

BOARD of SUPERVISORS



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MEMORANDUM

TO: Chief William Scott, Police Department
Joaquin Torres, Director, Office of Economic and Workforce Development

FROM: John Carroll, Assistant Clerk,
Public Safety and Neighborhood Services Committee,
Board of Supervisors

DATE: April 29, 2020

SUBJECT: LEGISLATION INTRODUCED

The Board of Supervisors' Public Safety and Neighborhood Services Committee has received the following proposed legislation, introduced by Supervisor Peskin on April 21, 2020:

File No. 200398

Ordinance amending the Police Code to regulate third-party food delivery services ("delivery services") by capping fees to restaurants at 10% of an order total, prohibiting delivery services from restricting restaurant pricing, and prohibiting delivery services from charging restaurants for telephone calls to the delivery service not resulting in any food or beverage order; requiring retention of and City access to records substantiating compliance with these restrictions; authorizing the imposition of penalties for violations; and authorizing the Office of Economic and Workforce Development to implement and enforce this Ordinance.

If you have any comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

c: Rowena Carr, Police Department
Asja Steeves, Police Department
J'Wel Vaughan, Office of Economic and Workforce Development
Anne Taupier, Office of Economic and Workforce Development
Lisa Pagan, Office of Economic and Workforce Development

1 [Police Code - Third-Party Food Delivery Services]

2

3 **Ordinance amending the Police Code to regulate third-party food delivery services**
 4 **(“delivery services”) by capping fees to restaurants at 10% of an order total, prohibiting**
 5 **delivery services from restricting restaurant pricing, and prohibiting delivery services**
 6 **from charging restaurants for telephone calls to the delivery service not resulting in**
 7 **any food or beverage order; requiring retention of and City access to records**
 8 **substantiating compliance with these restrictions; authorizing the imposition of**
 9 **penalties for violations; and authorizing the Office of Economic and Workforce**
 10 **Development to implement and enforce this Ordinance.**

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12 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
 13 **Additions to Codes** are in *single-underline italics Times New Roman font*.
 14 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.
 15 **Board amendment additions** are in double-underlined Arial font.
 16 **Board amendment deletions** are in ~~strikethrough Arial font~~.
 17 **Asterisks (* * * *)** indicate the omission of unchanged Code
 18 subsections or parts of tables.

16

17 Be it ordained by the People of the City and County of San Francisco:

18

19 Section 1. The Police Code is hereby amended by adding Article 53, consisting of
 20 Sections 5300-5309, to read as follows:

21

22 **ARTICLE 53: REGULATION OF THIRD-PARTY FOOD DELIVERY SERVICES**

23

24 **SEC. 5300. FINDINGS.**

25

1 (a) Restaurants are vital to the character and community fabric of San Francisco (“City”).
2 They reflect and nurture the cultural diversity of the City, while offering access to food, an essential
3 foundation of human health and basis for social connection. Restaurants are also important engines of
4 the local economy, providing jobs and serving as commercial anchors in neighborhoods across the
5 City.

6 (b) The central place of restaurants in the City’s commercial districts is evident from City real
7 estate statistics. Restaurants occupy a substantial percentage of ground floor retail space along the
8 City’s commercial corridors, in some neighborhoods accounting for close to 25% of active ground
9 floor businesses.

10 (c) But in recent years, the City’s restaurant industry has been in decline. According to data
11 from the Department of Public Health, the number of restaurant closures has exceeded the number of
12 new restaurants in the City for at least the past five consecutive years.

13 (d) The decline of brick-and-mortar restaurants in the City over the past five years coincides
14 with the rapid rise of third-party food delivery services, businesses that process food delivery and
15 pickup orders through mobile apps and websites. According to one consumer market outlook
16 publication, revenue in the U.S. “platform-to-consumer delivery” market was \$8.7 billion in 2019, a
17 nearly 10% increase over the same segment’s valuation in 2018. Market research data from the first
18 quarter of 2020 shows approximately 15.9% of all U.S. residents utilized third-party food delivery
19 services at least once in the past year, many on a regular basis, and industry experts expect that
20 percentage to continue to increase. Percentage use is even higher in urban markets such as San
21 Francisco, and the COVID-19 crisis has driven the usage rates higher still. This booming market is
22 highly concentrated in just a handful of businesses. As of November 2019, just four third-party food
23 delivery services controlled approximately 98% of the entire market.

24 (e) The increasing market dominance of a small number of third-party food delivery services
25 companies has resulted in increasingly difficult economic conditions for City restaurants, which must

1 contract with these companies if they wish to access the growing share of customers who rely on
2 delivery platforms to obtain meals.

3 (f) The market dominance of a few third-party food delivery services companies gives these
4 companies disproportionate leverage in contract negotiations with restaurants. These companies use
5 this leverage to extract high fees from restaurants – typically totaling 30% of an order total – and
6 thereby diminish restaurants’ already-narrow profit margins. Food delivery services companies also
7 often impose contract terms that prohibit restaurants from charging a higher price for delivery orders
8 than dine-in orders, eliminating a means by which restaurants could recoup the fees charged by
9 delivery services. And the companies frequently include in restaurant contracts a “telephone order
10 charge” that restaurants are required to pay even in cases where a customer telephone call does not
11 result in an order.

12 (g) Sample contracts used by leading third-party food delivery services companies reflect that
13 these companies commonly charge restaurants a 10% per-order fee for “delivery services,” the most
14 logistically demanding and resource-intensive service they provide to restaurants. These companies
15 often impose additional fees totaling as much as 20% of the order cost for what are described as
16 “marketing” or “logistics” services. Market research indicates that third-party food delivery services
17 companies that impose such a mix of services fees earn high profits. Market research also indicates
18 that companies’ profit margins from automated non-delivery services such as marketing and online
19 order processing are higher relative to profit margins from more resource-intensive delivery services.

20 (h) While money spent by consumers at local restaurants circulates within communities and
21 bolsters the vitality of commercial corridors, third-party food delivery services companies have
22 amassed concentrated wealth without providing similar community benefits. And increasingly, these
23 companies are using their market leverage to extract unfairly high payments from restaurants,
24 hastening the closure of City restaurants and the resulting decline of City commercial districts.

1 (i) The COVID-19 emergency has worsened the economic picture for City restaurants. Due to
2 a ban on dine-in restaurant service caused by a concern with the spread of COVID-19, third-party food
3 delivery services have enjoyed unprecedented revenue, while restaurants have become dependent on
4 delivery and takeout orders, and increasingly vulnerable to unfair contract terms demanded by delivery
5 services companies.

6 (j) Capping the fees third-party food delivery services companies can charge restaurants,
7 prohibiting these companies from restricting restaurant pricing, and prohibiting these companies from
8 imposing unfair “telephone order charges” unconnected with any customer purchase are all important
9 steps to ensure that restaurants can thrive in San Francisco and continue to nurture vibrant, distinctive
10 commercial districts. The fact that leading third-party food delivery services companies currently
11 charge a 10% per-order fee for the most resource-intensive aspect of their business – delivery services
12 – and that these companies report high profit margins from all aspects of their business operations,
13 indicate that a 10% fee cap on per-order fees charged to restaurants is a reasonable step to protect
14 restaurants from financial collapse without unduly constraining third-party food delivery services’
15 businesses.

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17 **SEC. 5301. DEFINITIONS.**

18 For purposes of this Article 53, the following definitions apply:

19 “City” means the City and County of San Francisco.

20 “Covered establishment” means a restaurant that offers, in a single commercial transaction
21 over the internet, whether directly or through a third-party food delivery service, the sale of food for
22 same-day pickup or delivery to customers from one or more retail locations within the City.

23 “Food preparation and service establishment” shall have the meaning set forth in Section 451
24 of the Health Code, as may be amended from time to time.

25 “OEWD” means the Office of Economic and Workforce Development or its successor agency.

1 “OEWD Director” means the Director of OEWD or the Director’s designee.

2 “Online order” means a food and/or beverage order placed by a customer through a platform
3 provided by a third-party food delivery service for delivery or pickup within the City.

4 “Purchase price” means the menu price of an online order. Such term therefore excludes taxes,
5 gratuities, and any other fees that may make up the total cost to the customer of an online order.

6 “Restaurant” shall have the meaning set forth in Section 451 of the Health Code, as may be
7 amended from time to time.

8 “Third-party food delivery service” means any website, mobile application, or other internet
9 service that offers or arranges for the sale of food and/or beverages prepared by, and the same-day
10 delivery or same-day pickup of food and beverages from, no fewer than 20 separately owned and
11 operated food preparation and service establishments.

12
13 **SEC. 5302. CAP ON PER-ORDER FEES.**

14 (a) No third-party food delivery service may charge a covered establishment a fee, commission,
15 or charge per online order that totals more than 10% of the purchase price of the online order.

16 (b) No third-party food delivery service may charge a covered establishment a fee, commission,
17 or charge that exceeds 10% of the purchase price of online orders to that covered establishment
18 processed through the third-party food delivery service during the time period covered by the fee,
19 commission, or charge.

20
21 **SEC. 5303. PROHIBITION ON RESTRICTING RESTAURANT PRICING.**

22 No third-party food delivery service may impose on a covered establishment, by contract or
23 other means, any restrictions on the prices that a covered establishment may charge for food or
24 beverages, whether sold through a website, app, or other service operated by the third-party food
25 delivery service, or sold directly from the restaurant, or through any other means.

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SEC. 5304. PROHIBITION ON TELEPHONE ORDER CHARGES.

No third-party food delivery service may charge a covered establishment a fee, commission, or charge for a telephone call by a customer to the third-party food delivery service that does not result in a purchase by a customer during the telephone call.

SEC. 5305. DOCUMENTATION OF COMMISSIONS, FEES, AND TERMS IMPOSED ON RESTAURANTS.

(a) Third-party food delivery services shall maintain records sufficient to document their compliance with Sections 5302, 5303, and 5304, including but not limited to all relevant agreements, invoices, and transaction records, for three years from the date of any related customer transaction.

(b) At any time, OEWD may direct any third-party food delivery service to disclose any documents and records required to be retained under subsection (a) with respect to any covered establishment. Any third-party food delivery service so directed must disclose specified documents and records to OEWD within 72 hours, not counting weekends or holidays. A third-party food delivery service's failure to provide required records to OEWD within the required 72 hours shall be a violation of this Article 53.

SEC. 5306. ADMINISTRATION AND ENFORCEMENT.

This Article 53 shall be administered and enforced by OEWD. The OEWD Director may adopt regulations, guidelines, and forms to carry out the provisions and purposes of this Article. Any regulations adopted by OEWD under this authority must be submitted to the Board of Supervisors, and shall become effective 30 days from that submission unless a member of the Board of Supervisors introduces an ordinance to modify or reject them. If a member of the Board of Supervisors introduces

1 such an ordinance, the regulations shall become effective 70 days from introduction of the ordinance,
2 unless the ordinance has been enacted.

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4 **SEC. 5307. PENALTIES AND ENFORCEMENT.**

5 (a) Enforcement Procedure. The OEWD Director shall issue an administrative citation for the
6 violation of any section of this Article 53. Administrative Code Chapter 100, “Procedures Governing
7 the Imposition of Administrative Fines,” is hereby incorporated in its entirety, except as it relates to the
8 definition of a violation and the calculation of penalty amounts, addressed in subsections (b) and (c).
9 Administrative Code Chapter 100 shall govern the procedure for imposition, enforcement, collection,
10 and administrative review of administrative citations issued under this Section 5307.

11 (b) Violations Subject to Penalties. Any third-party food delivery service that violates any
12 provision of this Article 53 shall be subject to an administrative penalty imposed by order of the OEWD
13 Director. For purposes of assessing penalties for violation of Sections 5302, 5303, and 5304, a
14 separate violation shall accrue each time a customer transaction is processed subject to any term, fee,
15 commission, charge, or price that violates one or more of these sections. As used in the prior sentence,
16 “customer transaction” includes a telephone call by a customer to the third-party food delivery service
17 that does not result in a purchase by a customer during the telephone call, for purposes of identifying a
18 violation of Section 5304. For purposes of assessing penalties for violation of Section 5305, each day a
19 third-party food delivery service fails to disclose documents or records in violation of that section shall
20 be a separate violation.

21 (c) Penalty Amounts. In setting the amount of the administrative penalty, which shall not
22 exceed \$1,000 per violation, the OEWD Director shall consider any one or more mitigating or
23 aggravating circumstances presented, including but not limited to the following: the amount of any fee,
24 commission, or charge collected in violation of this Article 53, the persistence of the misconduct, the
25

1 willfulness of the misconduct, the length of time over which the misconduct occurred, and the assets,
2 liabilities, and net worth of the third-party delivery service.

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4 **SEC. 5308. UNDERTAKING FOR THE GENERAL WELFARE.**

5 In enacting and implementing this Article 53, the City is assuming an undertaking only to
6 promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an
7 obligation for breach of which it is liable in money damages to any person who claims that such breach
8 proximately caused injury.

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10 **SEC. 5309. SEVERABILITY.**

11 If any section, subsection, sentence, clause, phrase, or word of this Article 53, or any
12 application thereof to any person or circumstance, is held to be invalid or unconstitutional by a
13 decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining
14 portions or applications of the Article. The Board of Supervisors hereby declares that it would have
15 passed this Article and each and every section, subsection, sentence, clause, phrase, and word not
16 declared invalid or unconstitutional without regard to whether any other portion of this ordinance or
17 application thereof would be subsequently declared invalid or unconstitutional.

1 Section 2. Effective Date. This ordinance shall become effective 30 days after
2 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the
3 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board
4 of Supervisors overrides the Mayor's veto of the ordinance.

5
6 APPROVED AS TO FORM:
7 DENNIS J. HERRERA, City Attorney

8 By: /s/ Sarah A. Crowley
9 SARAH A. CROWLEY
Deputy City Attorney

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LEGISLATIVE DIGEST

[Police Code - Third-Party Food Delivery Services]

Ordinance amending the Police Code to regulate third-party food delivery services (“delivery services”) by capping fees to restaurants at 10% of an order total, prohibiting delivery services from restricting restaurant pricing, and prohibiting delivery services from charging restaurants for telephone calls to the delivery service not resulting in any food or beverage order; requiring retention of and City access to records substantiating compliance with these restrictions; authorizing the imposition of penalties for violations; and authorizing the Office of Economic and Workforce Development to implement and enforce this Ordinance.

Existing Law

On April 10, 2020, the Mayor issued the Ninth Supplement to the Proclamation declaring the existence of a local emergency related to COVID-19 (“Ninth Supplement”). The Ninth Supplement imposes a temporary 15% cap on per-order fees charged by third-party food delivery services to San Francisco restaurants until the ban on dine-in restaurant service is lifted, but exempts from that fee cap orders with restaurants that qualify as “formula retail” under the Planning Code. These aspects of the Mayor’s Ninth Supplement are currently in effect, but are subject to concurrence by the Board of Supervisors.

Amendments to Current Law

This ordinance would add Article 53 to the Police Code to regulate third-party food delivery services on a permanent basis. It would authorize OEWD to implement and enforce Article 53, and would prohibit third-party food delivery services from doing the following:

- charging restaurants a fee for online orders for delivery or pickup in San Francisco that exceeds 10% of the order total;
- restricting restaurants’ discretion to set prices; and
- charging restaurants a fee for “telephone orders” through the third-party food delivery service that do not result in a customer purchase.

The ordinance would require that third-party food delivery services maintain records sufficient to substantiate their compliance with these provisions for three years from the date of a customer transaction, and produce these records on request to OEWD. The OEWD director would be authorized to impose penalties for violations of Article 53.

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Introduction Form

By a Member of the Board of Supervisors or Mayor

Time stamp
or meeting date

I hereby submit the following item for introduction (select only one):

- 1. For reference to Committee. (An Ordinance, Resolution, Motion or Charter Amendment).
- 2. Request for next printed agenda Without Reference to Committee.
- 3. Request for hearing on a subject matter at Committee.
- 4. Request for letter beginning : "Supervisor inquiries"
- 5. City Attorney Request.
- 6. Call File No. from Committee.
- 7. Budget Analyst request (attached written motion).
- 8. Substitute Legislation File No.
- 9. Reactivate File No.
- 10. Topic submitted for Mayoral Appearance before the BOS on

Please check the appropriate boxes. The proposed legislation should be forwarded to the following:

- Small Business Commission
- Youth Commission
- Ethics Commission
- Planning Commission
- Building Inspection Commission

Note: For the Imperative Agenda (a resolution not on the printed agenda), use the Imperative Form.

Sponsor(s):

Subject:

The text is listed:

Signature of Sponsoring Supervisor:

For Clerk's Use Only