[Police Code - Third-Party Food Delivery Services]

Ordinance amending the Police Code to regulate third-party food delivery services ("delivery services") by 1) capping fees charged to non-formula retail restaurants at 1015% of an order total ~~plus a 3% point-of-sale processing charge~~; 2) prohibiting delivery services from restricting such restaurants' pricing~~,~~; 3) ~~and~~ prohibiting delivery services from charging such restaurants for telephone calls to the delivery service not resulting in any food or beverage order; 4) prohibiting delivery services from providing services to any such restaurants without the restaurant's express written agreement to receive such services; 5) requiring delivery services to terminate a service contract with such restaurants within 72 hours of receiving a notice requesting termination; 6) requiring retention of and City access to records substantiating compliance with these restrictions; 7) authorizing the imposition of penalties for violations; and 8) authorizing the Office of Economic and Workforce Development to implement and enforce this ordinance; and providing that the ordinance shall expire by operation of law 60 days after the County Health Officer amends the Stay Safer at Home Order to allow indoor dining at restaurants at 100% capacity.

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

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

Section 1. The Police Code is hereby amended by adding Article 53, consisting of Sections 5300-~~5309~~5312, to read as follows:

ARTICLE 53: REGULATION OF THIRD-PARTY FOOD DELIVERY SERVICES

SEC. 5300. FINDINGS.

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

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

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

(d) The decline of brick-and-mortar restaurants in the City over the past five years coincides with the rapid rise of third-party food delivery services, businesses that process food delivery and pickup orders through mobile apps and websites. According to one consumer market outlook publication, revenue in the U.S. "platform-to-consumer delivery" market was $8.7 billion in 2019, a nearly 10% increase over the same segment's valuation in 2018. Market research data from the first quarter of 2020 shows approximately 15.9% of all U.S. residents utilized third-party food delivery services at least once in the past year, many on a regular basis, and industry experts expect that

percentage to continue to increase. Percentage use is even higher in urban markets such as San Francisco, and the COVID-19 crisis has driven the usage rates higher still. This booming market is highly concentrated in just a handful of businesses. As of November 2019, just four third-party food delivery services controlled approximately 98% of the entire market.

(e) The increasing market dominance of a small number of third-party food delivery services companies has resulted in increasingly difficult economic conditions for City restaurants, which must contract with these companies if they wish to access the growing share of customers who rely on delivery platforms to obtain meals.

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

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

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

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

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

(k) Prohibiting third-party food delivery services from providing delivery and other services to a restaurant without the restaurant's express consent, and further requiring that third-party food delivery services terminate a contract promptly upon receiving oral or written termination notice from a restaurant, are other important steps to ensure that restaurants can exercise appropriate control over their businesses.

SEC. 5301. DEFINITIONS.

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

"City" means the City and County of San Francisco.

"Covered establishment" means a restaurant that offers, in a single commercial transaction over the internet, whether directly or through a third-party food delivery service, the sale of food for same-day pickup or delivery to customers from one or more retail locations within the City. Covered establishment shall not include any restaurant that meets the definition of a formula retail use under Section 303.1 of the Planning Code.

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

"OEWD" means the Office of Economic and Workforce Development or its successor agency.

"OEWD Director" means the Director of OEWD or the Director's designee.

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

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

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

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

SEC. 5302. CAP ON PER-ORDER FEES.

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

(b) No third-party food delivery service may charge a covered establishment a fee, commission, or charge that exceeds ~~10~~15% of the purchase price of online orders to that covered establishment processed through the third-party food delivery service during the time period covered by the fee, commission, or charge.

~~(c) Notwithstanding the limitation on fees, commissions, and charges set forth in subsections (a) and (b), above, a third-party food delivery service may charge a point-of-sale processing fee to a covered establishment of up to 3% of the purchase price. Such fee shall be itemized separately in any agreement, invoice, or other written statement of charges to a covered establishment, and shall not be considered in determining whether a third-party food delivery service has reached or exceeded the 15% fee cap referenced in subsections (a) and (b).~~

SEC. 5303. PROHIBITION ON RESTRICTING RESTAURANT PRICING.

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

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. PROHIBITION ON SERVICES WITHOUT WRITTEN CONSENT BY A COVERED ESTABLISHMENT.

No third-party food delivery service may provide any services related to the processing or delivery of an order for delivery of food or beverages from a covered establishment unless that covered establishment expressly agrees in writing to allow the third-party food delivery service to provide such services.

SEC. 5306. TERMINATION OF SERVICES WITHIN 72 HOURS OF NOTICE BY COVERED ESTABLISHMENT.

A third-party food delivery service shall terminate any service contract with a covered establishment within 72 hours after the covered establishment provides oral or written notice of its decision to terminate the contract to an individual contact person designated for communications regarding the termination or amendment of a contract in either the parties' contract or in the version of the third-party delivery service's software application used by the covered establishment, or if no such individual is so specified, to either the individual designated on the website of the California Secretary of State as agent for service of process for the third-party delivery service, or to any officer or local or regional manager of the third-party delivery service. For purposes of this Section 5306, "written notice" shall include any writing delivered by email, text message or similar message transmitted through phone or software application, facsimile, personal delivery, or mail service.

SEC. ~~5305~~5307. 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, 5305, and 5306, 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~~5308. 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 such an ordinance, the regulations shall become effective 70 days from introduction of the ordinance, unless the ordinance has been enacted.~~

SEC. ~~5307~~5309. PENALTIES AND ENFORCEMENT.

(a) Enforcement Procedure. The OEWD Director shall issue an administrative citation for the violation of any section of this Article 53. Administrative Code Chapter 100, "Procedures Governing

the Imposition of Administrative Fines," is hereby incorporated in its entirety, except as it relates to the definition of a violation and the calculation of penalty amounts, addressed in subsections (b) and (c). Administrative Code Chapter 100 shall govern the procedure for imposition, enforcement, collection, and administrative review of administrative citations issued under this Section ~~5307~~5309.

(b) Violations Subject to Penalties. Any third-party food delivery service that violates any provision of this Article 53 shall be subject to an administrative penalty imposed by order of the OEWD Director. For purposes of assessing penalties for violation of Sections 5302, 5303, ~~and~~ *5304,* 5305, and 5306, *a separate violation shall accrue each time a customer transaction is processed subject to any* contract, *term, fee, commission, charge, or price that violates one or more of these sections. As used in the prior sentence, "customer transaction" includes 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, for purposes of identifying a violation of Section 5304. For purposes of assessing penalties for violation of Section ~~5305~~5307, each day a third-party food delivery service fails to disclose documents or records in violation of that section shall be a separate violation.*

(c) Penalty Amounts. In setting the amount of the administrative penalty, which shall not exceed $1,000 per violation, the OEWD Director shall consider any one or more mitigating or aggravating circumstances presented, including but not limited to the following: the amount of any fee, commission, or charge collected in violation of this Article 53, the persistence of the misconduct, the willfulness of the misconduct, the length of time over which the misconduct occurred, and the assets, liabilities, and net worth of the third-party delivery service.

SEC. ~~5308~~5310. UNDERTAKING FOR THE GENERAL WELFARE.

In enacting and implementing this Article 53, the City is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an

obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

SEC. ~~5309~~5311. SEVERABILITY.

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

SEC. 5312. SUNSET DATE.

This Article 53 shall expire by operation of law 60 days after the County Health Officer amends or terminates the Stay Safer At Home Order or any subsequent order regulating restaurants so that restaurants may allow the number of patrons present in the indoor space of the restaurant to resume at 100% of the restaurant's maximum occupancy, provided that no subsequent order is issued to restrict restaurant occupancy below 100% capacity during that 60-day window. ~~two years from its effective date. Upon expiration, the City Attorney shall cause this Article to be removed from the Police Code.~~ Upon expiration, the City Attorney shall cause this Article to be removed from the Police Code.

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

APPROVED AS TO FORM:
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By: */s/ Sarah A. Crowley*
SARAH A. CROWLEY
Deputy City Attorney

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