

# The Changing Regulatory Paradigm for Food Delivery Services

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The food and grocery delivery space is a testament to how a regulatory scheme can develop organically for a nascent industry that has quickly found itself in the spotlight.

## An Increase in Demand

Although delivery services were already growing rapidly to accommodate consumers' busy lifestyles, COVID-19 created a massive need that delivery services were happy to fill. Restaurants were forced to close their doors and could only serve patrons using third-party delivery services like Grubhub and DoorDash. Aversions to crowded grocery stores meant that many consumers were staying home and paying companies like Amazon and Instacart to deliver their groceries.

The increased importance of food delivery services has been met with increased regulatory scrutiny. Every major delivery service has been hit with some combination of class action lawsuits and enforcement actions from the Federal Trade Commission (FTC) and state attorneys general, and the scrutiny has led several states to consider legislation or regulation aimed at curbing billing practices.

## The Toll of Fees

There have been a number of class actions regarding delivery fees in the past couple of years. For example, a class action complaint filed in 2020 against DoorDash, Postmates and Uber Eats alleged that the "exorbitant" fees charged by these entities violated antitrust laws.

Regulators have also been particularly active in the space. To date, the largest regulatory action over delivery fees came in February 2021 with a \$61.7 million settlement between Amazon and the FTC. According to the FTC, Amazon advertised to its delivery drivers and customers that 100% of tips would go to delivery drivers, when in actuality Amazon lowered delivery driver wages and used tips to make up the shortfall. Similarly, Instacart received a lawsuit in 2020 from the Washington, D.C. Attorney General over allegations that it pocketed the optional "service fee" that the company claimed it would use to pay its delivery personnel, and the D.C. Attorney General has brought further regulatory action over fees as recently as March 2022.

Given how important delivery services have become for both consumers and restaurants, a number of municipalities chose to begin regulating delivery services more directly. Los Angeles, Chicago and other major cities passed ordinances that limit delivery fees to 15% while pandemic-related restrictions are in effect. Some cities also require apps to increase fee transparency by listing the restaurant's actual menu price and the app's fees, and prohibit apps from retaining tips meant for restaurant workers.

Permanent caps have also been implemented in San Francisco and New York City. The New York City law has been particularly controversial. In June, a class action was filed alleging that major delivery apps have been deliberately flouting the New York City law. And in September, Grubhub, Uber Eats and DoorDash filed suit to enjoin the New York City law, arguing that the legislation "bears no relationship to any public-health emergency, and qualifies as nothing more than unconstitutional, harmful, and unnecessary government overreach."

California and Texas have also recently passed laws that more comprehensively regulate the industry statewide. The California law makes it unlawful for a food delivery platform to charge a purchase price that is higher than the price posted by a restaurant, or to retain any amounts designated as a tip or gratuity. The bill also requires delivery platforms to provide a cost breakdown to consumers for each order. The Texas law takes a lighter hand, simply prohibiting delivery apps from charging restaurant fees unless the restaurant has agreed to those fees in writing.

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## What's on the Horizon

- The regulatory scrutiny being faced by food delivery services demonstrates what can happen when an industry grows rapidly.
- Regulation begins with individual, targeted actions by regulators and consumers that are aimed to curb particularly harmful practices.
- But, if a particular industry is seen as wielding too much power, it can find itself subject to a more pervasive regulatory scheme.