalls are initiated by the manufacturer or distributor of the meat or poultry product, sometimes at the request of FSIS. All FSIS recalls are voluntary. However, if a company refuses to recall its products, then FSIS has the legal authority to detain and seize any products that are in commerce.

FSIS notifies the public through a Recall Release for Class I and Class II recalls, and issues a Recall Notification Report (RNR) for Class III recall issues. The definitions for FSIS Class I, II and III recalls are slightly different than for FDA products, and are summarized below:

- Class I: involves a health hazard situation in which there is a reasonable probability that eating the food will cause health problems or death.
- Class II: involves a potential health hazard situation in which there is a remote probability of adverse health consequences from eating the food.
- Class III: involves a situation in which eating the food will not cause adverse health consequences.

For more USDA FSIS information on recalls:

<https://www.fsis.usda.gov/wps/portal/fsis/topics/recalls-and-public-health-alerts>

## B. Other resources

### Relevant resources regarding temperature control

- 2017 FDA Food Code Chapter 3 (Food), especially the section 3-5: Limitation of growth of organisms of public health concern  
<https://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM595140.pdf>
- FDA Draft Guidance for Industry: Hazard Analysis and Risk-Based Preventive Controls for Human Food  
<https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm517412.htm>
- FDA Fish and Fishery Products Hazards and Controls Guidance  
<https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Seafood/ucm2018426.htm>
- USDA Food Safety Information: Mail Order Food Safety  
[https://www.fsis.usda.gov/wps/wcm/connect/9020369a-247f-423c-8486-7e31ca6bcfc3/Mail\\_Order\\_Food\\_Safety.pdf?MOD=AJPERES](https://www.fsis.usda.gov/wps/wcm/connect/9020369a-247f-423c-8486-7e31ca6bcfc3/Mail_Order_Food_Safety.pdf?MOD=AJPERES)
- Centers for Disease Control and Prevention: Tips for Meal Kit and Food Delivery Safety  
<https://www.cdc.gov/foodsafety/communication/food-safety-meal-kits.html>
- Some states may have specific requirements for DTC or TPD food temperature control. Contact the state department that has jurisdiction over food regulations for details. Contact information for state departments of health and agriculture can be found at  
<https://www.foodsafety.gov/about>

### Relevant resources regarding pathogen growth risk

- US FDA Hazard Analysis Critical Control Point (HACCP) guidance  
<https://www.fda.gov/Food/GuidanceRegulation/HACCP/default.htm>
- FSIS Compliance Guideline HACCP Systems validation April 2015  
[https://www.fsis.usda.gov/wps/wcm/connect/a70bb780-e1ff-4a35-9a9a-3fb40c8fe584/HACCP\\_Systems\\_Validation.pdf?MOD=AJPERES](https://www.fsis.usda.gov/wps/wcm/connect/a70bb780-e1ff-4a35-9a9a-3fb40c8fe584/HACCP_Systems_Validation.pdf?MOD=AJPERES)
- FDA Guidance for Industry: Control of *Listeria monocytogenes* in refrigerated or frozen ready-to-eat-food  
<https://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/ucm073110.htm>
- CFP Emergency Action Plan for Retail Food Establishments  
<http://www.foodprotect.org/media/guide/Emergency%20Action%20Plan%20for%20Retail%20food%20Est.pdf>
- USDA Pathogen Modeling Program  
<https://pmp.errc.ars.usda.gov/PMPOnline.aspx>
- ComBase Predictor  
[http://browser.combase.cc/ComBase\\_Predictor.aspx?model=1](http://browser.combase.cc/ComBase_Predictor.aspx?model=1)

### Procedures for taking food temperatures

The Food Code Annex 5, entitled “Conducting Risk-Based Inspections includes relevant information on temperature measurement in sections related to assessing temperatures (pages 608-612).

Several different types of thermometers are used to monitor the temperature of foods, including: bi-metal stemmed, digital, thermocouple and infrared types. Depending on their specific usage, these devices have advantages and disadvantages as described below.

<b>Type of Hand Held Thermometer</b>	<b>Advantages</b>	<b>Disadvantages</b>
Bi-Metal	Small – fits in pocket Inexpensive Can be calibrated	Requires frequent calibration Slow response time Not suitable for thin foods Narrow range (0 to +220°F) Less accurate Sensor located 2 ½” from tip
Digital	LCD display – easy to read Wide temp range (-50 to +300°F) Sensor located at tip Fast response time	Most require manufacturer calibration Require batteries
Thermocouple	Very wide temp range (-60 to +2000°F) Fast response time Very accurate Ideal for all food temp’s	Must be factory calibrated Expensive
Infrared	Fast response time Wide temp range (-25 to +900°F) Food contact not required Non-destructive	Measures surface temperatures only Used only as temperature indicator Not suitable for regulatory purposes

Employees preparing food within the DTC food delivery company prior to shipment should be trained on correct application, how to properly use and how to maintain the instruments to ensure they work properly. Thermometers need to be washed, rinsed, sanitized and air dried before and after use to prevent cross-contamination.

Any food temperature measuring devices should be readily accessible for use and stored in a clean manner. Regulatory guidance suggests food temperature measuring devices be calibrated in accordance with manufacturer's specifications (including frequency and method of calibration) to ensure their accuracy.

TCS food temperatures should be monitored and controlled in the following stages:

- Receiving

- Refrigerated storage
- Freezer storage
- Cooking
- Hot and cold holding
- Cooling
- Reheating
- Packing
- Mailing/Transport

Temperatures should be measured and recorded at appropriate frequencies and corrective actions should be taken when deviations are identified.

The FDA Model Food Code temperatures are given in Part 3-2, 3-4 and 3-5. However, mail order food companies should check with local jurisdictions for any local variations.



## C. Trading standards and imported food issues

Under the U.S. Federal Food, Drug and Cosmetic Act, importers and brokers of food products intended for introduction into U.S. interstate commerce are responsible for ensuring the products are safe, sanitary and labeled according to U.S. requirements. Both imported and domestically produced foods must meet the same legal requirements in the United States. FDA is not authorized under the law to approve, certify, license, or otherwise sanction individual food importers, product labels, or shipments. Importers can import foods into the United States as long as the facilities which manufacture, process, package, or hold the products are registered with FDA, and prior notice of incoming shipments is provided to FDA. It should be noted that some facilities are exempt from registration. Imported food products are subject to FDA inspection when offered for import at U.S. ports-of-entry. FDA may detain shipments of products offered for import if the shipments are not in compliance with U.S. requirements. For an overview of the U.S. Import Program, please see: <https://www.fda.gov/Food/GuidanceRegulation/ImportsExports/Importing/default.htm>

Food imported into the United States directly to consumers by international mail is also subject to prior notice requirements (for more information see 21 CFR 1.279(c)). For an article of food sent by international mail, prior notice must be submitted and confirmed by FDA before the food is sent. The Prior Notice Confirmation Number must accompany the article of food and must appear on the Customs Declaration that accompanies the package. For further information about sending food to consumers through international mail, visit the following FDA link: <https://www.fda.gov/media/118190/download>

The FDA Food Safety Modernization Act gives FDA new tools and authorities to make certain imported foods meet the same safety standards as foods produced in the U.S. The following link outlines FDA's key new import authorities and mandates: <https://www.fda.gov/food/food-safety-modernization-act-fsma/background-fda-food-safety-modernization-act-fsma>

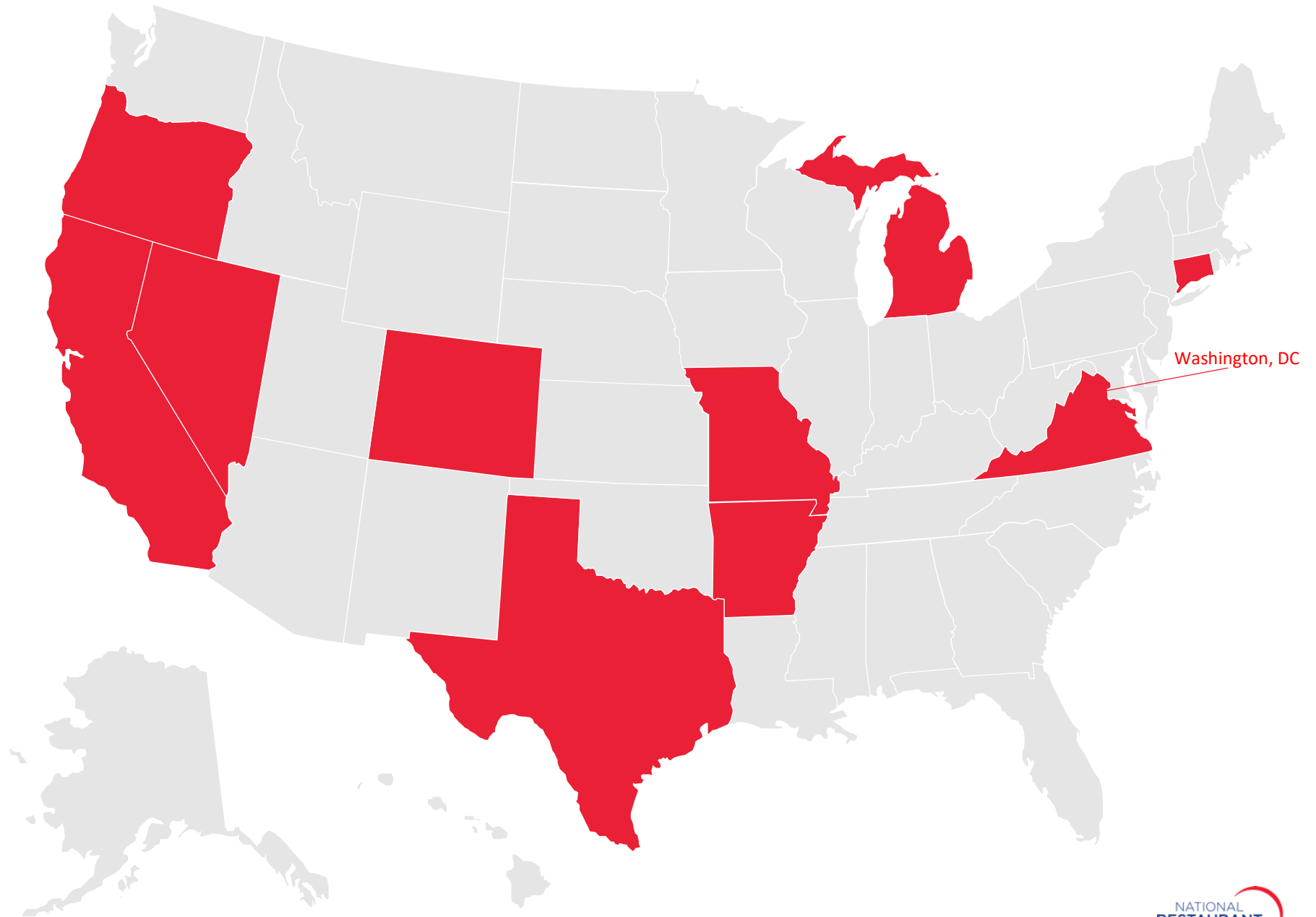
The USDA Food Safety and Inspection Service (FSIS) is responsible for ensuring domestic and imported meat, poultry, and egg products are safe, wholesome, and accurately labeled. In addition, the primary inspection responsibility for Siluriformes fish, commonly known as catfish, was transferred to FSIS on March 1, 2016, for domestic producers and on April 15, 2016, for importers.

Foreign countries which export meat, poultry, catfish, and egg products to the United States are required to establish and maintain inspection systems which are equivalent to those of the United States. The USDA FSIS provides detailed guidance on steps to ensure that these products are imported in compliance with the applicable statutes and regulations of the United States: <https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/production-and-inspection/fsis-import-procedures-for-meat-poultry-and-egg-products/fsis-import-procedures>

Here is a link to the USDA FSIS website regarding Siluriformes information: <https://www.fsis.usda.gov/wps/portal/fsis/topics/inspection/siluriformes>

# Third Party Delivery Consent Laws

- Third party delivery companies need permission to deliver a restaurant's food



# Proposed Food Delivery Protection Act

States and localities across the country have already taken steps to address many third-party delivery related issues ranging from fees and sharing customer data, to trademark and food safety issues. The Iowa Restaurant Association is seeking the broadest protections for the most Iowa establishments, as well as their patrons.

**40%**

Have had a third party delivery service represent themselves as a partner, service, or agent of their restaurant without their permission.

**92%**

of Operators want 3rd party delivery services to assume liability food safety and driver behavior



**88%**

of operators would like rules disallowing smoking, passengers and animals in food delivery vehicles



## Industry Ask:

- Require a contractual relationship between third-party delivery service and the restaurant it claims to represent online, with a system for fines or sanctions. This would include a requirement the contract outline the use of any likeness, registered trademark, menu, or other intellectual property belonging to a food service establishment.
- Clarify liability of delivery drivers and/or third-party delivery companies in the case of an accident or mishandling of product including proof of insurance by the third-party delivery service and for any driver it utilizes.
- Ensure that all liability is assumed by the third-party delivery companies once the food and/or beverages are handed to the driver and have left the premises. This includes any issues that arise from mishandling prepared food that requires certain times and temperatures before consumption.
- Require rules stating no minor children, animals or smoking are allowed in the car during delivery, as well as disallowing intermittent passenger pickups.

Contact Eric Goranson ([eric@goranson-consulting.com](mailto:eric@goranson-consulting.com)) or Jessica Dunker ([jdunker@restaurantiowa.com](mailto:jdunker@restaurantiowa.com)) with questions.

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# Iowa law sets new rules for food delivery apps

MAY 31, 2022 BY [O. KAY HENDERSON](#)

A new state law is establishing new restrictions on food delivery apps like Uber Eats, Grubhub and DoorDash.

The companies must have an agreement with a restaurant, bar or diner before their drivers can deliver food and beverages from that business. Jessica Dunker, president and C-E-O of the Iowa Restaurant Association, says that will hopefully stop what the restaurant industry calls pirating.

"It doesn't let a third party delivery service just take Mike's logo and take Mike's menu and put it in their mobile app because a consumer believes you have a relationship and Mike might not have any idea of who it is," Dunker says. "It also has a certain amount of liability because if somebody runs over someone with a car, it isn't Mike's fault."

The law establishes food safety standards for delivery drivers, too.

"You can't have your pets or your sick children or smoke or vape in the car and that you have a bag that keeps something the temperature it's supposed to be," Dunker says. "I mean, it's really, really basic."

Perhaps most basic of all — the food delivery companies will face fines if drivers are caught eating some of the food they're supposed to be delivering.

"There is a study. It was conducted by US Foods where they reached out to delivery drivers all over the country and found out 28% of them admitted to, at least once, trying the food before they delivered it," Dunker says. "We always laugh about this with the association because 28% said: 'yes,' but a percentage of them probably thought: 'I shouldn't answer this as yes' on that survey."

Dunker says food third party delivery services really didn't really help restaurants during the depths of the pandemic and restaurants aren't making money on food order through a delivery app. Restaurants are sometimes charged commissions of up to 30% on food delivery orders.

"Go pick up your food. We would love to have you have carry out. We will bring it to your car. It's so much better from safety, from cost," Dunker says. "Just pick up your food."

Dunker made her comments during a recent appearance on "Iowa Press" on Iowa PBS.

Some major cities have started regulating what food delivery services may charge restaurants. The companies say their apps are a marketing opportunity, giving restaurants another platform to reach new customers and find new revenue.

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## FEATURED STORIES

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**U-I doctor sees link between hormones and injuries in female athletes**

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**Delaware County residents raise concerns about pipeline surveyors**

**DNR studying all options for recycling wind turbine blades**

**Officials in several Iowa cities discuss panhandling ordinances**

**Officials in Spirit Lake district have plan for armed school staff**



**Tweets from @Radiolowa**

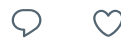
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**Radio Iowa High School Football Poll 9/26/22**

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**High school sports on the radio turns 100**

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**Iowa State hosts No. 17 Baylor to start Big 12 play**

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**Iowa opens Big Ten play at Rutgers**

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# Food Law

The newsletter of the Illinois State Bar Association's Section on Food Law

## Greetings From the Chair

BY LYNNE R. OSTFELD

As we start a new year, I want to welcome you to the Food Law Section. This has been a rough year for accomplishing much other than learning how to conduct meetings via Zoom. But, because people always need to eat and because the growing, preparation and sale of what they eat is increasingly newsworthy, this section will always have value and activities. We are needed to keep other lawyers informed

in ways to help their clients and benefit their practices.

The Food Law Section had just been organized when the pandemic hit. We will continue the work started by immediate past chair, Molly Wiltshire, and member Jane McBride, and the way the section has been organized. That is to organize the many topics touching on food law

*Continued on next page*

## 2021 Update: Third-Party Food Delivery Service Lawsuits and Legislation

BY JESSICA GUARINO & PATRICK WARTAN

The landscape of food production and delivery has seen an expedited logistical shift thanks to the COVID-19 pandemic. In fact, one study suggests as much as \$19 billion in growth of third-party delivery services resulted “purely due to the pandemic.”<sup>1</sup> Over the past five years in the United States, the market revenue for platform-to-consumer services like DoorDash, Grubhub, and UberEats has increased by a dramatic 204 percent.<sup>2</sup> Most recently, third-party food delivery companies have been the source and target

for nationwide litigation spanning an array of legal issues, from employment concerns to deceptive sales practices. Below is a description of the pending litigation and bills of concern current to the time this update was written.

### New York

#### Lawsuits

#### Fee Caps

*Doordash, Inc., Grubhub Inc., and*

*Continued on page 3*

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## Greetings From the Chair

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by subcommittees: Food Innovation, Technologies, Regulations and Litigation; Illinois Alcohol & Beverage; Illinois Farming & Craft Foods; Sustainability & Environmental; Restaurants (new).

The Food Law Section through each subcommittee will sponsor timely seminars and webcasts. We have already put on a seminar, via Zoom, Getting to Zero Food Waste, which went very well. Food Labeling & Cell Based Meat will be a webcast on October 19, 2021.

We will also continue a newsletter, which we hope to publish on a monthly basis. All members of the section are welcome to contribute to this.

Communication, questions, and comments can be dealt with through the ISBA Central Communities. To access this, sign into the ISBA website, go to “Groups & Participation” (fourth item from the left in the upper ribbon below the ISBA logo). In the third column “Get Involved” go to the first item under the heading “ISBA Central Committees.” There, go to the first heading on the left “Getting Started.” Entry numbered three is “... post a message...” Click on that. It will open a new page “Start New Thread.” Fill in the community or section to be posted to. It is a drop-down menu. The rest is self-evident.

I look forward to your participation in this Section and our providing informative, timely help to our legal community. ■

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*Lynne Ostfeld has a general civil practice and concentrates on legal assistance to small and medium sized companies and individuals. This is in the area of business law and contracts, estate planning and probate, and dispute resolution. She is also general manager of a family limited partnership involved in the production of corn, soybeans and rice in Illinois, Iowa and Louisiana, along with a hog operation in Iowa.*

*Lynne R. Ostfeld is a solo practitioner admitted to practice in the State of Illinois and before the Supreme Court of the United States of America, the United States Court of Appeals for the Seventh Circuit, and the United States District Court for the Northern District of Illinois.*

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*Currently, she is chair of the Illinois State Bar Association Food Law Section Council and a member of the ISBA Agriculture Law Section Council. She has been adjunct professor of international agri-business law at the John Marshall Law School (now University of Illinois Chicago Law School).*

*In 2017 Ostfeld was awarded the Medal of Knight of the French National Order of Merit for her work for the French in the Midwest. She continues as legal advisor to the Consulate of France in Chicago.*

## Food Law

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The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

## 2021 Update: Third-Party Food Delivery Service Lawsuits and Legislation

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*Portier, LLC v. City of New York*, No. 21-cv-7564 (S.D.N.Y. 2021)

In May 2020, the city of New York enacted price controls that set the amount of money that third-party delivery services could charge restaurants to 15 percent of the total order price, as well as 5 percent for marketing fees.<sup>3</sup> Plaintiffs assert that the city government repeatedly pushed back the expiration date for these price controls and eventually announced that the price controls would be permanent. The plaintiffs allege that the price controls are unconstitutional because they limit the freedom to pursue legitimate business enterprise, as well as violate the equal protection clause of the New York and U.S. Constitutions.

The plaintiffs state that the price controls unfairly target third-party delivery services, and that the city arbitrarily set the cap at 15 percent without an inquiry the economic impact of the price controls. Furthermore, the plaintiffs state that the irrational motivations” of the city government are made clearer by other measures that the government has undertaken against third-party delivery services, including policies that mandate licensing requirements.<sup>4</sup>

### Customer Data

*DoorDash, Inc. v. City of New York*, No. 21-cv-7695 (S.D.N.Y. 2021)

In September 2020, DoorDash filed an additional lawsuit challenging a New York City ordinance requiring DoorDash’s disclosure of customer data to restaurants, such as their names, addresses, emails and telephone numbers.<sup>5</sup> Notably, the ordinance prohibits “third-party platforms from limiting restaurants’ ability ‘to download and retain such data’ or to ‘use . . . such data for marketing or other purposes,’”<sup>6</sup> and restricts the applicability of the bill to third-party food delivery platforms. The ordinance also functionally requires customers to opt-out of the app’s sharing of their data for each specific online order.<sup>7</sup> Plaintiffs allege that the ordinance violates the First Amendment, the Contract Clause, the Takings Clause, the Dormant Commerce Clause, the Due Process Clause, and the Equal Protection

Clause of the U.S. Constitution.

### Legislation

Additionally, the New York City Council passed a series of bills in September of 2021 to address many of the issues involved in the nationwide litigation, which are detailed below. The New York City Council is the first to take action of this kind, establishing a minimum set of protections for delivery workers.<sup>8</sup>

- Int. 2294-A Establishes minimum payments

Requires the Department of Consumer and Worker Protection (DCWP) to “conduct a study to determine how much delivery workers must be paid for their work,” and to “promulgate rules establishing a method of determining minimum payments for delivery workers by January 1, 2021.”<sup>9</sup>

- Int. 2296-A Creates standards for payment

Prohibits “food delivery apps and couriers from charging delivery workers for the payments of their wages. It would also require the food apps and couriers pay their delivery workers for their work at least once per week.”<sup>10</sup>

- Int. 2298-A Bathroom access for deliveristas

Requires that, during the creation of contracts between third party delivery services and restaurants, apps “include a provision in these contracts requiring restaurants and other food service establishments to make their toilet facilities available for delivery workers’ use, as long as the delivery worker seeks to access the facilities while picking up a food or the beverage order for delivery.”<sup>11</sup>

- Int. 1846-A Ensures gratuity policies “Prohibits a food delivery app from soliciting a tip from a customer unless that app discloses conspicuously in plain language the amount or proportion of each gratuity that is provided to the delivery worker; and the manner in which gratuities are provided, whether immediately or not, and whether in cash or not . . . before or at the same time the gratuity is solicited from the customer.”<sup>12</sup>

Requires “food delivery apps to credit gratuities to the delivery worker . . . [and] notify delivery workers whether a gratuity was added to the order, how much the gratuity was, whether the customer removed it from the bill and why, if a reason was provided.”<sup>13</sup>

- Int. 2289-A Distance and route limits

Protects delivery workers by allowing them to set and change the following trip parameters: “maximum distance per trip, from a restaurant, that they will travel; and that such worker will not accept trips over any bridges or tunnels, or over particular bridges or tunnels.”<sup>14</sup>

Requires apps to provide the following information to the delivery driver prior to their acceptance of the trip: “the address where the food, beverage or other goods must be picked up; the estimated time and distance for the trip; the amount of any gratuity, if specified by the consumer; and the amount of compensation to be paid to the food delivery worker, excluding gratuity.”<sup>15</sup>

- Int. 22880-A Requires insulated food delivery bags

Requires provision of insulated bags to any delivery worker who has completed at least six deliveries for the company, free of charge.<sup>16</sup>

Grants DCWP power to suspend, revoke, and deny or refuse to renew a food delivery app license if any provision relating to this bill is violated twice in the previous two years.<sup>17</sup>

### Chicago

#### Fee Caps/Deceptive Practices

*City of Chicago v. DoorDash, Inc. and Caviar, LLC*, (Cook County Cir. Ct. 2021)

In September 2021, Chicago “officials accused DoorDash and GrubHub of harming the City’s restaurants and their customers by charging high fees and through other deceptive practices.”<sup>18</sup> These deceptive practices include the misrepresentation of various fees, from describing the delivery fee as the full price of delivery service to hiding markups of menu prices. Other allegations include accusations that DoorDash and other

third-party delivery services deceptively inflated menu prices and promotional discounts, that they list unaffiliated restaurants without the restaurants' permission while falsely portraying them as business partners, and that they deceptively used consumer tips to subsidize the platform's payment to the driver.<sup>19</sup>

### Legislation

Since the COVID-19 pandemic, the City of Chicago has passed various ordinances regulating third-party food and beverage delivery fees. The latest Ordinance (Ordinance 2021-2862) was passed on July 28, 2021 and took effect on September 24, 2021 but expired, along with all other third-party food delivery fee regulations, on October 31, 2021.

The Ordinance (2021-2862) replaced the prior temporary fee relief that the City had passed (Ordinance 2021-2592) which, in addition to other restrictions, had provided that it was unlawful for third-party delivery services to charge fees in excess of 10 percent of the total order price. Under the new regulations, it was unlawful for a third-party delivery service to charge a restaurant:

1. a fee greater than 15 percent of the total order price;
2. any amount designated as a 'delivery fee' for an online order than does not involve the delivery food or beverages;
3. any fee, commission, or cost other than as specifically stated above.

Notwithstanding this language, third-party delivery services could give restaurants an option to obtain delivery services for a total fee not to exceed 15 percent of the total order price. If the delivery services provided this option to restaurants, then such delivery services could also offer services wherein the above restrictions would not apply to such delivery services. Further, the regulations in this Ordinance do not apply to chain restaurants (i.e. restaurants with ten or more locations operating under a common business name).

Again, Chicago's food delivery fee cap regulations all expired on October 31, 2021. At this time, it is not anticipated that new fee cap regulations will be enacted in the City of Chicago.

## Massachusetts

### Fee Caps

*Commonwealth of Massachusetts v. Grubhub Holdings Inc.* (Suffolk County Superior Ct. 2021)

On January 14, 2021, the Commonwealth of Massachusetts enacted an ordinance that capped fees that third-party delivery services could charge restaurants to 15 percent of the order price. The purpose of the ordinance was to protect restaurants that had been adversely affected by the pandemic and lasted the duration of the state of emergency declared by the Governor. The Massachusetts Attorney General brought a lawsuit against Grubhub in July of 2021.<sup>20</sup> While the plaintiff alleges that delivery services like DoorDash and Uber Eats seamlessly adjusted their policies to comply with the statute, they allege that GrubHub knowingly continued to charge restaurants in excess of the 15 percent cap, thus violating the General Legislature's ban on deceptive and unfair trade practices.<sup>21</sup> GrubHub allegedly did this by tacking on unnecessary fees such as those related to customer care and fraud monitoring, increasing the total fee amount to above 15 percent, and continued to engage in this unfair practice even after restaurants complained that the company was violating the delivery fee cap.<sup>22</sup>

## San Francisco

### Fee Caps

*DoorDash, Inc. and Grubhub Inc. v. City and County of San Francisco*, Case No. 3:21-CV-05502 (N.D. Cal. 2021)

San Francisco recently enacted an ordinance that established price controls on what delivery services can charge restaurants for their services (15 percent cap), limiting the ability of delivery services and restaurants to freely negotiate prices. DoorDash and other third-party food delivery services filed suit against the City and County of San Francisco in response in July 2021.<sup>23</sup> The plaintiffs assert that the ordinance at question is economically detrimental to restaurants, consumers, and delivery drivers since it limits the service options available to restaurants, could lead to higher prices for consumers, and decreases employment opportunities for delivery drivers.<sup>24</sup>

Furthermore, the plaintiffs assert that the ordinance is unconstitutional since it violates the constitutional right to freely negotiate contracts and borders on violating the equal protection clause; the plaintiffs claim that the ordinance is targeting them because of the companies' support of Proposition 22, which was recently struck down.<sup>25</sup> ■

*Jessica Guarino, J.D., LL.M., Postdoctoral Legal Research Associate, Bock Agricultural Law & Policy Program, Department of Agricultural and Consumer Economics, University of Illinois. The authors would also like to thank our research assistant, Jacopo Demarinis, for his extensive research on this topic upon which the article relies.*

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# Food Based Country and Region of Origin Litigation

BY MICHAEL R. REESE

“There are three things that matter... Location, Location, Location.” – Lord Harold Samuel (founder of one of Britain’s largest real estate companies)

Country and region of origin litigation (also known as “COOL”, but perhaps better termed as “ROOL” or “CROOL”, depending on one’s perspective) is a growing area of concern for food companies. Globalization has resulted in a dramatic increase in the number of companies and supply chains that transcend national or regional boundaries. For many food products, however, the country (or region) of origin is of significant importance to the consumer. One need think no further than the concept of *terroir* when it comes to French wines or Columbian coffee<sup>1</sup>, or perhaps Wisconsin cheese curds or authentic Chicago hot dogs, to appreciate that the location from which a food product originates is prized by the consumer and commands a premium price.

Indeed certain states have specific laws that prohibit marketing and labeling that could cause consumer deception regarding the origin of a product. For example, the California Consumer Legal Remedies Act states that: “The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful... **Using deceptive representations or designations of geographic origin in connection with goods or services.**”). See e.g. California Civil Code §1770(a).

This article explores several recent cases involving the origin of food products. These cases underscore the risks faced by companies when supply chains cross international or regional borders and conflict with the commonly assumed loci for food production.

## Risks Associated With Changing Location of Manufacture

“Cause, remember: no matter where you go... there you are.” - Buckaroo Banzai (physicist, neurosurgeon, test pilot, and rock star)

In the past decade, there have been a spate of mergers among food companies, which have resulted in the creation of international food conglomerates.<sup>2</sup> With these mergers, the site of food manufacturing has often moved, as consolidation occurs and companies try to gain efficiencies by relocating production closer to the point of sale. Consequently, manufacturing can become divorced from the commonly believed origin of a product. As seen below, this can spell trouble for food companies since consumer confusion can lead to lawsuits.

## Case Study One – Beck’s Beer

“On victory, you deserve beer, in defeat, you need it.” – Napoleon

Bremen – a town in northern Germany – is renowned for three things: the Bremen Town musicians from the Brothers Grimm fairy tale; Werder Bremen, a soccer team in the Bundesliga league; and Beck’s beer. Only the last is broadly known.

Beck’s beer originated and was brewed in Bremen, Germany in 1873, and continued to be for the next one hundred years. But, in 2012, after consolidation among beer companies, the production of Beck’s beer sold in North America was moved to Anheuser-Busch’s facilities in St. Louis, Missouri.<sup>3</sup>

Despite the fact that Beck’s beer sold in the United States was now brewed more than 5,000 miles from Germany, the labels of Beck’s beer still claimed the beer “Originated in Germany,” was made with “German Quality,” and “Brewed Under the German Purity Law of 1516.”

In 2013, several plaintiffs filed a lawsuit against Anheuser-Busch for allegedly

misleading consumers as to the origin of Beck’s beer in the case titled, *Marty v. Anheuser-Busch Companies, LLC*. The consumers claimed they had overpaid for Beck’s beer by paying a premium price for what they believed was an imported beer when, in fact, Beck’s is a domestic beer. The consumers brought claims for violation of the laws of Florida, New York and California, where the three plaintiffs resided. The case was brought as a class action; a procedural device that allows the claims of many individuals to be represented by a single plaintiff or a small group of plaintiffs. In other words, the three plaintiffs sought to represent not only their own claims, but also the claims of all other persons who purchased Beck’s beer within the past several years. This is significant, as the damages of individual purchasers of a food products are often small, particularly when compared to the expense of litigation. However, when those damages are multiplied by the millions of persons who purchased the product, the results are often in the hundreds of millions of dollars, making the costs and risk of litigation worthwhile. As the esteemed former Seventh Circuit Judge and University of Chicago lecturer Richard Posner so articulately stated, “[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”<sup>4</sup> This is what the class action device achieves, relief for millions of consumers for their everyday transactions.

Anheuser-Busch moved to dismiss the case, arguing that no reasonable consumer could be deceived by the labeling and marketing of the product given that the labels on the beer stated that it was a “Product of USA, Brauerei Beck & Co., St. Louis, MO” and also contained the words “BRAUEREI BECK & CO., BECK’S © BEER, ST. LOUIS, MO.”<sup>5</sup> The court rejected this argument, holding that the “Product of USA”

disclaimer on the labels was blocked from plain view by the carton packaging. The court reasoned: “[A] consumer would have to either open the cartons of twelve-pack bottles and twelve-pack cans or lift the bottle from the six-pack carton in order to see the ‘Product of USA’ disclaimer ... A reasonable consumer is not required to open a carton or remove a product from its outer packaging in order to ascertain whether representations made on the face of the packaging are misleading.”<sup>6</sup>

Furthermore, the court held that “the statement “BRAUEREI BECK & CO., BECK’S © BEER, ST. LOUIS, MO” was not sufficiently descriptive to alert a reasonable consumer as to the location where Beck’s is brewed.<sup>7</sup> Although this statement contains the words “St. Louis, Mo,” the court found that “there is nothing in the statement which discloses where Beck’s is brewed.”<sup>8</sup> As a result, it denied the motion to dismiss and allowed the case to proceed.

Shortly after issuance of the court’s order denying the motion to dismiss, the parties entered into a settlement. The terms of the settlement provided for partial refunds to consumers valued at \$20 million.<sup>9</sup>

## Case Study Two – Kona Brewing Company

“Hawaii is a state as well as a state of mind.” – The Honorable Beth L. Freeman

It is important to note that litigation based on place of origin is not just limited to countries, but also includes identifiable geographic areas within countries. This concept is most evident with respect to wines, where different regions within the same country – Bordeaux versus Beaujolais in France or Napa versus Russian River in California – can make a great difference in taste and price. As the case of *Broomfield v. Craft Brew Alliance, Inc.*, case no. 17-cv-1027-BLF, 2017 WL 3838453 (N.D. Cal. Sept. 1, 2017) demonstrates, this concept is not limited to fine wines but can apply to a wide array of food products, where a food is associated with a particular region.

At issue in *Broomfield* was beer sold under the Kona Brewing Company brand name, including flavors styled as “Longboard Island Lager,” Wailua Wheat Ale,” Lemongrass Luau,” and “Hanalei Island IPA,”

among others. The packaging for each variety of beer was adorned with Hawaiian-related images such as orchid flowers, volcanoes, palm trees, surfers, and hula dancers.

Historically, the beers were brewed in Kona, Hawaii. In 2010, however, the company was acquired by a publicly traded conglomerate, and the manufacture of Kona beers sold on the U.S. mainland was transferred to Oregon, New Hampshire, and Tennessee.

In 2017, three consumers filed a class action in federal court, alleging that the Kona branded beer sold on the mainland was misleadingly labeled because it led consumers to believe that the beer was brewed in Hawaii when it was not. The consumers asserted claims under state consumer protection laws, including California’s Consumer Legal Remedies Act (cited above in the introduction), which expressly prohibits misrepresentations as to the origin of a product.

The defendant – Craft Brew Alliance, Inc. (“CBA”) – moved to dismiss the complaint, arguing that no reasonable consumer would either believe or care that the beer was brewed in Hawaii.<sup>10</sup> The court disagreed, holding:

Hawaii is a state as well as a state of mind. When adults want to escape the mainland, they can go to their local grocery store, purchase a package of Kona Brewing Company beer, and feel as though they are transported to the beaches of Hawaii. This case is about the importance of where that beer actually is brewed.<sup>11</sup>

CBA also argued that it disclaimed that the product was brewed in Hawaii by listing on the bottles themselves all of the places the beers are made including on the mainland.<sup>12</sup> The court rejected this argument and held that the disclaimer on the labels of Kona beer is not enough to contradict the representations on the outer packaging and that, under well-established legal precedent, reasonable consumers are not required to investigate to ascertain whether representations made on the face of the packaging are misleading.<sup>13</sup>

The court further explained:

The disclaimer on the Kona beer label lists five locations,

including “Kona, HI, Portland, OR, Woodinville, WA, Portsmouth, NH, and Memphis, TN” which encompass “all locations where the beers are brewed.” A list of multiple locations on a product label does not amount to an explicit statement that the beer is brewed and packaged at a particular location. ... Particularly the inclusion of Kona, Hawaii on the list mitigates the disclaimer’s effectiveness, since Plaintiffs allege that no bottled or canned beer bearing the Kona label is actually brewed in Kona, Hawaii. Therefore, even if the Court was to consider the label in the context of the packaging, a reasonable consumer could still be deceived because the list of brewery locations does not “alert a reasonable consumer as to the location where [Kona beer] is brewed.”<sup>14</sup>

The court then denied the majority of CBA’s remaining arguments and allowed the case to proceed. The case ultimately resulted in a class action settlement.<sup>15</sup>

## Risks Associated With International Supply Chains

“The Supply Chain stuff is really tricky.” – Elon Musk (CEO of Tesla)

Country of origin litigation also is a risk where food production involves an international or multi-regional supply chain. This is especially the case where a food or ingredient commands a premium when it comes from a particular country or region.

## Case Study – Filippo Berio Olive Oil

Filippo Berio is a popular brand of olive oil that originated in Lucca, Italy in 1867. The Salov North America Corporation imports and markets the Filippo Berio brand olive oil in the United States.

The words “Imported from Italy” appeared prominently on the front label of each bottle of Filippo Berio olive oil sold in the United States. However, the olives from which the oil is made are grown and pressed in other countries such as Spain, Greece and Tunisia, after which the oils are shipped to Italy where they are blended and bottled for export.

In 2014, a consumer filed a lawsuit in

federal court in the Northern District of California, titled *Kumar v. Salov North America Corp.*, case no. 14–CV–2411–YGR, 2015 WL 457692 (N.D. Cal. Feb. 3, 2015). He alleged that the “Imported from Italy” statement on the product labels was false and misleading, and violated federal regulations and state law concerning country of origin and misbranding of food products.<sup>16</sup>

The company defendant moved to dismiss, arguing that “no reasonable consumer would understand ‘Imported from Italy’ to mean that the product was made entirely from Italian-grown olives.”<sup>17</sup> The defendant also argued that the back label of the bottle disclosed that the olives did not come solely from Italy but rather also originated from Spain, Greece and Tunisia.<sup>18</sup>

The court rejected these arguments by the company, noting that reasonable consumers should not be expected to look beyond misleading representations on the front of the bottle to discover the truth from smaller text displayed elsewhere.<sup>19</sup> The court refused to dismiss the complaint, concluding that the plaintiff should be given an opportunity to show at trial that reasonable consumers perceive “Imported from Italy” to mean that the product was made exclusively from olives grown in Italy.<sup>20</sup>

After several more rounds of litigation, including a successful motion to certify the case as a class action, the matter settled with the company changing the labelling and paying partial refunds to consumers.<sup>21</sup>

## Conclusion

Jake: How are you gonna get the band back together? Those cops have your name, your address

Elwood: They don’t have my address. I falsified my renewal. I put down 1060 West Addison.

Jake: 1060 West Addison? That’s Wrigley Field.

Jake and Elwood Blues (a.k.a. The Blues Brothers)

As the above cases reveal, telling the truth about the origin of a food product is important. While this may seem obvious, it becomes trickier when the “origin” of a product has changed, or is murky because of what can be implied through the use of words or images that could convey the

product is from a place that it in fact, is not.

When food companies change the site of manufacturing either through mergers or changes in supply chain, they need to be aware that consumers’ expectations regarding product origin might no longer be met. This could result in significant exposure to COOL, ROOL, or CROOL liability.

Furthermore, even disclosures as to the new origin of a product may be deemed legally inadequate, particularly if the disclosures are provided in a manner that are not readily evident to the consumer, such as on the back of a product or in small print.

Accordingly, with any changes to production or supply chains, it is important for a manufacturer to review the marketing and labeling of any food products that may have strong association to a place of origin. Consumer surveys (either in-house or through outside third-parties) are recommended to determine whether changes in sourcing or location of manufacturing potentially could mislead consumers. If so, it is important to update the marketing and labeling to clearly inform consumers of the new origin of the product. Otherwise, it could result in class action litigation due to consumer confusion. In cases of changes to the source of supply or site of manufacturing, it is *caveat venditor* or seller beware. ■

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# The Only Bad Burger Is the One the Government Bans: ISBA Food Law Section Council CLE Presents Latest Developments in Regulating Plant-Based Food Labels and Cell-Based Meats

BY MOLLY L. WILTSHIRE

The Food Law Section Council welcomed Laura Braden, Esq., the lead regulatory counsel for international non-profit The Good Food Institute, to discuss the latest legal developments in food labeling. Plant-based products and alternatives to “traditional” dairy and meat-based proteins have become ubiquitous in our supermarkets and restaurants. In response to these developments, the legal landscape at the state and federal level has reacted. In multiple forums, interest groups have petitioned legislators and regulators to proscribe or require specific wording on the product labels, with varying results and court proceedings. More recently, as cell-based or cultivated meat, poultry, and seafood products get closer to launching in the United States, the federal regulators have been called to determine a regulatory scheme to ensure consumer safety. Ms. Braden provided an overview and looked ahead at what industry and consumers can expect in the coming year.

**Plant-based Product Labels:** Just like most of us are familiar with “gluten-free bread,” a label like “veggie burger” tells consumers the product is made from, e.g., pea or soy protein instead of an animal-sourced protein. Lawsuits have been filed around the country that address whether labels on products like veggie burgers, alternative milks, and plant-based dairy products are misleading to consumers. One recent case involved Miyoko’s “cultured vegan butter” “made from plants”: *Miyoko’s Kitchen Inc. v. Ross* (N.D. Cal. 3:20-cv-00893). The manufacturer,

Miyoko’s, challenged a California law that directed California’s Department of Food and Agriculture to enforce against products sold in California the labeling requirements for “butter” according to the U.S. Food Drug and Cosmetic Act and the U.S. Food and Drug Administration’s (“FDA”) regulations for “cultured dairy products” “resembling milk products.” The federal district court in California ruled that while the butter-related federal regulations had been in effect since the 1920s, “language evolves,” and the use of the term butter in Miyoko’s cultured vegan butter label did per se mislead consumers. The State had no evidence of consumers’ confusion around the product, and so the law was unenforceable against that product.

Similar labels in other states remain susceptible to consumer protection claims, however. In 2018-2019, for instance, several states passed laws restricting plant-based protein products from using terms on their labels if the products were not derived from harvested livestock. At the same time, regulatory petitions have sought clarification around such labeling expectations. In 2017, The Good Food Institute filed a Citizen Petition requesting guidance on how foods may be named by reference to the names of other standard foods, like almond milk or soy sausage. The FDA did not respond to the full petition but subsequently asked for public comment on the use of dairy terms in the labels of non-dairy alternatives. The agency has indicated that it intends to publish Draft Guidance on the Labeling of Plant-based Milk Alternatives in June 2022.

In September 2021, the U.S. Department of Agriculture (“USDA”) denied a petition filed by the U.S. Cattlemen’s Association to ban plant-based products’ use of the terms “meat” and “beef.”

**Federal Oversight of Cultivated Meat:** Cultivated meat, poultry, and seafood products are not yet on the market in the United States, but federal agencies are developing regulatory guidance for producers. In March 2019, the FDA and USDA entered a formal agreement to establish a “Joint Regulatory Framework” for cell-based meats. Under that framework, FDA will oversee cell collection, cell banks, cell growth, and differentiation for all products. USDA will take over responsibility at “point of harvest” – overseeing further processing, pre-approving labels, and conducting inspections. These agencies also have committed to developing “joint principles” for cultured meat product labeling. In September 2021, USDA-FSIS published its Advance Notice of Public Rulemaking on cultivated meat and poultry labeling. The Advance Notice requests economic and consumer data in support of potential labeling rules. USDA is expected to consider First Amendment boundaries, existing and potentially changing Standards of Identity (21 C.F.R. § 101.3), and the use of common or usual meat and poultry products on these new products’ labels.

**Looking Ahead:** The legal landscape on this topic is evolving. As Ms. Braden noted, we expect in the coming months to receive FDA’s guidance on labeling plant-based



milks, a rulemaking from USDA on cell-based/cultivated meat, and as always, the potential for state laws and litigation over labeling. ■

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*and appellate court experience in federal and state courts and has won a number of pre- and post-trial motions for her clients.*

*Molly founded the ISBA Food Law Section Council in 2019 and served as its inaugural chair. Her passion for food law started from her background in animal and environmental litigation. Molly has counseled a range of food clients on contract and warranty disputes and federal food inspection and production standards.*

*In addition to commercial litigation and food law, Molly is committed to diversity and inclusion in the legal profession, and is a member of the Institute*

*for Inclusion in the Legal Profession (IILP) and the Leadership Council on Legal Diversity (LCLD). She has presented to various groups on topics including diversity and inclusion, the attorney-client privilege, and ethical rules regarding confidentiality. Molly received her J.D. from the University of Chicago Law School and her B.A., magna cum laude, from Columbia University.*

## Member Spotlight: Angela Peters

My interest in the ISBA Food Law Section stems from many years being a vegan, getting involved in issues related to animal cruelty, food waste, plant based foods (faux meats and milk), backyard raising of crops for sale, water health, soil health, pesticides and herbicides, fertilizers, and impact of runoff from hog farming onto organic farms. This just names a few issues that I have

much interest in and energy to be involved in. Inspiration for this Food Law section was created on the ISBA Environmental Law Section. So many of the topics touch profoundly on environmental concerns also.

Admitted to bar, 1985.

Education: University of Illinois, Chicago (B.A. Philosophy, 1973); IIT-Chicago Kent College of Law (J.D. 1985).

Publications: Co-Author: "Foundational Requirements for Admissibility of Breach Machine Results," John Marshall Law Review, February, 1989. ■

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*Across the country, lawmakers are considering legislation that could change how third-party marketplaces work and work with restaurants*

## **NEWS**

### **6 ways cities and states are trying to regulate third-party marketplaces**

*Legislation in California, Rhode Island and NYC could change the way Grubhub, DoorDash, Uber Eats and Postmates operate.*

Gloria Dawson | Feb 13, 2020

It seems operators' concerns have been heard. For the past few years, many in the restaurant industry have grumbled about how third-party marketplaces operate. Marketplaces such as DoorDash, Uber Eats, Postmates and Grubhub keep customers' data and list restaurants without permission, among other things. But across the country, lawmakers are considering legislation that could change how third-party marketplaces work and work with restaurants.

### **In California, a bill would require third-party marketplaces to share customer data with restaurants.**

Bill AB 2149, proposed by California State Assemblywoman Lorena Gonzalez (D-San Diego), would authorize a food delivery platform to share consumers' email address, telephone numbers, and delivery address with the food facility the consumer has ordered from.

"One-on-one engagement—hearing feedback from customers, being responsive to complaints, addressing the quality of service and delivery—it's critical to ensuring a good experience," said Greg Dulan, owner of Dulan's Soul Food Kitchen and Hotville Chicken in Los Angeles in a news statement in support of the bill. "It is hard to do that if we don't know who our customers are—this bill will fix that."

AB 2149 would also prohibit restaurants from being listed on delivery apps without a prior agreement in place.

### **In Rhode Island, a bill would prohibit third-party marketplaces from listing non-partnered restaurants.**

House Bill 7414 would also prohibit third-party marketplaces from listing restaurants on apps without an agreement.

"This act would prohibit third-party delivery services from using any likeness or intellectual property of a merchant without written consent. This act would require a

third-party delivery service to register to do business in Rhode Island," the bill states.

The bill proposes that merchants, such as restaurants, can bring action against the provider in superior court to recover actual damages or up to \$5,000, whichever is greater. The bill also proposes that any third-party service who violates this chapter shall pay \$1,000 per violation per day in fines.

### **In New York City, legislation would require third-party delivery players to disclose tipping practices .**

In January, New York City Council member Ritchie Torres introduced legislation that would require third-party delivery providers to disclose how much of the tip goes to drivers.

In a tweet , Torres said New York City "can no longer afford to turn a blind eye to app-based delivery companies stripping workers of their hard-earned tips. It's wage theft, plain & simple, and the public has a right to hold businesses accountable for exploiting their workers and stealing their wages."

The New York City council has held oversight hearings on the impact of food delivery apps and ghost kitchens . The committee has said it is set to announce its first set of legislation governing food delivery platforms shortly.

### **In California, AB5 is changing how third-party marketplaces classify their workers.**

This law , which went into effect on January 1, 2020, makes it harder for companies like Uber and Postmates to classify drivers and couriers as independent contractors.

This month, a federal judge rejected a request by Uber and the Postmates to block the law from taking effect.

This law, authored by Assemblywoman Gonzalez, seeks to give couriers workplace protections and benefits, like minimum wage, paid sick days, health insurance benefits and workman's compensation, as well as the ability to unionize. But it may have the unintended consequence of increasing delivery costs.

## **Pennsylvania, New York and Illinois are scrutinizing sales tax**

After discovering that many third-party marketplaces were not charging sales tax on delivery fees, lawmakers in Pennsylvania, New York and Illinois are demanding clarity on the issue and compliance by third-party marketplaces.

## **Illinois is looking at food safety**

Illinois Restaurant Association announced its "top concerns with third-party delivery services surround food safety, operator knowledge and consent to engage delivery services, transparency to customers, and honest fee structures for both restaurants and consumers."

As Crain's Chicago Business notes, currently, there is no language for a statewide bill in Illinois. But it could come soon.

As Sam Toia, president and CEO of the IRA told Crain's "We look forward to working with all stakeholders to find practical solutions that benefit restaurants and delivery services while keeping consumers safe."

Email Gloria Dawson at [gloria.dawson@informa.com](mailto:gloria.dawson@informa.com)

Follow her on Twitter: [@GloriaDawson](https://twitter.com/GloriaDawson)

**Source URL:** <https://www.nrn.com/news/6-ways-cities-and-states-are-trying-regulate-third-party-marketplaces>



United States ▼

## Independent Contractor Agreement - United States

DoorDash Dashers

Last Updated: January 2022

This Agreement (“Agreement”) is made and entered into by and between you, the undersigned contractor (“CONTRACTOR”), an independent contractor engaged in the business of performing the services contemplated by this Agreement, and DoorDash, Inc. (“DOORDASH,” “COMPANY,” “we,” “us,” or “our”). CONTRACTOR may enter this Agreement either as an individual sole proprietor or a corporate entity. This Agreement will become effective on the date it is accepted regardless of whether you are eligible to, or ever do, perform any Contracted Services.

**IMPORTANT: PLEASE REVIEW THIS AGREEMENT CAREFULLY. IN PARTICULAR, PLEASE REVIEW THE MUTUAL ARBITRATION PROVISION IN SECTION XII, AS IT REQUIRES THE PARTIES (UNLESS YOU VALIDLY OPT OUT OF ARBITRATION, AS PROVIDED BELOW) TO RESOLVE DISPUTES ON AN INDIVIDUAL BASIS, TO THE FULLEST EXTENT PERMITTED BY LAW, THROUGH FINAL AND BINDING ARBITRATION. BY ACCEPTING THIS AGREEMENT, YOU ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTOOD ALL OF THE TERMS, INCLUDING SECTION XII, AND HAVE TAKEN THE TIME AND SOUGHT ANY ASSISTANCE NEEDED TO COMPREHEND THE CONSEQUENCES OF ACCEPTING THIS AGREEMENT.**

**PLEASE READ THE TERMS OF THIS AGREEMENT CAREFULLY. BY ACCESSING THE DOORDASH PLATFORM AS A DASHER, YOU AGREE TO BE BOUND BY (1) THIS AGREEMENT, (2) DOORDASH E-SIGN CONSENT AGREEMENT, (3) [DOORDASH DASHER PRIVACY POLICY](https://help.doordash.com/dashers/s/privacy-policy-us?language=en_US)**

**([https://help.doordash.com/dashers/s/privacy-policy-us?language=en\\_US](https://help.doordash.com/dashers/s/privacy-policy-us?language=en_US)), AND (4) [DOORDASH CONSUMER TERMS OF SERVICE](https://help.doordash.com/consumers/s/terms-and-conditions-us?language=en_US) ([https://help.doordash.com/consumers/s/terms-and-conditions-us?language=en\\_US](https://help.doordash.com/consumers/s/terms-and-conditions-us?language=en_US)).**

### RECITALS

DOORDASH is a company that provides an online marketplace platform using web-based technology that connects contractors, restaurants and/or other businesses, and consumers (“DOORDASH platform” or “platform”). DOORDASH’s software permits registered users to place orders for food and/or other goods from various restaurants and businesses. Once such orders are made, DOORDASH software notifies contractors that a Delivery Opportunity is available and the DOORDASH software facilitates completion of the delivery. DOORDASH is not a restaurant, food delivery service, or food preparation business.

CONTRACTOR is an independent provider of delivery and other services, authorized to conduct the services contemplated by this Agreement in the geographic location(s) in which CONTRACTOR operates. CONTRACTOR possesses all equipment and personnel necessary to perform the delivery and any other services contemplated by this Agreement in accordance with applicable laws. CONTRACTOR desires to enter into this Agreement for the right to receive delivery opportunities made available through DOORDASH'S platform. CONTRACTOR understands and expressly agrees that they are not an employee of DOORDASH or any restaurant, other business or consumer and that they are providing delivery and other services on behalf of themselves and their business, not on behalf of DOORDASH. CONTRACTOR understands (i) they are free to select the times they wish to be available on the platform to receive delivery opportunities; (ii) they are free to negotiate their compensation by among other things accepting or rejecting the opportunities transmitted through the DOORDASH platform by consumers, and can make such decisions to maximize their opportunity to profit; and (iii) they have the sole right to control the manner in which deliveries are performed and the means by which those deliveries are completed.

In consideration of the above, as well as the mutual promises described herein, DOORDASH and CONTRACTOR (collectively “the parties”) agree as follows:

## **I. PURPOSE OF THE AGREEMENT**

1. This Agreement governs the relationship between DOORDASH and CONTRACTOR, and establishes the parties’ respective rights and obligations. In exchange for the promises contained in this Agreement, CONTRACTOR shall have the right and obligation to perform the “Contracted Services” as defined herein. However, nothing in this Agreement requires CONTRACTOR to perform any particular volume of Contracted Services during the term of this Agreement, and nothing in this Agreement shall guarantee CONTRACTOR any particular volume of business for any particular time period.
2. CONTRACTOR shall have no obligation to accept or perform any particular “Delivery Opportunity” (as that term is defined herein) offered through the DOORDASH platform. However, once a Delivery Opportunity is accepted, CONTRACTOR shall be contractually bound to complete the Contracted Services in accordance with all consumer and merchant specifications and the terms laid out in this Agreement.

## **II. CONTRACTOR'S OPERATIONS**

1. CONTRACTOR represents that they operate an independently established enterprise that provides delivery and other services, and that they satisfy all legal requirements and have all necessary licenses and permits necessary to perform any services contemplated by this Agreement. As an independent contractor/enterprise, CONTRACTOR shall be solely responsible for determining how to operate their business and how to perform the Contracted Services.
2. CONTRACTOR agrees to provide DOORDASH with information that is true and accurate, and to promptly inform DOORDASH should any information require updating.
3. CONTRACTOR agrees to fully perform the Contracted Services in a timely, efficient, safe, and lawful manner. DOORDASH shall have no right to, and shall not, control the manner, method or means CONTRACTOR uses to perform the Contracted Services. Instead, CONTRACTOR shall be solely responsible for determining the most effective, efficient, and safe manner to perform the Contracted Services, including determining the manner of pickup, delivery, and route selection.
4. As an independent business enterprise, CONTRACTOR retains the right to perform services (whether delivery services or other services) for other businesses, and CONTRACTOR represents that they advertise and hold themselves out to the general public as a separately established business. The parties recognize that they are or may be engaged in similar arrangements with other businesses to supply the same or similar services and nothing in this Agreement shall prevent CONTRACTOR or DOORDASH from doing business with others. DOORDASH does not have the right to restrict CONTRACTOR from performing services for CONTRACTOR's own business, other businesses, customers, or consumers at any time, even if such business directly competes with DOORDASH, and even during the time CONTRACTOR is logged into the DOORDASH platform so long as such services do not otherwise violate this agreement. CONTRACTOR's right to compete with DOORDASH, or perform services for businesses that compete with DOORDASH, will survive even after termination of this Agreement.
5. CONTRACTOR is not required to purchase, lease, or rent any products, equipment or services from DOORDASH as a condition of doing business with DOORDASH or entering into this Agreement.
6. CONTRACTOR agrees to immediately notify DOORDASH in writing at [www.doordash.com/help/](http://www.doordash.com/help/) (<http://www.doordash.com/help/>) if CONTRACTOR's right to control the manner or method they use to perform services differs from the terms contemplated in this Section.
7. When signing up to be a user of the DOORDASH platform, CONTRACTOR's information will be used to create an account. CONTRACTOR may not sign up to be a Dasher more than once by creating multiple accounts.
8. CONTRACTOR acknowledges that when engaging with the DOORDASH platform on a mobile device, data usage and rates may apply.
9. By using the DOORDASH platform, CONTRACTOR also agrees to be bound by the DOORDASH Customer Terms of Service ([https://help.doordash.com/consumers/s/terms-and-conditions-us?language=en\\_US](https://help.doordash.com/consumers/s/terms-and-conditions-us?language=en_US)) and that any breach of the DOORDASH Customer Terms of Service will be considered a breach of this Agreement. However, to the extent that this Agreement and the DOORDASH Customer Terms of Service conflict, the terms of this Agreement shall govern.
10. To prevent unauthorized access to CONTRACTOR's account and to prevent unauthorized use of the DOORDASH platform, CONTRACTOR agrees to protect and keep confidential their email, phone number, password, or other means of accessing their account via the DOORDASH platform. CONTRACTOR



acknowledges that unauthorized use of CONTRACTOR's account, email, phone number and password could lead to financial loss and access to CONTRACTOR's sensitive personal and account information. If CONTRACTOR discloses their account information, user ID, and/or password to any person or entity, CONTRACTOR assumes all risks and losses associated with such disclosure. If CONTRACTOR believes someone may attempt to use or has accessed CONTRACTOR's account without CONTRACTOR's permission, or that any other unauthorized use or security breach has occurred, CONTRACTOR agrees to immediately notify us at [www.doordash.com/help/](http://www.doordash.com/help/) (<http://www.doordash.com/help/>).

### III. CONTRACTED SERVICES

1. From time to time, the DOORDASH platform will notify CONTRACTOR of the opportunity to complete deliveries from restaurants or other businesses to consumers in accordance with orders placed by consumers through the DOORDASH platform or directly from restaurants or other businesses (each of these is referred to as a "Delivery Opportunity"). CONTRACTOR agrees by logging into the DOORDASH platform as a Dasher, CONTRACTOR is making themselves available to receive Delivery Opportunities, which CONTRACTOR may accept or reject. For each Delivery Opportunity accepted by CONTRACTOR ("Contracted Service"), CONTRACTOR agrees to proceed to the restaurant or other business to retrieve the order in a safe and timely fashion, ensure the order is accurately filled according to the consumer, restaurant, and/or business specifications, and complete delivery of the order to consumers in a safe and timely fashion without taking any action that would change the quality or presentation of the items being delivered and while adhering to reasonable expectations on food safety, quality and health standards as required by the restaurants or other businesses and/or applicable law. A Delivery Opportunity is considered complete when the order has been delivered to the ordering party, or, and only when applicable, placed in a designated area as selected by the consumer, in addition to any other task required for completion of the delivery. CONTRACTOR agrees to timely mark a delivery as completed through the DOORDASH platform upon delivery of the order to the ordering party.

2. CONTRACTOR understands and agrees that the parameters of each Contracted Service are established by the consumer, restaurant, and/or other business, not DOORDASH, and represent the end result desired, not the means by which CONTRACTOR is to accomplish the result. CONTRACTOR has the right to cancel a Contracted Service when, in the exercise of CONTRACTOR's reasonable discretion and business judgment, it is appropriate to do so. Notwithstanding the foregoing, CONTRACTOR agrees to maintain both a customer rating and a completion rate found [here \(https://help.doordash.com/dashers/s/article/Dasher-Ratings-Explained?language=en\\_US\)](https://help.doordash.com/dashers/s/article/Dasher-Ratings-Explained?language=en_US) as of the date this Agreement becomes effective. Failure to satisfy this obligation constitutes a material breach of this Agreement, and DOORDASH shall have the right to terminate this Agreement and/or deactivate CONTRACTOR'S account.

3. CONTRACTOR acknowledges that DOORDASH has discretion as to which, if any, Delivery Opportunity to present to CONTRACTOR, just as CONTRACTOR has the discretion whether and to what extent to accept any Delivery Opportunity.

4. CONTRACTOR warrants that CONTRACTOR is engaged in CONTRACTOR's own business, separate and apart from DOORDASH'S business, which is to provide an online marketplace platform using web-based technology that connects contractors, restaurants and/or other businesses, and consumers.

5. CONTRACTOR authorizes DOORDASH, during the course of a Contracted Service, to communicate with CONTRACTOR, consumer, and/or restaurant or other business to assist CONTRACTOR, or facilitate direct communication between CONTRACTOR and the consumer, restaurant, and/or business, to the extent permitted by CONTRACTOR, in facilitating deliveries. However, under no circumstances shall DOORDASH be authorized to control the manner or means by which CONTRACTOR performs delivery services or other services contemplated under this Agreement. This includes, but is not limited to, the following:

- a. DOORDASH does not require any specific type, or quality, of CONTRACTOR's choice of transportation.
- b. CONTRACTOR does not have a supervisor or any individual at DOORDASH to whom they report.
- c. CONTRACTOR is not required to use any signage or other designation of DOORDASH on their vehicle or person at any point in their use of the platform to perform the Contracted Services.
- d. DOORDASH has no control over CONTRACTOR's personal appearance.
- e. CONTRACTOR does not receive performance evaluations by DOORDASH.

6. CONTRACTOR may use whatever payment method they choose to purchase items to be delivered to consumers, including but not limited to CONTRACTOR's personal credit or debit card, cash, or a prepaid card. CONTRACTOR may use, for CONTRACTOR's convenience, the prepaid card solely for purchasing items to be delivered to consumers. If CONTRACTOR chooses to use their personal credit or debit card or cash, CONTRACTOR shall invoice DOORDASH on a weekly basis and DOORDASH agrees to pay all invoices within 10 days of receipt.

7. In the event CONTRACTOR fails to fully perform any Contracted Service (a "Service Failure") due to CONTRACTOR's action or omission, CONTRACTOR shall forfeit all or part of the agreed upon fee for that service. If CONTRACTOR disputes responsibility for a Service Failure, the dispute shall be resolved pursuant to the "Payment Disputes" provision below.

8. CONTRACTOR agrees to immediately notify DOORDASH in writing by submitting a Support inquiry through <https://help.doordash.com/s/> (<https://help.doordash.com/s/>) if CONTRACTOR's services or scope of work differ in any way from what is contemplated in this Section.

#### **IV. CONTENT**

1. Parts of the DOORDASH platform enable CONTRACTOR to provide feedback, text, photos, audio, video, information, and other content (collectively, "Content"). By providing Content, in whatever form and through whatever means, CONTRACTOR grants DOORDASH a non-exclusive, worldwide, royalty-free, irrevocable, perpetual, sub-licensable and transferable license to copy, modify, prepare derivative works of, distribute, publish and otherwise exploit, that Content, without limitation. If Content includes personal information, DOORDASH's [Privacy Policy](https://help.doordash.com/dashers/s/privacy-policy-us?language=en_US) ([https://help.doordash.com/dashers/s/privacy-policy-us?language=en\\_US](https://help.doordash.com/dashers/s/privacy-policy-us?language=en_US)) describes how DOORDASH uses that personal information. Where DOORDASH pays for the creation of Content or facilitates its creation, DOORDASH may own that Content, in which case supplemental [terms or disclosures](https://help.doordash.com/dashers/s/article/Content-and-Likeness-Consent-Release?) (<https://help.doordash.com/dashers/s/article/Content-and-Likeness-Consent-Release?>

[language=en\\_US](#)), will say that. CONTRACTOR is solely responsible for all Content that CONTRACTOR provides and warrants that CONTRACTOR either own it or is authorized to grant DOORDASH the rights described in these Terms. CONTRACTOR is responsible and liable if any of CONTRACTOR's Content violates or infringes the intellectual property or privacy rights of any third party. Content that is, among other things, discriminatory, obscene, harassing, deceptive, violent, or illegal is prohibited, and Content must comply with all applicable DOORDASH policies, including but not limited to the DOORDASH Content Policy. CONTRACTOR agrees that DOORDASH may make available services or automated tools to translate Content and that CONTRACTOR's Content may be translated using such services or tools.

## **V. RELATIONSHIP OF PARTIES**

1. The parties acknowledge and agree that this Agreement is between two co-equal, independent business enterprises that are separately owned and operated. The parties intend this Agreement to create the relationship of principal and independent contractor and not that of employer and employee. The parties are not employees, agents, joint venturers, or partners of each other for any purpose. Neither party shall have the right to bind the other by contract or otherwise except as specifically provided in this Agreement.
2. DOORDASH shall not have the right to, and shall not, control the manner or the method of accomplishing Contracted Services to be performed by CONTRACTOR. The parties acknowledge and agree that those provisions of the Agreement reserving ultimate authority in DOORDASH have been inserted solely for the safety of consumers and other CONTRACTORS using the DOORDASH platform or to achieve compliance with federal, state, or local laws, regulations, and interpretations thereof.
3. DOORDASH shall report all payments made to CONTRACTOR on a calendar year basis using an appropriate IRS Form 1099, if the volume of payments to CONTRACTOR qualifies. CONTRACTOR agrees to report all such payments and any cash gratuities to the appropriate federal, state and local taxing authorities.

## **VI. PAYMENT FOR SERVICES**

1. Unless a different rate of pay is negotiated or CONTRACTOR is notified otherwise by DOORDASH in writing or except as provided herein, CONTRACTOR will receive payment per accurate Contracted Service completed in an amount consistent with the publicly provided pay model, which CONTRACTOR can view [here](https://help.doordash.com/dashers/s/article/How-is-Dasher-pay-calculated) (<https://help.doordash.com/dashers/s/article/How-is-Dasher-pay-calculated>). DOORDASH reserves the right to adjust or withhold all or a portion of payment owed to CONTRACTOR if DOORDASH reasonably believes that CONTRACTOR has defrauded or abused, or attempted to defraud or abuse, the platform. From time to time, DOORDASH may offer opportunities for CONTRACTOR to earn more money for performing Contracted Services at specified times or in specified locations. Nothing prevents the parties from negotiating a different rate of pay, and CONTRACTOR is free to accept or reject any such opportunities to be paid at different rates.
2. DOORDASH's online credit card software may permit consumers to add a gratuity to be paid to CONTRACTOR, and consumers can also pay a gratuity to CONTRACTOR in cash. CONTRACTOR shall retain 100% of any gratuity paid by the consumer, whether by cash or credit card. DOORDASH acknowledges it has no

right to interfere with the amount of gratuity given by the consumer to the CONTRACTOR.

3. For purchases that involve consumer payment via the DOORDASH platform, DOORDASH will process payments made by consumers and transmit applicable payment for the Contracted Services to CONTRACTOR. Payments for all Contracted Services completed in a given week, less the amount of cash payments that CONTRACTOR receives from cash-based Contracted Services they complete, will be transferred via direct deposit on no less than a weekly basis unless DOORDASH notifies CONTRACTOR otherwise in writing or CONTRACTOR opts to receive payments sooner via Fast Pay or the DasherDirect program.

4. DOORDASH offers CONTRACTOR the option to receive payments daily to a debit card via Fast Pay. For a fee of \$1.99 per transaction, DOORDASH will transfer these funds earlier than the scheduled weekly payout. By electing to use Fast Pay, CONTRACTOR agrees to be charged \$1.99 per transaction and bound by any and all conditions set forth [here \(https://help.doordash.com/dashers/s/article/What-is-Fastpay?language=en\\_US\)](https://help.doordash.com/dashers/s/article/What-is-Fastpay?language=en_US).

5. CONTRACTOR is responsible for verifying the accuracy of their bank account and/or debit card information to receive timely payments. DOORDASH is not responsible for lost or late payments due to incorrect routing and/or account information.

6. By agreeing to any separate contract with a third-party that will process payments owed under this Agreement to CONTRACTOR, CONTRACTOR agrees that DOORDASH shall discharge its payment obligations to CONTRACTOR by funding the amounts payable and directing the third-party processor to pay such funded amounts to CONTRACTOR. After DOORDASH funds and directs payment, any continuing refusal by the third-party processor to issue payment to CONTRACTOR shall be the responsibility of CONTRACTOR to resolve.

7. From time to time, DOORDASH may offer CONTRACTOR a cash-based Delivery Opportunity. The order subtotal and CONTRACTOR earnings from those Delivery Opportunities will be deducted from CONTRACTOR's earnings balance in the DOORDASH platform, and CONTRACTOR will keep the cash provided by the customer. CONTRACTOR is responsible for tracking, reporting, and paying appropriate taxes on all tips received from cash-based Delivery Opportunities.

8. Notwithstanding the terms of Section VI(1) - (3), fulfillment orders placed directly with restaurants or other businesses rather than through the platform or [doordash.com \(http://doordash.com/\)](http://doordash.com/) ("Fulfillment Orders") may be subject to a different payment model. More information regarding Fulfillment Orders may be found [here \(https://doordash.squarespace.com/doordash-drive/\)](https://doordash.squarespace.com/doordash-drive/). Nothing prevents the parties from negotiating a different rate of pay for a Fulfillment Order, and the CONTRACTOR is free to accept or reject Fulfillment Order opportunities. As with all Delivery Opportunities, CONTRACTOR shall retain 100% of any gratuity paid by the consumer for a Fulfillment Order. DoorDash's software may not always include an option to add gratuity for Fulfillment Orders; however, consumers can pay a gratuity to CONTRACTOR in cash.

9. From time to time, DOORDASH may offer various Dasher promotions or referral programs. CONTRACTOR agrees that they will not manipulate or abuse the referral programs or Dasher promotions by, among other things: (a) tampering with the location feature on their mobile phone; (b) collecting incentive or promotional pay when not eligible to receive such pay under relevant policies; or, (c) creating multiple Dasher or consumer accounts. CONTRACTOR understands that engaging in this type of manipulation or abuse constitutes a material breach of this Agreement and may lead to deactivation of their account.

## **VII. PAYMENT DISPUTES**

1. *CONTRACTOR's Failure*: In the event there is a Service Failure, CONTRACTOR shall not be entitled to payment as described above (as determined in DOORDASH's reasonable discretion). Any withholding of payment shall be based upon proof provided by the consumer, restaurant or other business, CONTRACTOR, and any other party with information relevant to the dispute. DOORDASH shall make the initial determination as to whether a Service Failure was the result of CONTRACTOR's action/omission. CONTRACTOR shall have the right to challenge DOORDASH's determination through any legal means contemplated by this Agreement; however, CONTRACTOR shall notify DOORDASH in writing at [www.doordash.com/help/](http://www.doordash.com/help/) (<http://www.doordash.com/help/>) of the challenge and provide DOORDASH the opportunity to resolve the dispute. CONTRACTOR should include any documents or other information in support of their challenge.
2. *DOORDASH's Failure*: In the event DOORDASH fails to remit payment in a timely or accurate manner, except as provided in Section VI(5), CONTRACTOR shall have the right to seek proper payment by any legal means contemplated by this Agreement and, should CONTRACTOR prevail, shall be entitled to recover reasonable costs incurred in pursuing proper payment, provided, however, CONTRACTOR shall first inform DOORDASH in writing at [www.doordash.com/help/](http://www.doordash.com/help/) (<http://www.doordash.com/help/>) of the failure and provide a reasonable opportunity to cure it.

## **VIII. EQUIPMENT AND EXPENSES**

1. CONTRACTOR represents that they have or can lawfully acquire all equipment, including vehicles and food thermal bags ("Equipment") necessary for performing Contracted Services, and CONTRACTOR is solely responsible for ensuring that any vehicle used conforms to all vehicle laws pertaining to registration, safety, equipment, inspection, and operational capability.
2. CONTRACTOR agrees that they are responsible for all costs and expenses arising from CONTRACTOR's performance of Contracted Services, including, but not limited to, costs related to CONTRACTOR's Personnel (defined below) and Equipment. Except as otherwise required by law, CONTRACTOR assumes all risk of damage or loss to their Equipment.

## **IX. PERSONNEL**

1. In order to perform any Contracted Services, CONTRACTOR must, for the safety of consumers on the DOORDASH platform, pass a background check administered by a third-party vendor, subject to CONTRACTOR's lawful consent. CONTRACTOR is not required to perform any Contracted Services personally, but may, to the extent permitted by law and subject to the terms of this Agreement, hire or engage others (as employees or subcontractors of CONTRACTOR) to perform all or some of the Contracted Services, provided any such employees or subcontractors meet all the requirements applicable to CONTRACTOR including, but not limited to, accepting the terms of this Agreement, separately completing the process to receive Delivery Opportunities, and being eligible to provide the Contracted Services in the geographic location. To the extent

CONTRACTOR furnishes their own employees or subcontractors (collectively "Personnel"), CONTRACTOR shall be solely responsible for the direction and control of the Personnel CONTRACTOR uses to perform all Contracted Services.

**2. CONTRACTOR assumes full and sole responsibility for the payment of all amounts due to their Personnel for work performed in relation to this Agreement, including all wages, benefits and expenses, if any, and for all required state and federal income tax withholdings, unemployment insurance contributions, and social security taxes as to CONTRACTOR and all Personnel employed by CONTRACTOR in the performance of Contracted Services under this Agreement. DOORDASH is not an employer or joint employer of CONTRACTOR's Personnel, and shall have no responsibility for any wages, benefits, expenses, or other payments due CONTRACTOR's Personnel, nor for income tax withholding, social security, unemployment insurance contributions, or other payroll taxes relating to CONTRACTOR or their Personnel. Neither CONTRACTOR nor their Personnel shall receive any wages, including vacation pay or holiday pay, from DOORDASH, nor shall they participate in or receive any other benefits, if any, available to DOORDASH's employees.**

**3. Unless mandated by law, DOORDASH shall have no authority to withhold state or federal income taxes, social security taxes, unemployment insurance taxes/contributions, or any other local, state or federal tax on behalf of CONTRACTOR or their Personnel.**

4. CONTRACTOR and their Personnel shall not be required to wear a uniform or other clothing of any type bearing DOORDASH's name or logo.

5. If CONTRACTOR uses the services of any Personnel to perform the Contracted Services, CONTRACTOR's Personnel must satisfy and comply with all of the terms of this Agreement, which CONTRACTOR must make enforceable by written agreement between CONTRACTOR and such Personnel. A copy of such written agreement must be provided to DOORDASH at least 7 days in advance of such Personnel performing the Contracted Services, and CONTRACTOR must notify DOORDASH when their Personnel will be performing Contracted Services. The parties acknowledge that the sole purpose of this requirement is to ensure CONTRACTOR's compliance with the terms of this Agreement.

## **X. INSURANCE**

1. CONTRACTOR agrees, as a condition of doing business with DOORDASH, that during the term of this Agreement, CONTRACTOR will maintain current insurance, in amounts and of types required by law to provide the Contracted Services and cover CONTRACTOR during performance of the Contracted Services, at their own expense. CONTRACTOR acknowledges that failure to secure or maintain satisfactory insurance coverage shall be deemed a material breach of this Agreement and shall result in the termination of the Agreement and the loss of CONTRACTOR's right to receive Delivery Opportunities.

**2. NOTIFICATION OF COVERAGE:** CONTRACTOR agrees to deliver to DOORDASH, upon request, current certificates of insurance as proof of coverage. CONTRACTOR agrees to provide updated certificates each time CONTRACTOR purchases, renews, or alters CONTRACTOR's insurance coverage. CONTRACTOR agrees to give DOORDASH at least thirty (30) days' prior written notice before cancellation of any insurance policy required by this Agreement.

**3. WORKERS' COMPENSATION/OCCUPATIONAL ACCIDENT INSURANCE:** CONTRACTOR agrees that CONTRACTOR will maintain sufficient insurance to cover any risks or claims arising out of or related to CONTRACTOR'S relationship with DoorDash, including workers' compensation insurance where required by law. CONTRACTOR acknowledges and understands that CONTRACTOR will not be eligible for workers' compensation benefits through DOORDASH and is instead responsible for maintaining CONTRACTOR'S own workers' compensation insurance or occupational accident insurance. CONTRACTOR'S maintenance of CONTRACTOR'S own workers' compensation insurance or occupational accident insurance will not disqualify CONTRACTOR from participating in the Occupational Accident Insurance Policy for Dashers, which DOORDASH may make available to CONTRACTOR.

## **XI. INDEMNITY**

1. DOORDASH agrees to indemnify, protect and hold harmless CONTRACTOR from any and all claims, demands, damages, suits, losses, liabilities and causes of action arising directly from DOORDASH's actions offering and facilitating the Contracted Services to CONTRACTOR.
2. CONTRACTOR agrees to indemnify, protect and hold harmless DOORDASH, including all parent, subsidiary and/or affiliated companies, as well as its and their past and present successors, assigns, officers, owners, directors, agents, representatives, attorneys, and employees, from any and all claims, demands, damages, suits, losses, liabilities and causes of action arising directly or indirectly from, as a result of or in connection with, the actions of CONTRACTOR and/or their Personnel arising from the performance of delivery services under this Agreement, including personal injury or death to any person (including to CONTRACTOR and/or their Personnel), as well as any liability arising from CONTRACTOR's failure to comply with the terms of this Agreement. CONTRACTOR's obligations hereunder shall include the cost of defense, including attorneys' fees, as well as the payment of any final judgment rendered against or settlement agreed upon by DOORDASH or its parent, subsidiary and/or affiliated companies.
3. CONTRACTOR agrees to indemnify, protect and hold harmless DOORDASH, including all parent, subsidiary, and/or affiliated companies, as well as its and their past and present successors, assigns, officers, owners, directors, agents, representatives, attorneys, and employees, from any and all tax liabilities and responsibilities for payment of all federal, state and local taxes, including, but not limited to all payroll taxes, self-employment taxes, workers compensation premiums, and any contributions imposed or required under federal, state and local laws, with respect to CONTRACTOR and CONTRACTOR's Personnel.
4. CONTRACTOR shall be responsible for, indemnify and hold harmless DOORDASH, including all parent, subsidiary, and/or affiliated companies, as well as its and their past and present successors, assigns, officers, owners, directors, agents, representatives, attorneys, and employees, from all costs of CONTRACTOR's business, including, but not limited to, the expense and responsibility for any and all applicable insurance, local, state or federal licenses, permits, taxes, and assessments of any and all regulatory agencies, boards or municipalities.

## **XII. MUTUAL ARBITRATION PROVISION**

1. CONTRACTOR and DOORDASH mutually agree to this Mutual Arbitration Provision, which is governed by the Federal Arbitration Act (9 U.S.C. §§ 1-16) ("FAA") and shall apply to any and all disputes arising out of or relating to this Agreement, including but not limited to CONTRACTOR's classification as an independent contractor, CONTRACTOR's provision of Contracted Services to consumers, restaurants, or other businesses, the payments received by CONTRACTOR for providing services to consumers, restaurants, or other businesses, the termination of this Agreement, and all other aspects of CONTRACTOR's relationship with DOORDASH, past, present or future, whether arising under federal, state or local statutory and/or common law, including without limitation harassment, discrimination or retaliation claims and claims arising under or related to the Civil Rights Act of 1964 (or its state or local equivalents), Americans With Disabilities Act (or its state or local equivalents), Age Discrimination in Employment Act (or its state or local equivalents), Family Medical Leave Act (or its state or local equivalents), Federal Credit Reporting Act (or its state or local equivalents), Telephone Consumer Protection Act (or its state or local equivalents), or Fair Labor Standards Act (or its state or local equivalents), state and local wage and hour laws, state and local statutes or regulations addressing the same or similar subject matters, and all other federal, state or local claims arising out of or relating to CONTRACTOR's relationship or the termination of that relationship with DOORDASH. This Mutual Arbitration Agreement extends to disputes between CONTRACTOR and any DOORDASH affiliates, subsidiaries, successors, agents, and employees that arise out of or relate to this Agreement. This Mutual Arbitration Agreement does not apply to any claims that cannot be arbitrated under applicable law. To the extent the parties have both arbitrable and non-arbitrable disputes that are related, the arbitrable disputes shall proceed first in arbitration and the non-arbitrable disputes shall be stayed, and any applicable statutes of limitations tolled, pending completion of the arbitration. The parties expressly agree that this Agreement shall be governed by the FAA even in the event CONTRACTOR and/or DOORDASH are otherwise exempted from the FAA. Any disputes regarding the FAA's application shall be resolved exclusively by an arbitrator. If for any reason the FAA does not apply, the state law governing arbitration agreements in the state in which the CONTRACTOR operates shall apply.

2. CONTRACTOR and DOORDASH agree that good-faith informal efforts to resolve disputes often can result in a prompt, low-cost and mutually beneficial outcome. CONTRACTOR and DOORDASH therefore agree that, before either CONTRACTOR or DOORDASH demands arbitration against the other, we will personally meet and confer, via telephone or videoconference, in a good-faith effort to resolve informally any claim covered by this mutual Arbitration Agreement. For sake of clarification only, the informal dispute resolution conferences shall be individualized such that a separate conference must be held each time either party intends to commence individual arbitration; multiple individuals initiating claims cannot participate in the same informal telephonic dispute resolution conference, unless mutually agreed to by the parties. If CONTRACTOR is represented by counsel, CONTRACTOR's counsel may participate in the conference, but CONTRACTOR shall also fully participate in the conference. The party initiating the claim must give notice to the other party in writing of their intent to initiate an informal dispute resolution conference, which shall occur within 60 days after the other party receives such notice, unless an extension is mutually agreed upon by the parties. To notify DOORDASH that CONTRACTOR intends to initiate an informal dispute resolution conference, email [Dasher.Informal.Resolution@doordash.com](mailto:Dasher.Informal.Resolution@doordash.com) (<mailto:Dasher.Informal.Resolution@doordash.com>), providing CONTRACTOR's name, the telephone number associated with CONTRACTOR's Dasher account (if any), the



email address associated with CONTRACTOR's Dasher account, and a description of CONTRACTOR's claims. If DOORDASH intends to initiate an informal dispute resolution conference, DOORDASH shall do so by emailing the email address associated with CONTRACTOR's Dasher account, and providing a description of DOORDASH's claims. In the interval between the party receiving such notice and the informal dispute resolution conference, the parties shall be free to attempt to resolve the initiating party's claims. Engaging in an informal dispute resolution conference is a requirement that must be fulfilled before commencing arbitration. The statute of limitations and any filing fee deadlines shall be tolled while the parties engage in the informal dispute resolution process required by this paragraph.

3. If, following the informal resolution process, either CONTRACTOR or DOORDASH wishes to initiate arbitration, the initiating party must notify the other party in writing via certified mail, return receipt requested, or hand delivery within the applicable statute of limitations period. This demand for arbitration must include (1) the name and address of the party seeking arbitration, (2) a statement of the legal and factual basis of the claim, (3) a description of the remedy sought, (4) the amount in controversy, and (5) the personal signature of the party seeking arbitration. Any demand for arbitration by CONTRACTOR must be delivered to the counsel who represented DoorDash in the informal resolution process, or if there was no such counsel, then to General Counsel, 303 2nd Street, Suite 800, San Francisco, CA 94107.

4. Arbitration Class Action Waiver. CONTRACTOR and DOORDASH mutually agree that by entering into this agreement to arbitrate, both waive their right to have any dispute or claim brought, heard or arbitrated as, or to participate in, a class action, collective action and/or representative action—including but not limited to actions brought pursuant to the Private Attorney General Act ("PAGA"), California Labor Code section 2699 et seq., and any request seeking a public injunction—and an arbitrator shall not have any authority to hear or arbitrate any class, collective or representative action, or to award relief to anyone but the individual in arbitration ("Arbitration Class Action Waiver"). Notwithstanding any other clause contained in this Agreement or the CPR Rules, as defined below, any claim that all or part of this Arbitration Class Action Waiver is unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator. In any case in which (1) the dispute is filed as a class, collective, or representative action and (2) there is a final judicial determination that all or part of the Arbitration Class Action Waiver is unenforceable, the class, collective and/or representative action to that extent must be litigated in a civil court of competent jurisdiction, but the portion of the Arbitration Class Action Waiver that is enforceable shall be enforced in arbitration. All other disputes with respect to whether this Mutual Arbitration Provision is unenforceable, unconscionable, applicable, valid, void or voidable, and all disputes regarding the payment of arbitrator or arbitration-organization fees including the timing of such payments and remedies for nonpayment, shall be determined exclusively by an arbitrator, and not by any court. For sake of clarification only, nothing in this paragraph shall be construed to prohibit settlements on a class-wide, collective, and/or representative basis.

5. CONTRACTOR agrees and acknowledges that entering into this Mutual Arbitration Provision does not change CONTRACTOR's status as an independent contractor in fact and in law, that CONTRACTOR is not an employee of DOORDASH or its customers and that any disputes in this regard shall be subject to arbitration as provided in this Agreement.

6. Any arbitration shall be governed by the CPR Administered Arbitration Rules and, when applicable, the CPR Employment-Related Mass-Claims Protocol (together, the "CPR Rules") of the International Institute for Conflict Prevention & Resolution, except as follows:

- a. The arbitration shall be heard by one arbitrator (the "Arbitrator") selected in accordance with the CPR Rules. The Arbitrator shall be an attorney with experience in the law underlying the dispute.
- b. If the parties cannot otherwise agree on a location for the arbitration, the arbitration shall take place within 45 miles of CONTRACTOR's residence as of the effective date of this Agreement.
- c. The CPR fee schedule will apply with the following exceptions. Unless applicable law provides otherwise, in the event that DOORDASH and CONTRACTOR have agreed to this Mutual Arbitration Provision, DOORDASH and CONTRACTOR shall equally share filing fees and other similar and usual administrative costs, as are common to both court and administrative proceedings, but CONTRACTOR's share of such fees and costs will not exceed the filing fee to file the case in a court of competent jurisdiction embracing the location of the arbitration. DOORDASH shall pay any costs uniquely associated with arbitration, such as payment of the fees of the Arbitrator, as well as room rental.
- d. The Arbitrator may issue orders (including subpoenas to third parties, to the extent permitted by law) allowing the parties to conduct discovery sufficient to allow each party to prepare that party's claims and/or defenses, taking into consideration that arbitration is designed to be a speedy and efficient method for resolving disputes. For example, the Arbitrator shall apply the Apex Doctrine and preclude depositions of either party's current or former high-level officers absent a showing that the officer has unique, personal knowledge of discoverable information and less burdensome discovery methods have been exhausted.
- e. Except as provided in the Arbitration Class Action Waiver, the Arbitrator may award all remedies to which a party is entitled under applicable law and which would otherwise be available in a court of law, but shall not be empowered to award any remedies that would not have been available in a court of law for the claims presented in arbitration. The Arbitrator shall apply the applicable state or federal substantive law, or both, as is applicable.
- f. The Arbitrator may hear motions to dismiss and/or motions for summary judgment and will apply the standards of the Federal Rules of Civil Procedure governing such motions.
- g. The Arbitrator's decision or award shall be in writing and shall include findings of fact and conclusions of law.
- h. The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets, or other sensitive information. Subject to the discretion of the Arbitrator or agreement of the parties, any person having a direct interest in the arbitration may attend the arbitration hearing. The Arbitrator may exclude any non-party from any part of the hearing.
- i. Either CONTRACTOR or DOORDASH may apply to a court of competent jurisdiction for temporary or preliminary injunctive relief on the ground that without such relief the arbitration provided in this paragraph may be rendered ineffectual.

7. Nothing in this Mutual Arbitration Provision prevents you from making a report to or filing a claim or charge with the Equal Employment Opportunity Commission, U.S. Department of Labor, U.S. Securities and Exchange Commission, National Labor Relations Board, or Office of Federal Contract Compliance Programs. Nothing in this Mutual Arbitration Provision prevents the investigation by a government agency of any report, claim or

charge otherwise covered by this Mutual Arbitration Provision. This Mutual Arbitration Provision also does not prevent federal administrative agencies from adjudicating claims and awarding remedies based on those claims, even if the claims would otherwise be covered by this Mutual Arbitration Provision. Nothing in this Mutual Arbitration Provision prevents or excuses a party from satisfying any conditions precedent and/or exhausting administrative remedies under applicable law before bringing a claim in arbitration. DOORDASH will not retaliate against CONTRACTOR for filing a claim with an administrative agency or for exercising rights (individually or in concert with others) under Section 7 of the National Labor Relations Act. Disputes between the parties that may not be subject to predispute arbitration agreement, including as provided by an Act of Congress or lawful, enforceable Executive Order, are excluded from the coverage of this Mutual Arbitration Provision.

8. The CPR Rules may be found at [www.cpradr.org](http://www.cpradr.org) (<http://www.cpradr.org/>) or by searching for "CPR Administered Arbitration Rules" and "CPR Employment-Related Mass-Claims Protocol" using a service such as [www.google.com](http://www.google.com) (<http://www.google.com/>) or [www.bing.com](http://www.bing.com) (<http://www.bing.com/>) or by asking DOORDASH's General Counsel to provide a copy (by submitting a written request to General Counsel, 303 2nd Street, Suite 800, San Francisco, CA, 94107).

**9. New CONTRACTOR's Right to Opt Out of Mutual Arbitration Provision. Arbitration is not a mandatory condition of CONTRACTOR's contractual relationship with DOORDASH, and therefore each new CONTRACTOR may submit a statement notifying DOORDASH that CONTRACTOR wishes to opt out and not be subject to this MUTUAL ARBITRATION PROVISION. Existing CONTRACTORS who have agreed to a prior version of this Agreement with DOORDASH without opting out of the Mutual Arbitration Provision contained therein do not have an opportunity to opt out of this Mutual Arbitration Provision. DOORDASH will continue to honor the valid opt outs of existing CONTRACTORS who validly opted out of the Mutual Arbitration Provision in a prior version of the Agreement.** In order to opt out, a new CONTRACTOR must notify DOORDASH in writing of CONTRACTOR's intention to opt out by sending a letter, by First Class Mail, to General Counsel, 303 2nd Street, South Tower, Suite 800, San Francisco, CA 94107. Any attempt to opt out by email will be ineffective. The letter must state CONTRACTOR's intention to opt out. In order to be effective, CONTRACTOR's opt out letter must be postmarked within 30 days of the effective date of this Agreement. The letter must be signed by CONTRACTOR themselves, and not by any agent or representative of CONTRACTOR. The letter may opt out, at most, only one CONTRACTOR, and letters that purport to opt out multiple CONTRACTORS will not be effective as to any. No CONTRACTOR (or their agent or representative) may effectuate an opt out on behalf of other CONTRACTORS. If CONTRACTOR opts out as provided in this paragraph, CONTRACTOR will not be subject to any adverse action from DOORDASH as a consequence of that decision and they may pursue available legal remedies without regard to this Mutual Arbitration Provision. If CONTRACTOR does not opt out within 30 days of the effective date of this Agreement, CONTRACTOR and DOORDASH shall be deemed to have agreed to this Mutual Arbitration Provision. CONTRACTOR has the right to consult with counsel of CONTRACTOR's choice concerning this Mutual Arbitration Provision (or any other provision of this Agreement).

10. Except as specified in the prior paragraph, this Mutual Arbitration Provision supersedes any and all prior arbitration agreements between CONTRACTOR and DOORDASH and is the full and complete agreement relating to the formal resolution of disputes covered by this Mutual Arbitration Provision. In the event any

portion of this Mutual Arbitration Provision is deemed unenforceable, the remainder of this Mutual Arbitration Provision will be enforceable. The award issued by the Arbitrator may be entered in any court of competent jurisdiction.

### **XIII. LITIGATION CLASS ACTION WAIVER**

1. To the extent allowed by applicable law, separate and apart from the Mutual Arbitration Provision found in Section XII, CONTRACTOR agrees that any proceeding to litigate in court any dispute arising out of or relating to this Agreement, whether because CONTRACTOR opted out of the Mutual Arbitration Provision or any other reason, will be conducted solely on an individual basis, and CONTRACTOR agrees not to seek to have any controversy, claim or dispute heard as a class action, a representative action, a collective action, a private attorney-general action, or in any proceeding in which CONTRACTOR acts or proposes to act in a representative capacity ("Litigation Class Action Waiver"). CONTRACTOR further agrees that no proceeding will be joined, consolidated, or combined with another proceeding, without the prior written consent of all parties to any such proceeding. If a court of competent jurisdiction determines that all or part of this Litigation Class Action Waiver is unenforceable, unconscionable, void or voidable, the remainder of this Agreement shall remain in full force and effect.

### **XIV. PROPRIETARY RIGHTS AND LICENSES**

1. All copyright, database rights, trademarks (whether registered or unregistered), design rights (whether registered or unregistered), patent applications, patents, and other intellectual property rights of any nature in the DOORDASH platform together with the underlying software code and any and all rights in, or derived from the DOORDASH platform are proprietary and owned either directly by DOORDASH or by DOORDASH's licensors and are protected by applicable intellectual property and other laws. CONTRACTOR agrees that they will not use such proprietary information, materials, or intellectual property rights in any way whatsoever except for by use of the DOORDASH platform to perform the Contracted Service in compliance with the terms of this Agreement. No portion of the DOORDASH platform may be reproduced in any form or by any means, except as expressly permitted in the terms of this Agreement. CONTRACTOR agrees not to modify, rent, lease, loan, sell, distribute, or create derivative works based on the DOORDASH platform or any intellectual property rights therein in any manner, and CONTRACTOR shall not exploit the DOORDASH platform or any intellectual property rights therein in any unauthorized way whatsoever.

2. DOORDASH hereby grants CONTRACTOR a non-exclusive, non-transferable, non-sublicensable, revocable license to use the DOORDASH platform solely for their lawful use to perform the Contracted Services in accordance with these terms of this Agreement. DOORDASH retains all rights, title, and interest in and to the DOORDASH platform and its other intellectual property rights therein. Any such license shall terminate upon termination of this Agreement.

3. CONTRACTOR acknowledges and agrees that any questions, comments, suggestions, ideas, feedback or other information (“Submissions”) provided by CONTRACTOR to DOORDASH regarding the DOORDASH platform are provided freely and shall become the sole property of DOORDASH. DOORDASH shall own exclusive rights of such Submissions, including all intellectual property rights therein, and shall be entitled to the unrestricted use and dissemination of these Submissions for any purpose, commercial or otherwise, without acknowledgment or compensation to CONTRACTOR.

## **XV. LEGAL PROCESSES AFFECTING DASHER ACCOUNTS**

1. If legal action such as a garnishment, levy or other state or federal legal process (“Legal Process”) is brought against CONTRACTOR’S Dasher account, DOORDASH will not contest on CONTRACTOR’S behalf any such Legal Process and may take action to comply with such Legal Process as DOORDASH determines to be appropriate in the circumstances without liability to CONTRACTOR. CONTRACTOR agrees that DOORDASH may honor Legal Process that is served personally, by mail, email or facsimile transmission at any DOORDASH facility or at the office of any agent authorized by appointment or by law to receive service on behalf of DOORDASH, even if such service is insufficient under law.

2. If Legal Process is brought against CONTRACTOR’S Dasher account, DOORDASH may prohibit CONTRACTOR from utilizing payment options other than weekly direct deposits (i.e., prohibiting use of Fast Pay, DasherDirect or other payment alternatives that DOORDASH may offer to CONTRACTOR). CONTRACTOR shall be liable to DOORDASH for any amounts received by CONTRACTOR through payment options other than weekly direct deposit that otherwise would have been withheld pursuant to such Legal Process, and DOORDASH may recoup or offset such amounts from any obligation owed by DOORDASH to CONTRACTOR.

3. CONTRACTOR acknowledges that Legal Process against CONTRACTOR’S Dasher account may result in delays in payments to CONTRACTOR. DOORDASH shall not be liable to CONTRACTOR on account of any losses resulting from such delay.

## **XVI. TERMINATION OF AGREEMENT**

1. CONTRACTOR may terminate this Agreement upon seven (7) days written notice. DOORDASH may terminate this Agreement and deactivate CONTRACTOR’S Dasher account only for the reasons set forth in the DOORDASH Deactivation Policy, (<https://help.doordash.com/dashers/s/deactivation-policy-us>), which CONTRACTOR expressly agrees to, or for a material breach of this Agreement. Notwithstanding the foregoing, DOORDASH reserves the right to temporarily remove access to the DOORDASH platform for the purposes of timely investigation where fraud or abuse is suspected, including circumvention of compliance with Legal Process, or when deemed necessary to protect the safety and security of DOORDASH users.

2. Notwithstanding any other provision in this Agreement, DOORDASH reserves the right to modify the Deactivation Policy if, in DOORDASH’S good faith and reasonable discretion, it is necessary to do so for the safe and/or effective operation of the DOORDASH platform. DOORDASH shall provide notice of any such changes

to CONTRACTOR via email. Changes to the Deactivation Policy shall be effective and binding on the parties upon CONTRACTOR's continued use of the DOORDASH platform following DOORDASH's email notice of such modifications. Nothing will prevent CONTRACTOR from attempting to negotiate an exemption from any modification to the Deactivation Policy.

3. CONTRACTOR's and DOORDASH's obligations and rights arising under the Mutual Arbitration Provision of this Agreement shall survive termination of this Agreement. Notwithstanding any other provision in this Agreement, the Deactivation Policy is subject to change; such changes shall be effective and binding on the parties upon DOORDASH'S provision of notice to CONTRACTOR via email.

## **XVII. MODIFICATION**

1. DOORDASH may modify this Agreement at any time. When DOORDASH makes material changes to this Agreement, it will post the revised Agreement on the DOORDASH Platform and update the "Last Updated" date at the top of the Agreement. DOORDASH will also provide CONTRACTOR with notice of any material changes before the date the revised Agreement becomes effective. If CONTRACTOR disagrees with the revised Agreement, CONTRACTOR may terminate the Agreement immediately as provided herein. If CONTRACTOR does not terminate the Agreement before the date the revised Agreement becomes effective, CONTRACTOR's continued access to or use of the DOORDASH platform will constitute acceptance of the revised Agreement. DOORDASH may modify information on any website hyperlinked from this Agreement from time to time, and such modifications shall be effective upon posting. Continued use of the DOORDASH platform after any such changes shall constitute CONTRACTOR's consent to such changes.

## **XVIII. ENTIRE AGREEMENT, TRANSFERABILITY, AND WAIVER**

1. This Agreement shall constitute the entire agreement and understanding between the parties with respect to the subject matter of this Agreement and shall not be modified, altered, changed or amended in any respect, unless in writing and signed by both parties, or unless DOORDASH modifies the Agreement pursuant to Section XVII. Before accepting any modifications, alterations, changes or amendments, CONTRACTOR shall have the right to discuss any proposed changes with DOORDASH and consider whether to continue their contractual relationship with DOORDASH. This Agreement supersedes any prior contract between the parties. To the extent DOORDASH's consumer facing Terms and Conditions Agreement (or updated consumer facing Terms and Conditions Agreement, if applicable) is inconsistent or conflicts with this Agreement, this Agreement controls. However, the decision to opt-out of the Mutual Arbitration Provision in this Agreement does not affect the enforceability of any arbitration agreement in the consumer facing Terms and Conditions Agreement to which CONTRACTOR may be bound (and vice versa). This Agreement may not be assigned by either party without written consent of the other and shall be binding upon the parties hereto, including their heirs and successors, provided, however, that DOORDASH may assign its rights and obligations under this Agreement to an affiliate of DOORDASH or any successor(s) to its business and/or purchaser of substantially all of its stock or assets. References in this Agreement to DOORDASH shall be deemed to include such successor(s).

2. The failure of DOORDASH or CONTRACTOR in any instance to insist upon a strict performance of the terms of this Agreement or to exercise any option herein, shall not be construed as a waiver or relinquishment of such term or option and such term or option shall continue in full force and effect.

## **XIX. THIRD PARTY SERVICES**

1. From time to time, DOORDASH may enable CONTRACTOR to receive services from other third parties while using the DOORDASH platform. CONTRACTOR understands that these services are subject to the terms and conditions of each third-party provider. CONTRACTOR agrees that DOORDASH is not responsible and may not be held liable for these services or the actions or omissions of any third-party provider.

2. ADT Services: This Agreement incorporates by reference the ADT Services Agreement (<https://www.adt.com/about-adt/legal/adt-services-agreement>). By using the services in the SafeDash Toolkit on the DOORDASH platform, CONTRACTOR agrees that ADT's terms of service will apply to this usage. CONTRACTOR further agrees that in the event of a conflict in the terms of the ADT Services Agreement and this Agreement, the terms of this Agreement shall control with respect to DOORDASH and CONTRACTOR's agreements with DOORDASH herein. The dispute resolution and arbitration agreement provisions in Section XII above shall apply instead of any terms in the ADT Services Agreement for all purposes except with respect to claims that are solely against ADT.

3. Google Maps: As a CONTRACTOR, while using the DOORDASH platform CONTRACTOR may be able to use Google Maps in-app navigation services while performing Contracted Services. If CONTRACTOR does so, CONTRACTOR agree that Google may collect CONTRACTOR's location data when the DOORDASH platform is running in order to provide and improve Google's services, that such data may also be shared with DOORDASH in order to improve its operations, and that Google's terms ([https://www.google.com/help/terms\\_maps.html](https://www.google.com/help/terms_maps.html)) and privacy policy ([https://www.google.com/intl/en\\_gl/policies/privacy/](https://www.google.com/intl/en_gl/policies/privacy/)) will apply to this usage. CONTRACTOR can also use any other navigation app outside the DOORDASH platform or none at all.

## **XX. E-SIGN CONSENT AGREEMENT**

This DoorDash E-Sign Consent Agreement ("E-Sign Agreement") allows us to provide you with electronic versions of notices, disclosures and other communications in connection with the services we offer and agreements we enter into with you. In this E-Sign Agreement, the words "you" and "your" mean any person giving consent to our use of electronic Disclosures and signatures as described below. The words "DoorDash," "we," "us," and "our," mean DoorDash, Inc. its affiliates, successors, assigns, and any designated third-party service providers acting on their behalf.

### **1. Scope of E-Sign Agreement**

This E-Sign Agreement applies to all agreements, policies, terms, notices, authorizations, receipts, confirmations, statements, account histories, disclosures and any other communication (each, a “Disclosure”) that we are required by law to provide to you in connection with any products, services, transactions, or agreements we offer or enter into with you now or in the future (collectively, the “Services”).

## **2. Consent to Receive Disclosures Electronically**

By consenting to this E-Sign Agreement, you agree to the following:

- DoorDash may provide any or all Disclosures to you electronically in any manner, including, but not limited to, via our website, any DoorDash app, a hyperlink provided on the DoorDash website or app, a push notification, an email to the email address you provided to us, or a text message to the mobile telephone number you provided to us.
- DoorDash may, but is not required to, notify you via email, text message or push notification when a Disclosure is available. The Disclosures will be provided to you in a format that can either be retained, printed or downloaded for your records.
- Your electronic signature has the same effect as if you signed in ink.
- Disclosures we provide to you electronically will have the same meaning and effect as if provided in paper form, regardless of whether you actually view those Disclosures.
- DoorDash reserves the right to decide whether to provide a Disclosure electronically and whether to request your electronic signature for any Disclosure.
- You have reviewed this E-Sign Agreement and verified that you can print or save a copy of it with your records.

## **3. System Requirements**

You acknowledge and agree that, in order to view and/or retain copies of the Disclosures, you will need the following hardware and software:

- A personal computer or other access device (such as a mobile phone) that is capable of accessing the internet (e.g., you must have a modem and available phone line, a cable internet connection or some other means of access to the internet, and you must have an active account with an internet service provider). Your access to this page verifies that your system meets these requirements.
- You must have an Internet web browser which is capable of supporting 128-bit SSL encrypted communications, which requires a minimum web browser version of either Microsoft® Internet Explorer version 9, Mozilla Firefox 21, Google Chrome 27+, or Safari on Mac OS X 10.8 and your system must have 128-bit SSL encryption software. Your access to this page verifies that your browser and encryption software meet these requirements.
- A current version of a PDF reader.
- An active email address.



We will notify you if our hardware or software requirements change and whether any change creates a material risk that you would not be able to access or retain your electronic Disclosures. By continuing to use the Services after receiving any notice of a hardware or software requirements change you are reaffirming your consent to electronic Disclosures.

#### **4. Revocation of Electronic Consent**

You may revoke your consent to the use of electronic Disclosures by emailing DoorDash at [privacy@doordash.com](mailto:privacy@doordash.com) (<mailto:privacy@doordash.com>). The legal effectiveness, validity and/or enforceability of electronic Disclosures we sent before your consent is effective and will not be affected by your revocation. If you revoke your consent, DoorDash may close or limit access to your DoorDash account and any or all Services.

#### **5. Paper Copies**

You agree that DoorDash may modify or change the methods of issuing Disclosures as described herein, and that DoorDash may send you Disclosures in paper form at its option. You can obtain a paper copy of an electronic Disclosure at no charge if you request one within a reasonable time after we first provided the electronic Disclosure to you. To request a paper copy of a Disclosure, contact Customer Support at 855-431-0459.

#### **6. Updating Your Information**

It is your responsibility to provide DoorDash with a true and accurate primary email address, phone number, and other contact information. You also agree that it is your responsibility to notify DoorDash of any changes to your primary email address, phone number, or any other contact information so that DoorDash can communicate with you electronically. To update your information, contact Customer Support at 855-431-0459.

#### **7. Acceptance**

By accepting this E-Sign Agreement, you agree that you have read and consent to the terms set forth herein. In doing so, you are also confirming that you meet the system requirements described above, that you have demonstrated your ability to receive, retain, and view electronic Disclosures. If you do not provide your consent to this E-Sign Agreement, we may immediately close or limit access to your DoorDash account and any or all Services.

#### **XXI. MISCELLANEOUS**

1. CAPTIONS SECTION HEADINGS: Captions and section headings appearing in this Agreement are for convenience only and do not in any way limit, amplify, modify, or otherwise affect the terms and provisions of this Agreement.
2. SEVERABILITY Clause: Except as specifically provided in Section XII, if any part of this Agreement is declared unlawful or unenforceable, the remainder of this Agreement shall remain in full force and effect.

3. GOVERNING LAW: Except for the Mutual Arbitration Provision in Section XII above, which is governed by the Federal Arbitration Act, the choice of law for interpretation of this Agreement, and the right of the parties hereunder, as well as substantive interpretation of claims asserted pursuant to Section XII, shall be the rules of law of the state in which CONTRACTOR performs the majority of the services covered by this Agreement.

4. NOTICE AND OPPORTUNITY TO CURE: CONTRACTOR agrees to notify DOORDASH in writing at <https://www.doordash.com/help/> (<https://www.doordash.com/help/>) of any breach or perceived breach of this Agreement, of any claim arising out of or related to this Agreement, or of any claim that CONTRACTOR's services or scope of work differ in any way from what is contemplated in this Agreement, including but not limited to the terms in Sections II (Contractor's Operations) and III (Contracted Services), or if the relationship of the parties differs from the terms contemplated in Section V (Relationship of Parties).

Not a DoorDash Dasher? Check out your help site below!



# DoorDash Flexible Partnership Plans

There's no one-size-fits-all solution for helping restaurants thrive — that's why DoorDash offers a Partnership Plan enabling restaurants to choose the specific services they need at the price point they can afford.

Local merchants can choose a plan with a delivery commission rate starting as low as 15% and can add -on the products that best suit their businesses at various tiers of service.

Inspired by feedback from local partners, the plans expand the accessibility and affordability of delivery services while restaurants meet the challenges of a post-pandemic world.

75%  
of restaurants  
agree that  
DoorDash has  
allowed them to  
reach new  
customers

## Basic

DoorDash at the lowest cost

Let customers order from you on DoorDash and add marketing programs when you need them.

### Your Cost

15% Delivery Commission      6% Pickup Commission

Credit card processing included

### Key Benefits

- ✓ Reliable and fast delivery with DoorDash
- ✓ Access to high-value customers with DashPass
- ✓ A bigger delivery area to reach more customers
- ✓ Accept at least 20 orders per month or pay zero commissions\*

## Plus

More sales with DashPass

Increase sales and reach our most loyal and frequent customers with DashPass.

### Your Cost

25% Delivery Commission      6% Pickup Commission

Credit card processing included

### Key Benefits

- ✓ Reliable and fast delivery with DoorDash
- ✓ Access to high-value customers with DashPass
- ✓ A bigger delivery area to reach more customers
- ✓ Accept at least 20 orders per month or pay zero commissions\*

## Premier

The most orders and new customers

Maximize sales with the biggest delivery area, DashPass, and more. Backed by our Growth Guarantee.

### Your Cost

30% Delivery Commission      6% Pickup Commission

Credit card processing included

### Key Benefits

- ✓ Reliable and fast delivery with DoorDash
- ✓ Access to high-value customers with DashPass
- ✓ A bigger delivery area to reach more customers
- ✓ Accept at least 20 orders per month or pay zero commissions\*

Included with every plan

## Storefront by DoorDash



Let customers order delivery and pickup on your website. Storefront is commission-free and uses your branding and logo.

### Your Cost

## No commissions

Pay just 2.9% + 30 cents per order for credit card processing. No commissions, monthly fees or set-up fees.



\*Complete at least 20 orders per month or DoorDash will refund your commission costs for that month. Partners are eligible for this rebate if they are on the Premier plan or certain custom rates and if (1) they cancel fewer than 5 orders that month and (2) maintain "open hours" on DoorDash for 90% of the Store Hours that they have set in the Merchant Portal.