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<b>Legislative Review:</b>	BOS File No. 200398
<b>Name:</b>	Police Code – Third Party Delivery Services
<b>Sponsor(s):</b>	Supervisors Peskin, Safai, Mandelman, Walton
<b>Date Introduced:</b>	April 21, 2020
<b>Date Referred:</b>	April 29, 2020
<b>Scheduled for BOS Committee:</b>	Public Safety and Neighborhood Services Committee

**Existing law:**

On April 10, 2020 Mayor London N. Breed issued a supplement to the local declaration of an emergency related to COVID-19, known as the “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. Formula retail restaurants as defined in the Planning Code were exempt from the temporary delivery fee cap.

Dine-in restaurant service is expected to resume on July 13<sup>1</sup>.

**Proposed changes:**

The ordinance would add a new Article 23 to the Police Code which would permanently regulate third-party food delivery services. The ordinance would authorize the Office of Economic and Workforce Development (OEWD) to implement and enforce Article 23.

Specifically, third-party delivery services would be prevented 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.

This ordinance would also require that third-party food delivery services maintain records which would substantiate their compliance. These records would have to be maintained for three years from the date of the customer transaction. Records would also have to be produced to OEWD upon request and within 72 hours, not including weekends and holidays. The Director of OEWD would be charged with imposing penalties for any violations for the ordinance.

**Legislative Intent:**

The requirements as outlined above are intended to ensure that restaurants are fairly charged for the

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<sup>1</sup> <https://sf.gov/step-by-step/reopening-san-francisco>

delivery services that are provided to them by the third-party delivery service provider, and so that restaurants can retain control over the pricing of their meals, and restrict other unfair charging practices.

Although restaurants occupy a large swath of ground floor commercial space across the city, as much as 25% in some commercial corridors, the restaurant industry writ large has been in a steady state of decline. Per the findings of the legislation, the number of restaurant closures has exceeded the number of restaurant openings for the past five consecutive years. The findings also highlight that in the past five years there has been a surge in the use of third-party delivery services. This surge in consumer demand for third-party delivery services has only been exacerbated by the COVID-19 emergency. The findings also detail that just four third-party delivery service providers dominate 98% of the market.

The four third-party delivery service providers who control of 98% of this market have a disproportionate advantage over restaurants who they contract with. Its also been observed that restaurants pay as much as 30% of a total customer order back to the third-party delivery service provider. The 30% charge is generally a combination of fees assessed for the delivery service, and “marketing” and “logistics” services. According to the findings, contracts between restaurants and third-party delivery service providers will also frequently include provisions that prohibit restaurants from charging more for meals delivered than for dine-in. This contractual obligation stunts their ability to recoup sales lost in service fees.

**Relevant Definitions:**

“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.

“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.

“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.

### **Issues and Considerations:**

Third party delivery service providers, commonly known as delivery apps, are effectively ‘aggregators’ which connect customers with a multitude of local restaurants and retailers via websites or apps<sup>2</sup>. Orders placed via through these platforms are typically prepared by the restaurant and expedited by delivery workers.

In San Francisco, we have limited data relating to how prevalent the use of third-party delivery services by restaurants is. We do, however, know that in 2018 the San Francisco Municipal Transportation Agency (SFMTA) conducted a survey to better understand benefits and challenges related to delivery apps. Of 32 merchants who took part in the survey, 80% reported that they used delivery app services. Most reported using those services to increase revenue and expand their customer base.

Public sentiment related to delivery apps were shared during a Board of Supervisors Land Use hearing held in 2019 on the State of the Restaurant Industry in San Francisco. Restaurateurs shared that demand for online ordering has placed a strain on their ability to be successful, particularly as they have communicated other economic challenges they are facing.<sup>3</sup> Despite the costs, many restaurateurs have reported that opting out of on-demand delivery would leave them in an even more economically precarious position.

Third-party delivery service providers have expressed that delivery caps will lead to unintended consequences, like reduced restaurant sales<sup>4</sup>. A spokesperson from one third-party delivery service provider shared in an NPR article that, “Any arbitrary cap — regardless of the duration — will lower order volume to locally-owned restaurants, increase costs for small business owners, and raise costs on customers...Delivery workers would have fewer work opportunities and lower earnings.”<sup>5</sup> At this time, data related to the City of San Francisco’s emergency delivery fee cap has had on the San Francisco restaurant industry is not available.

Additionally, on May 13, 2020 the Commission submitted a number of recommendations for small business rebuilding and recovery efforts related to the COVID-19 local emergency to the Economic Recovery Task Force. Relative to third-party delivery service providers, the Commission recommended the following:

- Stop third party delivery platforms from engaging in predatory practices, including but not limited to high commission fees and adding businesses to the platform without their permission.
- Require delivery apps to provide information regarding online delivery sales trends.

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<sup>2</sup> <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/the-changing-market-for-food-delivery>

<sup>3</sup> <https://sf.eater.com/2019/9/17/20869268/sf-restaurants-meet-city-hall-board-of-supervisors-crisis>

<sup>4</sup> <https://www.politico.com/states/california/story/2020/05/05/as-restaurants-struggle-cities-look-to-cap-delivery-fees-1282401>

<sup>5</sup> <https://www.npr.org/2020/05/14/856444431/cities-crack-down-on-food-delivery-app-fees-as-restaurants-struggle-to-survive>

While the legislation does control for high commission fees, it does not address adding businesses to platforms without their permission. It also does not address the collection and provision of information related to online delivery sales trends to the city.