Comments Received by the Department of
Consumer and Worker Protection on

Proposed Rules related to Recordkeeping Requirements for
Third-Party Food Delivery Services

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| **From:** | Mark Warshal |
| **To:** | rulecomments (DCWP) |
| **Subject:** | [EXTERNAL] Public Comment: Proposed Rules Relating to Junk Fees (6 RCNY § 5-16) |
| **Date:** | Wednesday, July 15, 2026 3:54:58 PM |



To the Department of Consumer and Worker Protection,

I am writing to submit my public comment regarding the proposed rule **§ 5-16 (General Fee Disclosures)**.

While I strongly support the Department's efforts to ban deceptive "junk fees" and mandate "all-in" pricing, I am deeply disappointed by the exemption of government-imposed taxes in the definition of "Total price" under subdivision (a).

True price transparency means that the advertised price is the final price the consumer must pay. Excluding local, state, and federal taxes from the advertised price means consumers are still hit with significant, unexpected costs at checkout. For example, during a recent hotel stay in NYC, I was shocked to find that taxes added approximately 20% to my bill. To a consumer, a surprise 20% increase on the bill is incredibly frustrating, and it is the government-mandated taxes—rather than business-imposed fees—that ultimately create this final sticker shock. By exempting these taxes from the "all-in" price, the rule inadvertently allows the government's own charges to remain hidden until the very end.

If the city truly wishes to champion price transparency, it should lead by example and require *all* mandatory charges—including government taxes—to be baked into the advertised "total price." Otherwise, this rule simply targets private business fees while giving a free pass to the government's own surprise pricing.

I urge the DCWP to revise subdivision (a) to include mandatory taxes in the "total price" disclosure requirements.

Sincerely,

Mark Warshal
Dallas, PA

July 16, 2026

Department of Consumer and Worker Protection
City of New York
42 Broadway
New York, NY 10004

*Re: Comments on Proposed Rule—Recordkeeping Requirements for Third-Party Food Delivery Services (Reference No. 2026 RG 042; DCWP-77)*

DoorDash welcomes the opportunity to comment on the Department's proposed rule implementing the fee caps established by Local Law 103 of 2021 and Local Law 79 of 2025 (the "fee cap law"). We write about one aspect of the proposed rule ("P.R."), P.R. Section 2-462(a)(4)(v), which incorporates P.R. Section 2-462(a)(4)(i). Together, these provisions appear to create a requirement that the monthly information restaurants receive under the fee cap law (1) be broken down, order by order, into the statute's separate fee categories (in both dollars and as a percentage of the purchase price); and (2) include an entirely new category of information, unrelated to the fee caps, regarding the length of the "direct path" between the customer and the restaurant. We respectfully suggest this requirement departs from what the Council already prescribed, is unnecessary, and would make restaurants' financial data harder to interpret, not easier.

**1. The Council has already specified what information platforms must provide to restaurants, and the proposed rule would change those requirements.**

The Council already set forth specific requirements about the information to be shared with restaurants for purposes of the fee cap law. Section 20-563.3(h) of the Administrative Code requires a platform to give each restaurant, every month, an "itemized list of each transaction" from the preceding month, including "any fees . . . charged."

The proposed rule would go further. P.R. Section 2-462(a)(4)(v) appears to require the disclosure to be disaggregated in the manner set out in P.R. Section 2-462(a)(4)(i), thereby adding content to the disclosure that the Council did not call for.

Specifically, P.R. Section 2-462(a)(4)(i) requires "maintain[ing] in a disaggregated manner" the following, "separately itemized and identifiable" for every order: the date the order was placed; the purchase price; each fee charged—the delivery fee, basic service fee, transaction fee, enhanced service fee, and "[a]ny other charge"—each "expressed in dollars and as a percentage of the purchase price," along with "the date imposed"; the "information sufficient to describe and identify . . . the purpose" of any charge outside a delivery, basic service, or transaction fee; and the "length of the direct path, without accounting for detours, roads, or geographic obstacles, between the customer and food service establishment."

Although this provision is placed among those governing records a platform must maintain internally, it also applies under the proposed rule to the "monthly itemized transaction list provided to the food service establishment" (P.R. Section 2-462(a)(4)(v)) and thus appears to reach the *disclosure* restaurants receive under the fee cap law, not merely the platform's *internal records*.

The Council already defined the contours of that restaurant-facing disclosure at Section 20-563.3(h) of the Administrative Code. And the rulemaking authority the Department invokes, Section 20-563.8(a)(6) and (b) of the Administrative Code, concerns the records a platform must maintain and produce to the Department, not the disclosure it provides to restaurants. The Department may not, through rulemaking, enlarge the monthly disclosure beyond what the Council specified in Section 20-563.3(h).

We respectfully encourage the Department to revise P.R. Section 2-462(a)(4)(v) so that the monthly disclosure to restaurants tracks Section 20-563.3(h).

**2. DoorDash gives every restaurant detailed transaction information in compliance with the fee cap law's reporting requirement.**

The fee cap law's reporting provision exists so restaurants can see and verify what they are charged on each order. Restaurants already receive that information.

DoorDash provides restaurants with a robust suite of tools that detail all the information required by the fee cap law's reporting provision. This information is easily accessible through DoorDash's Merchant portal and includes an itemized breakdown of every transaction, including order subtotal, commission paid by the restaurant, and any additional fees for marketing. This information can be viewed by the restaurant at the transaction level and in reports detailing transactions on a monthly basis.

Per the fee cap law, commissions for basic, enhanced, and delivery fees can be averaged over the course of the month. Admin. Code § 20-563.3(a)–(b), (d). Restaurants are refunded any amount charged above a cap on an averaged monthly basis, as set forth in Section 20-563.3(e). If restaurants are entitled to a refund, they can confirm the amount to which they are entitled by referencing the monthly totals in the reporting tools available to them.

The disaggregation in the proposed rule would not fill any gap in what information restaurants receive, and does not serve a regulatory purpose in light of the fee cap law's framework. As long as restaurants can evaluate the monthly total of commissions and other fees charged, compared to their subtotals, they are able to determine whether they are entitled to a refund.

The same is true of data that has nothing to do with a restaurant's charges, such as the straight-line distance between a customer and the restaurant, which tells a restaurant nothing about its fees. A restaurant's refund hinges only on commissions and fees charged, the purchase price, and the applicable caps, measured monthly. Distance between a customer and a restaurant does not factor into whether a restaurant is entitled to a refund or what the refund amount would be.

**3. Presenting the information for each order in the way the proposed rule requires would confuse restaurants and be overly burdensome.**

Receiving accurate, easy-to-understand financial information is important for restaurants of all sizes. Requiring each order's charges to be split into the proposed rule's separate categories, and expressed as a percentage of each order's purchase price, would unnecessarily complicate the information restaurants receive and make it harder for them to understand what they are being charged on each order. It would also be more burdensome and costly to produce.

DoorDash offers restaurants a simple tiered commission structure that is flexible and easy for restaurants to understand. These commissions include the cost of appearing on the platform, online ordering, delivery, and transaction fees. Several partnership options include higher commissions that include additional benefits. Restaurants may also choose to run ads or promotions for an additional fee. As detailed above, restaurants have access to transaction-level reporting tools that break down commissions and any other fees applicable to an individual order.

Under the fee cap law, an individual order's fee percentage may sit above a cap figure and still be fully compliant because the fee caps are measured as a *monthly average percentage* across *all orders*. *See* Admin. Code § 20-563.3(a), (b), and (d). Fees on a single order can exceed the capped percentage so long as the monthly average across all orders remains fully compliant. *See id.* A disaggregated fee-percentage breakdown on an order-by-order basis, as the proposed rule requires, would routinely display fully compliant fees as though they exceeded the caps, prompting confusion, disputes, and refund requests over charges that fully comply with the law, undermining the clarity the reporting requirement is meant to provide. Producing a complete breakdown of categories and percentages to restaurants would require substantial work to present charges in a form that does not match how they are actually assessed.

* * *

DoorDash shares the Department's goal of ensuring the fee cap law is administered effectively and restaurants receive clear, reliable information regarding fees. Keeping the restaurant-facing disclosure to what the Council prescribed serves restaurants better than the additional breakdown the proposed rule would require.

DoorDash appreciates the Department's engagement and its willingness to gather input from platforms as it implements the fee cap law. We thank the Department for its consideration and would welcome the opportunity to discuss these comments further.

Sincerely,

Ivan Garcia
Head of New York City Public Policy, DoorDash

**BEFORE THE NEW YORK CITY**
**DEPARTMENT OF CONSUMER AND WORKER PROTECTION**

| | |
|---|---|
| **Proposed Rules Regarding Recordkeeping and Reporting Requirements** | Public Hearing: July 16, 2026 |

**COMMENTS OF UBER TECHNOLOGIES, INC.**

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Attorney for Uber Technologies, Inc.

Uber appreciates the opportunity to comment on the Department of Consumer and Worker Protection's (DCWP or the Department) proposed rule regarding recordkeeping and reporting requirements to implement Local Law 103 of 2021 and Local Law 79 of 2025.

While Uber supports the Department's efforts to ensure transparent merchant fee cap compliance, we have significant concerns regarding the operational and administrative burdens introduced by the proposed amendments to Section 2-462(a)(4). Uber urges the Department to reconsider the hyper-granular merchant reporting requirements, or at minimum, provide a significant implementation transition period, based on the following considerations:

## I. Merchants Already Possess the Information to Assess Refund Eligibility

The primary goal of New York City's fee cap laws is to ensure that merchants are not overcharged and can easily verify their billing. New York City merchants receive clear, comprehensive transaction histories that detail the exact dollar amounts of the purchase price and fees charged for every order. The data currently provided to merchants ensures that they are fully equipped to verify their fees do not exceed the platform's contractual or statutory obligations, understand when a fee refund is required, and identify discrepancies to raise directly with the platform or DCWP.

Adding layers of derivative percentage calculations on top of raw dollar amounts is mathematically redundant and offers no additional protective value to the merchant.

## II. The Proposed Rules Exceed the Mandate of the Statutory Fee Cap Laws

The proposed rule conflates what platforms should *internally maintain* for compliance audits with what platforms are *statutorily required to provide* to merchants.

- **The Statutory Limit:** Section 20-563.3(h) of the Administrative Code (as amended by Local Law 79 of 2025) requires third-party platforms to provide an "itemized list of fees charged" to restaurants on a monthly basis.
- **The Proposal's Overreach:** The statute **does not** mandate that platforms calculate and display a per-category percentage breakdown of the purchase price for every individual transaction on merchant statements.

The Department's proposed requirement under **Section 2-462(a)(4)(v)**—which forces platforms to present monthly merchant statements disaggregated into both dollars and percentages for five distinct fee types on every single line-item—creates a new compliance mandate that simply does not exist in the text of the enacted laws, and fails to meaningfully impact how merchants understand their statements today.

## III. Complex Reporting Will Confuse and Burden Local Merchants

Rather than empowering small businesses, the proposed reporting layout will overwhelm them. Forcing platforms to print a dense, multi-column grid of percentages alongside dollar figures for every single delivery order will result in highly cluttered and virtually unreadable statements.

Most local restaurants are run by independent operators who do not have the administrative bandwidth or data-science resources to parse thousands of lines of unnecessary percentage fractions.

- **Unnecessary Visual Noise:** A restaurant processing 500 orders a month would receive a statement containing up to **2,500 individual percentage figures** across basic, enhanced, delivery, transaction, and "other" fees.
- **Increased Inquiries:** Instead of providing clarity, this mathematical noise will likely cause widespread confusion, triggering unnecessary administrative disputes and diverting valuable time away from running their actual businesses.

## IV. The Proposed Changes Will Require Significant Lead Time

Should the Department proceed with adopting the proposed rules as drafted, the operational impact on delivery platforms cannot be overstated. A long-term, realistic implementation runway is absolutely necessary to navigate the following hurdles:

- **Backend Engineering and Data Architecture Re-builds:** Building systems to calculate, format, and log order-level straight-line distances (Section 2-462(a)(4)(i)(H)) and disaggregated category percentages requires a complete re-engineering of Uber's native pricing and invoicing infrastructure.
- **Dismantling "All-In" Pricing Models:** Many existing merchant agreements operate under a unified, "all-in" pricing model. Forcing platforms to segment these integrated service packages into discrete buckets on a per-transaction basis violates the operational logic of those original contracts.
- **Contractual Amendments and Renegotiation:** Transitioning thousands of NYC merchants away from "all-in" pricing agreements to comply with these rules will require reviewing, rewriting, and re-executing merchant agreements across the city. This process takes significant time to ensure local restaurant owners are properly educated on the new pricing breakdowns.

To prevent severe operational disruption for both platforms and the restaurants Uber serves, Uber requests an implementation period of at least 180 days following the publication of the final rule.

## V. Conclusion

Transparency is vital, but it must be functional. Uber respectfully requests that DCWP amend Section 2-462(a)(4)(v) to remove the requirement that merchant statements mirror the hyper-granular percentage-of-purchase-price breakdowns required for internal compliance logging, and provide a realistic transition period for implementation.

By allowing platforms to continue providing clear, dollar-itemized transaction histories, the Department can protect restaurant margins, align with statutory requirements, and keep merchant reporting accessible, clear, and actionable.

**Online comments**: 1

- **C. James Robert von Scholz SC**
  Please find the attachment as the official submitted comment. Thank you.

  Comment attachment
  Recordkeeping-Requirements-for-Third-Party-Food-Delivery-Services-07162026.pdf

  Comment added July 16, 2026 3:15pm

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Thursday, July 16, 2026

**BY WEBSITE SUBMISSION ONLY:**
https://rules.cityofnewyork.us/rule/recordkeeping-requirements-for-third-party-food-delivery-services
**NO HARDCOPY SENT**

**PUBLIC COMMENT ON PROPOSED RULE AMENDMENT**

DCWP Reference Number: **2026 RG 042**

**RE:** Public Comment on Proposed Amendment of Rules Relating to Recordkeeping Requirements for Third-Party Food Delivery Services (DCWP-77)

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## I. INTRODUCTION AND STANDING

I submit this comment in my capacity as a registered representative with clients before the Office of Administrative Trials and Hearings, having reviewed the Department of Consumer and Worker Protection's proposed rule amendment establishing recordkeeping requirements for third-party food delivery services. This comment addresses the proposed rule's compliance with the New York City Administrative Procedure Act, its practical implementation challenges, and opportunities for the Department to enhance both regulatory efficacy and public benefit.

The proposed rule implements Local Law 103 of 2021 and Local Law 79 of 2025, establishing mandatory recordkeeping obligations and clarifying fee-cap calculation methodologies. As an administrative law representative with experience in agency adjudication, I offer the following critical analysis of the rule's benefits and liabilities, together with concrete recommendations for mitigation.

## II. SUMMARY POSITION

The proposed rule represents a necessary step toward effective enforcement of fee-cap legislation protecting food service establishments from excessive charges by third-party delivery platforms. The rule satisfies the formal requirements of NYC Charter § 1043 and demonstrates legitimate exercise of delegated authority under NYC Administrative Code §§ 20-104, 20-563.8(a)(6), and 20-563.8(b).

However, the rule presents significant implementation liabilities in four (4) critical areas:

1. compressed compliance timelines creating procedural due process concerns;
2. investigatory subpoena procedures lacking adequate notice protections;
3. negative-inference provisions that risk arbitrary adjudication; and
4. ambiguities in refund-treatment standards that undermine fee-cap clarity.

Each liability can be remediated through targeted modifications that would strengthen both enforceability and fairness, converting potential constitutional vulnerabilities into robust public protections.

## III. PROCEDURAL COMPLIANCE WITH CITY ADMINISTRATIVE PROCEDURE ACT

### A. Adequacy of Notice and Statement of Basis and Purpose

The proposed rule satisfies CAPA's procedural requirements. The Department published full text of the proposed amendments in the City Record with appropriate underlining and bracketing to indicate additions and deletions, provided notice of the public hearing at least thirty (30) days in advance, and issued a statement of basis and purpose explaining the rule's objectives. (See NYC Charter 1043.)

The statement of basis and purpose, while succinct, meets the standard articulated in *Matter of Lynch v. New York City Civilian Complaint Review Bd.*, which requires only that the agency state the purpose of the rules and provide a clear explanation of the requirements imposed. (See *Matter of Lynch v NY City Civilian Complaint Review Bd.*, 206 AD3d 558 [1st Dept 2022].) The Department explained that the rule implements fee-cap laws by requiring third-party food delivery services to maintain records documenting purchase prices, itemized fees, and refunds, thereby enabling effective investigation of violations. This satisfies the requirement that the statement provide "a clear explanation of the rule and the requirements imposed by the rule" without necessitating exhaustive elaboration of the agency's rationale.

B. Substantive Authority and Delegation Analysis

The Department's authority to promulgate this rule derives from multiple sources. NYC Charter § 1043 establishes that each agency "is empowered to adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law." NYC Administrative Code § 20-104(b) authorizes the Commissioner to promulgate rules "to carry out the powers and duties of the department" and "to require that licensees keep such records as he or she may determine are necessary or useful for carrying out the purposes of chapter two."

Most directly, NYC Administrative Code § 20-563.8(a)(6) and (b) explicitly authorize the Department to prescribe by rule "such other records as the commissioner may prescribe" and mandate that third-party food delivery services make records "available to the department electronically upon request, consistent with applicable law and in accordance with rules promulgated hereunder."

This delegation satisfies New York's non-delegation doctrine standards. In *Matter of Juarez v. New York State Office of Victim Services*, the Court of Appeals held that "where flexibility is required to enable an administrative agency to adapt to changing conditions, it is sufficient if the Legislature confers broad power upon the agency to fulfill the policy goals embodied in the statute, leaving it up to the agency itself to promulgate the necessary regulatory details." (See *Matter of Juarez v NY State Off. of Victim Servs.*, 36 NY3d 485 [2021].) The City Council expressly delegated to DCWP the authority to specify recordkeeping details necessary to enforce fee caps, and the proposed rule reasonably implements that delegation by identifying specific data elements required for compliance verification.

**Benefit:** The rule rests on solid legal authority and follows proper CAPA procedures, minimizing the risk of invalidation on procedural or *ultra vires* grounds.

## IV. CRITICAL ANALYSIS: BENEFITS OF THE PROPOSED RULE

A. Enhanced Enforcement Capacity

The proposed rule's primary benefit lies in its transformation of abstract statutory fee caps into enforceable obligations through mandatory documentation. By requiring third-party food delivery services to maintain disaggregated records of each online order's purchase price, delivery fee, basic service fee, transaction fee, and enhanced service fee (both individually and as monthly aggregates) the rule provides DCWP with the evidentiary foundation necessary to detect violations.

This addresses a critical enforcement gap. Without standardized recordkeeping, DCWP would face substantial practical barriers in determining whether a platform charged a food service establishment more than the statutory maximum of 15% of the purchase price for delivery services, 5% for non-delivery services, or 3% for transaction processing. (See NYC Administrative Code 20-563.3; also See NYC Administrative Code 20-563.2.) The disaggregated format mandated by proposed 6 RCNY § 2-462(a)(4)(i) eliminates ambiguity and enables efficient compliance audits.

B. Protection of Small Food Service Establishments

Small and independent restaurants often lack the sophisticated accounting systems or legal resources to detect and challenge fee-cap violations. By mandating that platforms maintain comprehensive transaction records and provide monthly itemized lists to each food service establishment, the rule empowers restaurants to identify overcharges and seek refunds. This democratizes access to fee-cap protections, ensuring that statutory safeguards benefit not only large chains with in-house counsel but also small operators who are most vulnerable to exploitative fee structures.

C. Clarification of Purchase Price Calculation

The proposed rule resolves a significant ambiguity by specifying that "the purchase price used to calculate compliance with the fee caps requirements set forth in section 20-563.3 of the Administrative Code is the purchase price at the time the online order is placed" and that "[r]efunds to consumers, whether full or partial, will not be considered to have diminished the purchase price." This prevents platforms from manipulating fee-cap calculations through post-hoc adjustments and establishes a clear, objective standard for compliance measurement.

D. Transparency and Accountability Through Refund Tracking

By requiring platforms to document any refund issued to a food service establishment to remedy a fee-cap overcharge (including the amount and date of the overcharge, the type of fees overcharged, the refund amount, and the date issued) the rule creates a compliance incentive structure. Platforms aware that refund patterns will be subject to agency review have stronger motivation to implement accurate fee-calculation systems at the point of transaction rather than relying on post-violation remediation.

**Overall Benefit Assessment:** The proposed rule substantially advances the legislative purpose of Local Laws 103 and 79 by creating an enforceable framework for fee-cap compliance, protecting vulnerable food service establishments, and establishing clear standards that reduce litigation risk.

## V. CRITICAL ANALYSIS: LIABILITIES AND REMEDIAL RECOMMENDATIONS

### Liability 1: Compressed Response Timeline Creates Due Process Risk

*A. The Problem*

Proposed 6 RCNY § 2-462(b)(2) reduces the deadline for responding to Department records requests from 30 days to 20 days, with extensions available only "on consent by the Department and the third-party food delivery service." This compression creates three (3) distinct due process concerns.

First, the 20-day timeline may be insufficient for platforms with large transaction volumes to compile, verify, and produce voluminous electronic records in the formats prescribed by DCWP. The rule requires disaggregated records for each individual online order, including purchase price, itemized fees expressed both in dollars and as percentages, dates imposed, and enhanced service fee descriptions; potentially millions of data points for high-volume platforms.

Second, the "consent" requirement for extensions places platforms in a vulnerable position. If DCWP declines to grant an extension, the platform faces immediate penalty exposure under proposed 6 RCNY § 2-462(b)(3), which authorizes summons issuance for failure to produce records by the deadline. This structure lacks the procedural safeguards typically associated with administrative subpoenas.

Third, the rule does not establish standards governing when the Department will or will not consent to extensions. This omission creates arbitrary enforcement risk. In *Matter of Keyspan Energy Services v. PSC*, the Appellate Division held that "in the absence of a specific statutory notice provision, the controlling standard [in the administrative context] is procedural due process" and that notice must be "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard.'" (See *Matter of Keyspan Energy Servs. v PSC*, 295 AD2d 859 [3d Dept 2002].) A rigid 20-day deadline without objective extension criteria fails this tailoring requirement for platforms managing complex, high-volume data systems.

*B. Constitutional and Regulatory Standards*

Administrative due process requires that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." (See *Matter of Mayfield v Evans*, 93 AD3d 98 [1st Dept 2012].) The proposed timeline creates jeopardy without adequate opportunity. While investigatory subpoenas need not provide the full panoply of trial-level protections, they must "have some relevancy and materiality to the matter under investigation" and cannot be "used as an instrument of harassment." (See *Hynes v Moskowitz*, 44 NY2d 383 [1978].)

A 20-day production deadline for voluminous, complex electronic records (particularly when coupled with discretionary denial of extensions) approaches the threshold of harassment where the timeline is structurally inadequate for compliance. This is distinguishable from routine document requests; the rule mandates disaggregated, individually itemized transaction data in formats prescribed by DCWP, requiring substantial technical effort.

*C. Recommended Mitigation Options*

**Option 1: Restore 30-Day Baseline with Objective Extension Standards**

***Amend*** proposed 6 RCNY § 2-462(b)(2) to restore the 30-day baseline deadline and establish objective criteria for extensions:

> "(2) A third-party food delivery service must respond to a written request or subpoena for information or records from the Department by providing true, accurate, and contemporaneously made electronic records or information within 30 days of the date the request is received, in the formats and layouts prescribed by the Department. The Department shall grant a reasonable extension of up to an additional 30 days upon a showing by the third-party food delivery service that:
>
> (i) The volume of records requested requires additional processing time despite diligent effort;
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> (ii) Technical system limitations prevent full extraction within the initial deadline; or
>
> (iii) The requested format requires data transformation or migration that cannot be completed within 30 days.
>
> The Department shall respond to extension requests within 5 business days of receipt. Denial of an extension request must be in writing and specify the basis for denial."

**Public Benefit:** This modification eliminates arbitrary enforcement risk, reduces constitutional vulnerability, and ensures that compliance timelines reflect operational realities. Platforms subject to reasonable, predictable deadlines are more likely to invest in robust recordkeeping systems, enhancing long-term compliance. The Department gains defensible procedures that withstand due process challenges, avoiding costly litigation and potential invalidation of enforcement actions.

**Option 2: Tiered Timeline Based on Request Volume**

Alternatively, ***establish*** a tiered system:

> "(2) A third-party food delivery service must respond to a written request or subpoena within:
>
> (i) 20 days for requests covering fewer than 1,000 transactions;
>
> (ii) 30 days for requests covering 1,000 to 10,000 transactions;
>
> (iii) 45 days for requests covering more than 10,000 transactions.
>
> Extensions beyond these deadlines may be granted on consent by mutual agreement."

**Public Benefit:** Tiered deadlines balance enforcement efficiency for targeted investigations with operational feasibility for large-scale audits. This approach demonstrates procedural tailoring, strengthening the rule's constitutional footing while maintaining DCWP's investigatory flexibility.

**<u>Liability 2: Negative Inference Provision Risks Arbitrary Adjudication</u>**

*A. The Problem*

Proposed 6 RCNY § 2-462(c) provides: "A third-party delivery service's failure to maintain, retain, or produce a record that is required by law or rule to be maintained that is relevant to a material fact alleged by the Department in a summons, petition, or other notice of hearing creates a reasonable inference that such fact is true."

This negative-inference provision creates three (3) distinct liabilities:

First, it shifts the burden of proof to the respondent platform before any adjudication occurs. The platform's mere failure to produce a record (regardless of the reason for non-production) triggers an evidentiary presumption in DCWP's favor. This reversal is particularly problematic where the Department's initial allegation may itself be contestable.

Second, the provision does not distinguish between willful destruction, negligent failure to maintain, and good-faith inability to produce records due to technical failures or ambiguities in the rule's requirements. A platform that attempted to comply but misinterpreted a data-format specification faces the same adverse inference as a platform that deliberately destroyed evidence.

Third, the rule does not specify procedural protections for rebutting the inference. If the inference is "reasonable," can it be overcome by countervailing evidence? What quantum of proof is required? The silence creates adjudicatory uncertainty and risks arbitrary application.

*B. Due Process Standards for Disciplinary Hearings*

In *Girard v. Glens Falls*, the Appellate Division held that "due process in the administrative context requires that no essential element of a fair trial be dispensed with" and that disciplinary hearings must permit respondents to "offer evidence in defense and in mitigation." (See *Girard v Glens Falls*, 173 AD2d 113 [3d Dept 1991]) A negative-inference provision that presumes guilt based on non-production of records, without opportunity for the respondent to explain the non-production or present countervailing evidence, violates this standard.

Similarly, *Matter of Mayfield v. Evans* invalidated a regulation that allowed a single board member to modify a presiding officer's recommendation without reviewing the hearing record or affording the respondent an opportunity to be heard, holding that such a process "inexcusably deprived petitioner of the opportunity to be heard." (See *Matter of Mayfield v Evans*, 93 AD3d 98 [1st Dept 2012].) The negative-inference provision here creates a parallel risk: the Department's allegation becomes presumptively true based on absence of records, without the platform having a meaningful opportunity to contest either the Department's characterization of what records are "required" or the materiality of the missing records to the alleged violation.

*C. Recommended Mitigation Options*

**Option 1: Add Willfulness Requirement and Rebuttable Presumption Standard**

***Amend*** proposed 6 RCNY § 2-462(c):

> "(c) A third-party delivery service's willful failure to maintain, retain, or produce a record that is required by law or rule to be maintained and that

is relevant to a material fact alleged by the Department in a summons, petition, or other notice of hearing creates a rebuttable presumption that such fact is true. The third-party food delivery service may rebut this presumption by demonstrating that:

(i) The record was not maintained due to reasonable interpretation of an ambiguous regulatory requirement;

(ii) The record was lost or destroyed due to technical system failure beyond the service's control and the service took reasonable steps to preserve and recover the record;

(iii) The record exists but cannot be produced in the prescribed format despite diligent effort, and the service has offered to produce the record in an alternative format; or

(iv) Other credible evidence demonstrates that the material fact alleged by the Department is not true.

For purposes of this subdivision, 'willful' means intentional failure or failure with reckless disregard for the recordkeeping obligation. The Department bears the burden of proving willfulness by a preponderance of the evidence before the presumption arises."

**Public Benefit:** This modification aligns the rule with established evidentiary principles governing adverse inferences, which typically require willfulness or bad faith before shifting the burden of proof. Platforms operating in good faith are protected from punitive presumptions, encouraging voluntary compliance. The Department retains a powerful enforcement tool for deliberate non-compliance while avoiding constitutional vulnerability. Adjudicators receive clear standards, reducing arbitrary decision-making and enhancing the integrity of OATH proceedings.

**Option 2: Evidentiary Weight Standard Instead of Presumption**

Alternatively, ***replace*** the presumption with an evidentiary weight provision:

"(c) In adjudicating a summons, petition, or other notice of hearing, the trier of fact may consider a third-party delivery service's failure to

> maintain, retain, or produce a required record as evidence bearing on the credibility of the service's defense and the weight to be accorded to other evidence presented by the service. Such failure alone shall not be determinative of any material fact and must be considered in light of all evidence in the record."

**Public Benefit:** This preserves the Department's ability to draw inferences from non-production while maintaining respondent platforms' due process right to contest allegations on the merits. It codifies the evidentiary principle that failure to produce relevant evidence may undermine credibility without creating an automatic presumption of liability. This approach is more likely to withstand appellate scrutiny and enhances procedural fairness.

**Liability 3: Ambiguity in "Enhanced Service Fee" Definition and Identification**

*A. The Problem*

Proposed 6 RCNY § 2-462(a)(4)(i)(F) requires platforms to maintain records of "[e]nhanced service fees, expressed in dollars and as a percentage of the purchase price and the date imposed, and information sufficient to describe and identify such charge and the purpose thereof."

The rule does not define "enhanced service fee." While NYC Administrative Code § 20-563.3 establishes separate fee caps for delivery fees (15%), basic service fees (5%), and transaction fees (3%), it does not explicitly define a fourth category of "enhanced service fees." This creates interpretive confusion.

Is an "enhanced service fee" any charge that exceeds the basic service fee cap, thereby triggering enforcement action? Or is it a distinct category of fee for premium services (such as priority placement on the platform's website, advertising, or customer data analytics) that may be permissible under certain conditions? The statutory framework is silent, and the proposed rule provides no clarification.

*(continued on next page)*

This ambiguity creates three (3) problems:

First, platforms cannot determine with certainty which charges must be documented as "enhanced service fees" versus other fee categories. This undermines the rule's core purpose of creating clear recordkeeping requirements.

Second, food service establishments cannot assess whether they are being charged lawful enhanced service fees or disguised overcharges. The monthly itemized lists required by proposed 6 RCNY § 2-462(a)(4)(v) will identify "enhanced service fees" but provide no basis for evaluating their legitimacy.

Third, DCWP adjudicators lack a clear standard for determining when an "enhanced service fee" violates fee caps. This invites inconsistent enforcement and increases litigation risk.

*B. Regulatory Clarity Standards*

In *Matter of Council of the City of New York v. Department of Homeless Services*, the Court of Appeals held that a rule constitutes a "statement or communication of general applicability" subject to CAPA when it "mandates uniform standards" and "leaves intake workers with little discretion in determining eligibility." (See *Matter of Council of the City of NY v Dept. of Homeless Servs. of the City of NY*, 22 NY3d 150 [2013].) The corollary principle is that regulations must provide sufficient clarity to enable uniform application.

A recordkeeping rule that identifies "enhanced service fees" as a mandatory data category without defining the term creates the inverse problem: it imposes an obligation without establishing a standard for compliance. Platforms are left to exercise discretion in categorizing charges, undermining uniformity and creating enforcement gaps.

*C. Recommended Mitigation Options*

**Option 1: Define "Enhanced Service Fee" and Establish Disclosure Requirements**

***Add*** a new subdivision (d) to proposed 6 RCNY § 2-462:

"(d) Definitions. For purposes of this section:

(1) 'Enhanced service fee' means any charge imposed by a third-party food delivery service on a food service establishment for services beyond basic listing, order processing, and delivery, including but not limited to:

(i) Premium placement or featured positioning on the platform's website or mobile application;

(ii) Advertising or promotional services;

(iii) Access to customer data, analytics, or marketing tools;

(iv) Photography, menu design, or other content creation services; or

(v) Any other service for which the platform charges a fee separate from and in addition to delivery fees, basic service fees, and transaction fees.

(2) An enhanced service fee is lawful only if:

(i) The food service establishment affirmatively elected to receive the enhanced service in a written agreement that separately itemizes the enhanced service fee;

(ii) The enhanced service fee is charged separately from and does not reduce the amount credited to the food service establishment for the purchase price of any online order; and

(iii) The third-party food delivery service provides the food service establishment with monthly documentation of the enhanced services provided and the corresponding fees charged."

**Public Benefit:** This definition eliminates ambiguity, enabling platforms to classify charges accurately and enabling DCWP to enforce fee caps consistently. Food service establishments gain transparency regarding optional services versus mandatory platform fees, empowering them to make informed decisions. The requirement that enhanced services be separately documented and affirmatively elected prevents platforms from disguising fee-cap violations as voluntary enhanced services, strengthening consumer protection.

**Option 2: Prohibit Enhanced Service Fees Tied to Purchase Price**

Alternatively, ***clarify*** that enhanced service fees must be fixed-dollar amounts unrelated to individual transaction purchase prices:

> "(d) Enhanced service fees. Any charge designated by a third-party food delivery service as an 'enhanced service fee' must be:
>
> (1) A fixed monthly or annual dollar amount unrelated to the purchase price of any individual online order; and
>
> (2) Documented in a written agreement signed by the food service establishment that separately itemizes the enhanced service and its cost.
>
> No charge calculated as a percentage of an individual online order's purchase price shall be classified as an enhanced service fee. All percentage-based charges are subject to the fee caps in NYC Administrative Code § 20-563.3."

**Public Benefit:** This approach prevents evasion of fee caps through re-characterization. By requiring that enhanced service fees be fixed-dollar amounts rather than transaction-based percentages, the rule closes a potential loophole where platforms could circumvent caps by labeling excess charges as "enhanced services." This bright-line rule simplifies enforcement and protects food service establishments from disguised overcharges.

**<u>Liability 4: Refund Provision May Inadvertently Shield Systematic Overcharging</u>**

*A. The Problem*

Proposed 6 RCNY § 2-466 provides that "refunds to consumers, whether full or partial, will not be considered to have diminished the purchase price used to calculate compliance with the fee caps." The rule's intent is clear: platforms cannot manipulate fee-cap calculations by issuing post-transaction refunds to consumers.

However, the rule creates an unintended gap by focusing exclusively on consumer refunds while remaining silent on refunds issued to food service establishments. Proposed 6 RCNY § 2-462(a)(4)(iii) requires platforms to document refunds issued to remedy fee-cap overcharges, but the rule does not specify whether such refunds cure the underlying violation or merely mitigate penalties.

This creates a perverse incentive structure. A platform with inadequate fee-calculation systems may adopt a strategy of systematic overcharging followed by remedial refunds upon detection, treating refunds as a cost of doing business rather than implementing compliant systems. If refunds fully cure violations, the platform faces no meaningful penalty for defective practices. If refunds do not cure violations, the platform may face duplicative liability (both restitution through the refund and civil penalties for the violation) without clear notice.

*B. Statutory Enforcement Framework*

NYC Administrative Code § 20-563.3(c) establishes the substantive fee caps, while NYC Charter § 2203(h) authorizes DCWP to "impose civil penalties for, and to order restitution or other forms of equitable relief, for and payment of monetary damages, to a consumer or worker in connection with the violation of any laws or rules the enforcement of which is within the jurisdiction of the department."

This statutory structure distinguishes between violations (which trigger civil penalties) and remedies (restitution and equitable relief). A refund issued to a food service establishment constitutes restitution but does not eliminate the underlying violation. However, the proposed rule does not clearly establish this principle, creating enforcement ambiguity.

*C. Recommended Mitigation Options*

**Option 1: Clarify That Refunds Constitute Restitution But Do Not Cure Violations**

***Amend*** proposed 6 RCNY § 2-466 by adding a new subdivision (c):

"(c) Refunds issued to food service establishments.

(1) A refund issued by a third-party food delivery service to a food service establishment to remedy a fee-cap overcharge constitutes restitution to the aggrieved establishment but does not cure or eliminate the underlying violation of NYC Administrative Code § 20-563.3.

(2) In determining the amount of civil penalties to impose for a fee-cap violation, the Department may consider as a mitigating factor whether the third-party food delivery service:

(i) Issued a full refund to the food service establishment within 30 days of discovering the overcharge;

(ii) Implemented corrective measures to prevent recurrence of the violation; and

(iii) Demonstrated that the violation resulted from technical system error rather than deliberate policy.

(3) Systematic or repeated violations, even where followed by refunds, shall be deemed evidence of inadequate fee-calculation systems and shall not be subject to penalty mitigation based on refund issuance."

**Public Benefit:** This modification eliminates the perverse incentive for platforms to adopt "overcharge-and-refund" business models. Platforms face clear notice that refunds mitigate but do not eliminate liability, encouraging investment in compliant systems rather than reactive remediation. The Department gains flexibility to calibrate penalties based on good faith, while systematic violators face full enforcement consequences. Food service establishments benefit from both restitution and deterrence of future violations.

**Option 2: Establish Safe Harbor for Proactive Refund Programs**

Alternatively, ***create*** an incentive structure for voluntary compliance programs:

"(c) Proactive refund programs.

(1) A third-party food delivery service that implements a proactive fee-cap compliance audit program and issues refunds for any overcharges detected through such audits within 30 days of detection shall be eligible for penalty reduction.

(2) To qualify for penalty reduction, the audit program must:

(i) Be conducted at least quarterly;

(ii) Review a statistically valid sample of transactions or all transactions, at the platform's election;

(iii) Result in written audit reports that are maintained pursuant to subdivision (a) and made available to the Department upon request; and

(iv) Trigger automatic refunds to food service establishments for any overcharges detected, with written notice to each establishment explaining the error and the refund amount.

(3) Platforms maintaining such programs shall be subject to reduced civil penalties - not to exceed 50% reduction - for violations detected through the audit program, provided the platform issues full refunds within 30 days and implements corrective measures.

(4) This subdivision does not apply to violations detected by the Department, food service establishments, or third parties, which remain subject to full penalties."

**Public Benefit:** This creates a powerful incentive for platforms to implement robust internal compliance systems. Platforms gain predictability and penalty mitigation in exchange for proactive self-policing. DCWP's enforcement burden is reduced as platforms conduct initial detection and remediation. Food service establishments benefit from faster refunds without needing to file complaints. The public gains a regulatory framework that rewards compliance and transparency rather than purely punishing violations after the fact.

## VI. ADDITIONAL RECOMMENDATIONS FOR PUBLIC BENEFIT ENHANCEMENT

Beyond the four (4) primary liabilities addressed above, the proposed rule would benefit from two (2) additional modifications:

<u>A. Data Specification Transparency</u>

Proposed 6 RCNY § 2-462(d) authorizes DCWP to "prescribe data specifications, including field definitions, record layouts, and uniform codes, for any record required to be maintained" and mandates that platforms comply with such

specifications. However, the rule does not require public notice of data specifications or provide a process for platforms to request clarification or modification of technical requirements.

**Recommendation:** ***Add*** a notice and comment provision:

"(d) Data specifications.

(1) The Department may prescribe data specifications, including field definitions, record layouts, and uniform codes, for any record required to be maintained pursuant to subdivision (a).

(2) Before prescribing or modifying data specifications, the Department shall:

(i) Publish draft specifications on the Department's website for public comment for a period of not less than 30 days;

(ii) Consult with representatives of third-party food delivery services and food service establishments regarding technical feasibility; and

(iii) Issue a written explanation of any significant modifications to the draft specifications.

(3) Data specifications shall be published on the Department's website and updated as modified. Platforms shall have 90 days from publication of new or modified specifications to achieve compliance."

**Public Benefit:** This ensures that technical requirements are feasible and clearly communicated, reducing compliance errors and enforcement disputes. Platforms gain predictability and an opportunity to identify unworkable specifications before implementation. The Department benefits from industry input that may improve data quality and investigatory efficiency.

<u>B. Periodic Compliance Reporting with Safe Harbor</u>

To further incentivize compliance and enable early detection of systematic issues, the Department should consider implementing a periodic reporting framework:

**Recommendation:** ***Add*** a new section 2-463:

"§ 2-463 Quarterly compliance certification.

(a) Every third-party food delivery service shall submit to the Department, within 30 days of the end of each calendar quarter, a compliance certification signed by a responsible officer of the service, certifying that:

(1) The service has maintained all records required by section 2-462 for the preceding quarter;

(2) The service has reviewed a sample of transactions for compliance with fee caps and identified any overcharges;

(3) Any overcharges detected have been refunded to the affected food service establishments; and

(4) The service is not aware of any systematic fee-cap violations.

(b) False certification shall constitute a separate violation subject to civil penalties.

(c) Timely submission of accurate certifications shall be considered a mitigating factor in any enforcement action arising from violations during the certified period."

**Public Benefit:** Quarterly certifications create accountability touchpoints that encourage ongoing compliance review rather than reactive response to enforcement actions. The Department gains early warning of potential widespread violations. Platforms demonstrating consistent good faith through accurate certifications are protected from maximum penalties for isolated errors, creating a fairness balance that rewards systemic compliance while maintaining enforcement deterrence.

## VII. CONCLUSION AND SUMMARY OF RECOMMENDATIONS

The proposed rule represents a significant step forward in operationalizing fee-cap protections for New York City food service establishments. The Department has exercised its delegated authority appropriately and followed CAPA procedures correctly. The rule's core framework (mandatory recordkeeping of disaggregated transaction data, electronic accessibility for Department investigations, and clarification of purchase-price calculations) is sound and necessary for effective enforcement.

However, the four (4) identified liabilities create meaningful constitutional, procedural, and enforcement risks that should be remediated before final adoption:

1. **Compressed response timelines**: *Restore* the 30-day baseline or implement tiered deadlines based on request volume, with objective extension standards and written denial requirements.
2. **Negative inference provision**: *Add* a willfulness requirement, establish a rebuttable presumption standard with enumerated rebuttal grounds, and clarify burden-shifting procedures.
3. **Enhanced service fee ambiguity**: *Define* "enhanced service fee" comprehensively, require separate written agreements for enhanced services, and establish bright-line rules distinguishing enhanced services from fee-cap-subject charges.
4. **Refund treatment gaps**: *Clarify* that refunds to food service establishments constitute restitution but do not cure violations; implement penalty mitigation for good-faith proactive refund programs while preserving full enforcement against systematic violators.

Additionally, the Department should enhance public benefit by:

- Requiring public notice and comment for data specifications, with adequate implementation periods;
- Implementing quarterly compliance certifications with safe-harbor protections for good-faith actors.

These modifications would convert potential liabilities into public benefits by:

- Strengthening procedural due process protections, reducing litigation risk and enhancing enforceability;
- Encouraging investment in robust compliance systems rather than reactive remediation;

- Providing clarity that enables platforms to comply and adjudicators to enforce consistently;
- Creating incentive structures that reward transparency and proactive self-policing; and
- Balancing strong enforcement tools with fairness protections that distinguish willful violators from isolated good-faith errors.

## VIII. SPECIFIC TEXTUAL RECOMMENDATIONS

To facilitate the Department's consideration of these recommendations, I propose the following specific textual amendments to the proposed rule:

<u>Amendment 1: Modified Response Timeline with Extension Standards</u>

**Current Text (Proposed 6 RCNY § 2-462(b)(2)):**

> "(2) A deadline of more than [30] 20 days may be agreed to on consent by the Department and the third-party food delivery service."

**Recommended Revised Text:**

> "(2) A third-party food delivery service must respond to a written request or subpoena for information or records from the Department by providing true, accurate, and contemporaneously made electronic records or information within 30 days of the date the request is received, in the formats and layouts prescribed by the Department. The Department shall grant a reasonable extension of up to an additional 30 days upon a showing by the third-party food delivery service that:
>
> (i) The volume of records requested requires additional processing time despite diligent effort;
>
> (ii) Technical system limitations prevent full extraction within the initial deadline; or
>
> (iii) The requested format requires data transformation or migration that cannot be completed within 30 days.
>
> The Department shall respond to extension requests within 5 business days of receipt. Denial of an extension request must be in writing and

specify the basis for denial. No penalties under subdivision (b)(3) shall accrue during the pendency of a timely filed extension request."

Amendment 2: Revised Negative Inference Provision

**Current Text (Proposed 6 RCNY § 2-462(c)):**

"(c) A third-party delivery service's failure to maintain, retain, or produce a record that is required by law or rule to be maintained that is relevant to a material fact alleged by the Department in a summons, petition, or other notice of hearing creates a reasonable inference that such fact is true."

**Recommended Revised Text:**

"(c) Evidentiary effect of failure to maintain or produce records.

(1) A third-party delivery service's willful failure to maintain, retain, or produce a record that is required by law or rule to be maintained and that is relevant to a material fact alleged by the Department in a summons, petition, or other notice of hearing creates a rebuttable presumption that such fact is true.

(2) For purposes of this subdivision, 'willful' means intentional failure or failure with reckless disregard for the recordkeeping obligation. The Department bears the burden of proving willfulness by a preponderance of the evidence before the presumption arises.

(3) The third-party food delivery service may rebut this presumption by demonstrating that:

(i) The record was not maintained due to reasonable interpretation of an ambiguous regulatory requirement;

(ii) The record was lost or destroyed due to technical system failure beyond the service's control and the service took reasonable steps to preserve and recover the record;

(iii) The record exists but cannot be produced in the prescribed format despite diligent effort, and the service has offered to produce the record in an alternative format; or

(iv) Other credible evidence demonstrates that the material fact alleged by the Department is not true.

(4) Where willfulness is not established, the trier of fact may consider the failure to maintain, retain, or produce a required record as evidence bearing on the credibility of the service's defense and the weight to be accorded to other evidence, but such failure alone shall not be determinative of any material fact."

Amendment 3: Enhanced Service Fee Definition

**Recommended New Subdivision (Proposed 6 RCNY § 2-462(e)):**

"(e) Enhanced service fee definition and requirements.

(1) For purposes of this section, 'enhanced service fee' means any charge imposed by a third-party food delivery service on a food service establishment for services beyond basic listing, order processing, and delivery, including but not limited to:

(i) Premium placement or featured positioning on the platform's website or mobile application;

(ii) Advertising or promotional services;

(iii) Access to customer data, analytics, or marketing tools;

(iv) Photography, menu design, or other content creation services; or

(v) Any other service for which the platform charges a fee separate from and in addition to delivery fees, basic service fees, and transaction fees as defined in NYC Administrative Code § 20-563.3.

(2) An enhanced service fee is lawful only if:

(i) The food service establishment affirmatively elected to receive the enhanced service in a written agreement that separately itemizes the enhanced service fee and describes the service to be provided;

(ii) The enhanced service fee is charged separately from and does not reduce the amount credited to the food service establishment for the purchase price of any online order;

(iii) The enhanced service fee is structured as either a fixed monthly or annual amount, or as a percentage that is separately disclosed and separately billed from fees subject to the caps in NYC Administrative Code § 20-563.3; and

(iv) The third-party food delivery service provides the food service establishment with monthly documentation of the enhanced services provided and the corresponding fees charged.

(3) No charge calculated as a percentage of an individual online order's purchase price and imposed without a separate written agreement for enhanced services shall be classified as an enhanced service fee. All such percentage-based charges are subject to the fee caps in NYC Administrative Code § 20-563.3."

Amendment 4: Refund Treatment Clarification

**Current Text (Proposed 6 RCNY § 2-466):**

"§ 2-466 Refunds.

1. The purchase price used to calculate compliance with the fee caps requirements set forth in section 20-563.3 of the Administrative Code is the purchase price at the time the online order is placed.
2. Refunds to consumers, whether full or partial, will not be considered to have diminished the purchase price used to calculate compliance with the fee caps requirements set forth in section 20-563.3 of the Administrative Code."

**Recommended Revised Text:**

"§ 2-466 Refunds and purchase price calculation.

(a) The purchase price used to calculate compliance with the fee caps requirements set forth in section 20-563.3 of the Administrative Code is the purchase price at the time the online order is placed.

(b) Refunds to consumers, whether full or partial, will not be considered to have diminished the purchase price used to calculate compliance with the fee caps requirements set forth in section 20-563.3 of the Administrative Code.

(c) Refunds issued to food service establishments.

(1) A refund issued by a third-party food delivery service to a food service establishment to remedy a fee-cap overcharge constitutes restitution to the aggrieved establishment but does not cure or eliminate the underlying violation of NYC Administrative Code § 20-563.3.

(2) In determining the amount of civil penalties to impose for a fee-cap violation, the Department may consider as a mitigating factor whether the third-party food delivery service:

(i) Issued a full refund to the food service establishment within 30 days of discovering the overcharge;

(ii) Implemented corrective measures to prevent recurrence of the violation; and

(iii) Demonstrated that the violation resulted from technical system error rather than deliberate policy.

(3) Systematic or repeated violations, even where followed by refunds, shall be deemed evidence of inadequate fee-calculation systems and shall not be subject to penalty mitigation based on refund issuance.

(4) A third-party food delivery service that implements a proactive fee-cap compliance audit program and issues refunds for any overcharges detected through such audits within 30 days of detection shall be eligible for penalty reduction of up to 50%, provided the audit program:

(i) Is conducted at least quarterly;

(ii) Reviews a statistically valid sample of transactions or all transactions;

(iii) Results in written audit reports maintained pursuant to section 2-462(a) and made available to the Department upon request; and

(iv) Triggers automatic refunds with written notice to each affected establishment.

(5) Subdivision (c)(4) does not apply to violations detected by the Department, food service establishments, or third parties, which remain subject to full penalties."

<u>Amendment 5: Data Specification Transparency</u>

**Recommended New Text (Proposed 6 RCNY § 2-462(d), renumbering current (d) as (f)):**

"(d) Data specification procedures.

(1) The Department may prescribe data specifications, including field definitions, record layouts, and uniform codes, for any record required to be maintained pursuant to subdivision (a).

(2) Before prescribing or modifying data specifications that impose new technical requirements or materially alter existing requirements, the Department shall:

(i) Publish draft specifications on the Department's website for public comment for a period of not less than 30 days;

(ii) Consult with representatives of third-party food delivery services and food service establishments regarding technical feasibility and implementation timeline; and

(iii) Issue a written explanation of any significant modifications to the draft specifications.

(3) Final data specifications shall be published on the Department's website and updated promptly when modified. Third-party food delivery services shall have 90 days from publication of new or modified specifications to achieve compliance. During this 90-day implementation

period, good-faith efforts to comply shall be considered a mitigating factor in any enforcement action arising from non-compliance with the new specifications.

(4) Technical corrections and clarifications that do not impose new substantive requirements may be issued without the procedures in paragraph (2), provided they are published on the Department's website with reasonable notice."

## IX. CONSTITUTIONAL AND STATUTORY ANALYSIS SUPPORTING RECOMMENDATIONS

A. Procedural Due Process Framework

The recommended modifications align with established due process principles governing administrative enforcement. The United States Supreme Court's decision in *Mathews v. Eldridge*, though not directly cited in the provided research, establishes the framework applied by New York courts in *Matter of Keyspan Energy Services v. PSC*, which held that administrative notice must be "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard.'" (See *Matter of Keyspan Energy Servs. v PSC*, 295 AD2d 859 [3d Dept 2002].) The recommended 30-day baseline deadline with objective extension criteria implements this tailoring requirement. Third-party food delivery platforms managing millions of transactions have materially different "capacities and circumstances" than parties responding to routine document requests. A rigid 20-day deadline without extension standards fails to account for this reality and creates constitutional vulnerability.

Similarly, the modified negative-inference provision responds to the principle articulated in *Matter of Mayfield v. Evans* that administrative procedures must afford respondents "the opportunity to be heard." (See *Matter of Mayfield v Evans*, 93 AD3d 98 [1st Dept 2012].) A presumption triggered by mere non-production, without requiring the Department to prove willfulness or allowing the respondent to demonstrate good-faith reasons for non-production, deprives the platform of meaningful opportunity to contest the Department's allegations.

B. Administrative Law Reasonableness Standards

The enhanced service fee definition and refund treatment clarifications implement the reasonableness standard articulated in *Matter of Juarez v. New York State Office of Victim Services*. (See *Matter of Juarez v NY State Off. of Victim Servs.*, 36 NY3d 485 [2021].) That decision held that agency regulations must have "a rational basis and [not be] unreasonable, arbitrary or capricious" and that courts will uphold rulemaking that is "reasonably designed to further the regulatory scheme."

Defining "enhanced service fee" furthers the regulatory scheme by eliminating ambiguity that would otherwise undermine enforcement. A term imposed as a mandatory recordkeeping category but left undefined cannot be "reasonably designed" to achieve consistent compliance. The definition supplied in Amendment 3 provides the clarity necessary for rational implementation.

The refund treatment provisions similarly advance rationality by establishing clear consequences for fee-cap violations. Without clarification, platforms face uncertainty regarding whether refunds cure violations or merely mitigate penalties—a gap that invites arbitrary enforcement and undermines deterrence. The recommended text resolves this ambiguity while preserving the Department's enforcement discretion.

C. Statutory Construction and Delegation

The recommended modifications respect the boundaries of DCWP's delegated authority while ensuring that regulations do not exceed statutory intent. NYC Administrative Code § 20-563.8(b) authorizes the Department to promulgate rules governing record availability "consistent with applicable law." The recommended procedural protections (extension standards, willfulness requirements, and data specification notice) implement this "consistent with applicable law" limitation by incorporating due process requirements that would otherwise apply through judicial interpretation.

This approach follows the principle established in *Big Apple Food v. Street Vendor Review Panel*, where the Court of Appeals held that agencies exercising delegated rule-making authority must follow notice-and-comment procedures and may not adopt standards that lack sufficient clarity for uniform application. (See *Big Apple Food v St. Vendor Review Panel*, 90 NY2d 402 [1997].) The recommended data specification transparency provisions operationalize this principle by requiring notice and comment for technical requirements that impose new compliance obligations.

**X. RESPONSE TO ANTICIPATED COUNTERARGUMENTS**

<u>A. "Extended Timelines Will Delay Enforcement"</u>

The Department may contend that restoring the 30-day baseline and allowing extensions will impede timely investigation of violations. This concern is unfounded for three (3) reasons:

First, the recommended framework allows the Department to impose shorter timelines for targeted requests covering limited transaction volumes, as demonstrated in Alternative Option 2 (tiered timelines). For focused investigations of specific complaints, 20-day timelines remain available.

Second, objective extension standards prevent dilatory tactics. Platforms seeking extensions must affirmatively demonstrate volume constraints, technical limitations, or format requirements; not mere inconvenience. Frivolous extension requests can be denied with written explanation, preserving the Department's ability to proceed expeditiously against bad-faith actors.

Third, constitutionally adequate procedures enhance rather than impede enforcement by reducing the risk of invalidation on due process grounds. An enforcement action built on records obtained through procedures that violate due process is vulnerable to dismissal, requiring the Department to restart the investigation. Frontloading procedural protections eliminates this risk.

<u>B. "Negative Inference Modifications Weaken Enforcement Tools"</u>

The Department may argue that requiring proof of willfulness before triggering adverse inferences imposes an undue burden and allows platforms to escape liability through claims of good-faith misunderstanding. This concern misunderstands the recommended framework.

The modified provision preserves the Department's ability to draw negative inferences, it merely requires that the Department first establish that the non-production was willful rather than inadvertent. This burden is minimal: evidence that the platform received clear notice of recordkeeping obligations, had technical capacity to maintain records, and failed to do so despite this capacity suffices to establish willfulness.

Moreover, the rebuttable presumption structure continues to shift the burden to the platform once willfulness is shown. The platform must then affirmatively demonstrate one of the enumerated rebuttal grounds, a meaningful evidentiary burden that prevents evasion.

Finally, even where willfulness is not established, the rule allows the trier of fact to consider non-production as evidence affecting credibility. The Department retains a powerful enforcement tool; it simply cannot invoke an automatic presumption without threshold showing of bad faith.

C. "Enhanced Service Fee Definition Is Overly Prescriptive"

Platforms may contend that the recommended definition of "enhanced service fee" unduly restricts their ability to offer innovative services and negotiate customized arrangements with food service establishments. This objection lacks merit. The definition is deliberately structured as inclusive rather than exclusive. Subparagraph (e)(1)(v) provides that enhanced services include "any other service for which the platform charges a fee separate from and in addition to delivery fees, basic service fees, and transaction fees," preserving flexibility for novel offerings. The definition's requirements (separate written agreements, separate billing, and monthly documentation) do not prohibit any particular service. They simply mandate transparency and ensure that charges designated as "enhanced services" are genuinely optional and separately negotiated rather than disguised fee-cap violations.

Platforms retain complete freedom to offer any services they choose. The definition merely requires that charges for such services be clearly documented and separately agreed upon, protecting food service establishments from involuntary enrollment in premium services used to circumvent fee caps.

## XI. BROADER POLICY CONSIDERATIONS

Beyond the specific textual recommendations, the proposed rule and its modifications implicate broader policy questions regarding platform regulation, small business protection, and administrative enforcement philosophy.

### A. Balancing Innovation and Protection

Third-party food delivery platforms have transformed restaurant economics, providing market access and delivery infrastructure that many small establishments could not otherwise afford. Regulation that imposes excessive compliance burdens or eliminates flexible pricing models risks driving platforms from the market or inducing them to delist small restaurants in favor of large chains with sophisticated legal and accounting departments.

The recommended modifications balance these concerns by establishing clear, objective standards that sophisticated platforms can readily implement while providing procedural protections against punitive enforcement for good-faith errors. The proactive audit safe harbor in Amendment 4 particularly advances this balance by rewarding platforms that invest in robust compliance systems, creating a race to the top rather than a compliance floor enforced solely through punitive measures.

### B. Empowering Small Food Service Establishments

The ultimate beneficiaries of fee-cap legislation are small, independent restaurants operating on thin margins where excessive platform fees can mean the difference between viability and closure. These establishments often lack the bargaining power to negotiate favorable terms or the legal resources to detect and challenge violations.

The proposed rule's mandatory itemized reporting requirements (requiring platforms to provide monthly transaction lists showing all fees charged) empower restaurants to monitor compliance independently. The recommended enhanced service fee definition and separate agreement requirements further strengthen this empowerment by ensuring that restaurants understand exactly what they are purchasing and can make informed decisions about optional services.

C. Creating a Sustainable Enforcement Framework

Effective regulation requires not only strong statutory prohibitions but also sustainable enforcement mechanisms. The recommended modifications enhance sustainability in three (3) ways:

First, by establishing clear standards and procedural protections, the modifications reduce litigation risk. Enforcement actions built on well-defined rules and constitutionally adequate procedures are more likely to withstand appellate review, maximizing deterrent effect.

Second, by creating incentives for proactive compliance through audit safe harbors and penalty mitigation, the modifications reduce the Department's investigative burden. Platforms that self-police and promptly remediate violations require less intensive oversight than platforms that respond only to external enforcement.

Third, by requiring transparency in data specifications and providing implementation periods, the modifications facilitate voluntary compliance. Regulated entities that clearly understand requirements and have adequate time to implement systems are more likely to comply, reducing the volume of violations requiring adjudication.

**XII. CONCLUSION**

The Department of Consumer and Worker Protection's proposed rule establishing recordkeeping requirements for third-party food delivery services represents a critical implementation of Local Laws 103 and 79's fee-cap protections. The rule's core framework is sound, legally authorized, and procedurally compliant with CAPA requirements. However, the four (4) identified liabilities (compressed response timelines, overbroad negative inference provisions, enhanced service fee ambiguity, and refund treatment gaps) create constitutional, procedural, and enforcement vulnerabilities that should be remediated through the specific textual amendments recommended in Section VIII.

These modifications would transform potential liabilities into public benefits by:

- **Strengthening constitutional compliance**, ensuring that enforcement procedures withstand due process scrutiny and that enforcement actions built on the rule are not vulnerable to invalidation;
- **Enhancing regulatory clarity**, providing platforms with unambiguous standards that facilitate compliance and reduce inadvertent violations;
- **Creating positive compliance incentives**, rewarding platforms that invest in robust systems and proactive self-policing rather than relying solely on reactive enforcement;
- **Protecting small businesses**, empowering food service establishments with transparency tools and clear recourse mechanisms while ensuring that fee-cap protections are enforceable; and
- **Establishing sustainable enforcement**, reducing litigation burden and administrative costs while maximizing deterrent effect.

I respectfully urge the Department to incorporate these recommendations into the final rule. The modifications strengthen rather than weaken enforcement authority, enhance rather than diminish public protection, and ensure that the regulatory framework serves its intended purpose: protecting New York City's food service establishments from exploitative platform practices while maintaining a fair, transparent marketplace.

Respectfully submitted,

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