



**MEMORANDUM**

**DATE:** June 16, 2020  
**TO:** Christine Daniel, City Manager  
**FROM:** Charles S. Bryant, Community Development Director  
**SUBJECT:** **Report On Third-Party Delivery Platform Commission Fee Limits**

**RECOMMENDATION**

Staff recommends that the City Council receive and discuss this report on limits on third-party delivery platform commission fees during the COVID-19 pandemic.

**BACKGROUND**

*COVID-19<sup>1</sup>*

On March 16, 2020, based on evidence of increasing occurrence of COVID-19 within Alameda County and throughout the Bay Area, the Alameda County Health Officer, along with Health Officers in five other Bay Area counties, issued an order “directing all individuals living in the County to shelter at their place of residence...directing all businesses and governmental agencies to cease non-essential operations at physical locations in the County; prohibiting all non-essential gatherings of any number of individuals; and ordering cessation of all non-essential travel”. On March 16, 2020 the Alameda County Director of Emergency Services also declared a local emergency based on conditions of extreme peril to the safety of persons and property within the County from the introduction of COVID-19 in the County. The Alameda County Health Officer issued additional shelter in place orders, amending and extending the previous orders on March 31, 2020, April 29, 2020, and May 18, 2020. The May 18 order allowed for additional activities outside of an individual’s residence but provided that the shelter in place order was in place until further notice. As of June 4, 2020, Alameda County has had 3,548 cases of COVID-19, and 97 deaths attributed to COVID-19.

*The State of California’s Response*

With the unprecedented orders and directives from federal, state, and local authorities to practice social distancing measures, which include self-isolation and self-quarantine, many Emeryville residents and business owners find themselves isolating in their residences. As a result of the shelter in place orders, the City, the state, and the nation face an unprecedented economic downturn and uncertainty. In recent weeks, it has become clear that COVID-19 will continue to have a presence in society, and that society must adapt to its presence if there is to be an economic recovery. Accordingly, the State of California has developed a “Resilience Roadmap” for modification of the statewide shelter in place restrictions. The Resilience Roadmap provides for four stages to recovery

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<sup>1</sup> Information presented in this subsection is derived from information made publicly available by the Centers for Disease Control, Alameda County Department of Public Health, and the State of California.

from the pandemic.<sup>2</sup> In the first stage, the State is focused on safety and preparedness and only essential business and activities may occur. In the fourth stage, the State enters the end of the stay at home order, and business resumes as usual. Stage 4 requires therapeutics to either prevent or completely treat COVID-19. Stage 4 is many months away, if not longer.<sup>3</sup> Currently, the State, as well as Alameda County, is transitioning to Stage 2 of the Roadmap, where certain non-essential businesses are allowed to open under restrictions, but residents are still subject to a shelter-in-place order.

### *Emeryville's Response*

On March 17, 2020, in light of actual or threatened conditions of disaster or extreme peril to the safety of persons and property that have arisen within the City of Emeryville caused by the introduction COVID-19, as to which there is no known natural immunity and for which there is currently no vaccine, which has become a pandemic, and which is contributing to a shortage of essential health care supplies, pursuant to section 4-2.08(a)(1) of the Emeryville Municipal Code, the City Manager declared a local emergency. On March 19, 2020, the City Council adopted Resolution No. 20-23 to ratify the City Manager's proclamation of emergency.

In addition, at the special meeting on March 19, 2020, the City Council adopted an urgency ordinance (Ordinance No. 20-002) to establish a moratorium on residential rental evictions, and commercial evictions due to failure to pay rent for certain commercial tenants impacted by COVID-19. Subsequently, due to modifications to the residential rental eviction moratorium, the City Council adopted urgency Ordinance No. 20-008 on April 7, 2020, and Ordinance No. 20-007 on April 21, 2020, which repealed and replaced Ordinance No. 20-002. Ordinance Nos. 20-007 and 20-008 modified the moratorium on residential rental evictions and extended the time period for all moratoriums, but otherwise, did not modify the terms of the moratorium on commercial evictions. Under the aforementioned ordinances, affected commercial tenants are still obligated to repay rent that they have not been able to pay during the current City moratorium on commercial evictions for failure to pay rent.

In view of the severe and ongoing economic impacts to restaurants, and the essentiality of food businesses to the community, on June 9, 2020, the City Council will consider an ordinance requiring landlords to provide a 12-month repayment plan for "Food Establishments", as defined by the ordinance, for rent that is unpaid during the term of the moratorium on commercial evictions. The purpose of the repayment ordinance is to preserve economic infrastructure and to ensure the continued availability of food from restaurants to the people of Emeryville.

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<sup>2</sup> Update on California's Pandemic Roadmap. <https://www.gov.ca.gov/wp-content/uploads/2020/04/Update-on-California-Pandemic-Roadmap.pdf>. Last visited on May 16, 2020.

<sup>3</sup> Graff, Amy, et al. "Updates: SF Health Director says scientists expect virus to be with us 18-24 months," San Francisco Chronicle, dated May 19, 2020, at <https://www.sfgate.com/news/editorspicks/article/whats-open-in-Bay-Area-orders-county-15280514.php>. Last visited on May 19, 2020.

### *Impacts to Restaurants*

The restaurant industry has been significantly impacted by the public health orders outlined above. Dine-in service has been prohibited since mid-March, with restaurants restricted to takeout and delivery service only. This restriction has severely impacted restaurant revenues, especially for restaurants that did not already have a robust delivery service model. A recent survey by the Golden Gate Restaurant Association found that 73% of restaurants surveyed remained open for delivery and takeout during the shelter-in-place order, but that 87% of restaurants indicated they cannot survive financially with takeout and delivery service alone<sup>4</sup>.

With the public health orders restricting restaurants to delivery and takeout service, many restaurants have turned to third-party, app-based delivery service providers to implement delivery service. Because these providers provide a platform that aggregate restaurant offerings for consumers and provide a simple and consistent transaction format, their popularity has grown. However, commission fees charged by these platforms can vary widely and, in many cases, restaurants are required by the providers to provide consistent pricing between their dine-in and delivery pricing of menu items. Research has shown that many third-party platforms apply commissions of up to 30% of the order amount.

In response to this issue during the pandemic, several cities have established limitations on the commission fees charged by third-party, app-based delivery services. Examples include the Cities of San Francisco, Seattle, New York City and Jersey City, all of which have instituted a cap on third-party delivery service fees during the pandemic. The City of Los Angeles is also scheduled to consider a similar policy.

On May 19, 2020 the City Council directed staff to provide information on the impacts of these measures. The following sections of this report provide an overview of the ordinances and orders limiting fees in other cities, background on the third-party delivery platform industry, and topics for consideration if the City Council wishes to consider a similar policy.

## **DISCUSSION**

### *The Third-Party Delivery Industry*

The third-party delivery industry is comprised of many companies, but approximately 95% of the sales are concentrated in four firms: DoorDash, Uber Eats, Postmates and Grubhub<sup>5</sup>. The companies' share of the marketplace varies by region: in the San Francisco Bay Area, DoorDash has 64% of third-party delivery service sales, followed by Grubhub and Uber Eats (15% and 14%, respectively) and Postmates (6%). Of these, Grubhub and Uber Eats are publicly traded, while the others are private companies.

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<sup>4</sup> Bitker, Janelle. "Survey reveals dire state of SF restaurants during coronavirus shelter-in-place", San Francisco Chronicle, dated May 17, 2020 at <https://www.sfchronicle.com/food/article/Survey-reveals-dire-state-of-SF-restaurants-15274517.php> Last visited on May 27, 2020.

<sup>5</sup> Second Measure, dated May 19, 2020 at <https://secondmeasure.com/datapoints/food-delivery-services-grubhub-uber-eats-doordash-postmates/> Last visited on June 3, 2020

In a letter to shareholders dated October 28, 2019, Grubhub reported \$1.4 billion in gross food sales, and net income of \$1 million<sup>6</sup>. The letter states that the Grubhub's business model is predicated on generating additional demand for restaurants, effectively as an advertising platform. Grubhub acknowledges that delivery service itself is not likely to be a long-term profitable activity. The letter states: "...we...don't believe now, that a company can generate significant profits on just the logistics component of the business. It is a commodity and there are significant variable costs that are hard to leverage even with technology and scale. Extremely large delivery/logistics companies can generate slim margins, but only because of the hub and spoke efficiencies they gain at substantial scale. The point-to-point nature of [Grubhub's] business mostly eliminates that aspect of operating leverage."

However, public health measures in response to the COVID-19 pandemic have significantly increased the usage of third-party delivery services. While this may not necessarily result in increased profitability, the increase in sales is notable, nearly doubling at the end of April 2020 compared to April 2019. Within this context, and due to this business model's reliance on network effects and market penetration, the third-party delivery services industry is under pressure to consolidate. Last year, DoorDash acquired Caviar<sup>7</sup>, and Uber is reportedly discussing an acquisition of Grubhub<sup>8</sup>. Further consolidation and growth could impact restaurants ability to negotiate the terms of contracts with third-party delivery companies while simultaneously increasing restaurants reliance on these services.

The major third-party delivery fee companies responded to the pandemic with fee deferrals, reduced commissions and other voluntary measures. According to Emeryville businesses, DoorDash is offering a commission-free period of 30 days for new restaurant partners. After the 30-day period, commissions are 30% for delivery and 6% for pickup orders. This same offer is available through Caviar (as they are now owned by DoorDash). Grubhub is offering a deferral of marketing commission fees until June 30, 2020, after which commissions are 22.5% or 30%, depending on the advertising package selected by the restaurant. The attractiveness of these packages vary due to restaurants' specific situations and the complexity of the contracts. For example, Grubhub's offer has been criticized for requiring restaurants to agree to keep using Grubhub for one year after signing on to their fee deferral program<sup>9</sup>. The programs offered by third-party delivery companies are evolving rapidly and subject to change, which reduces certainty for business owners.

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<sup>6</sup> Maloney, Matt and DeWitt, Adam. Letter to Shareholders dated October 28, 2019 at [https://s2.q4cdn.com/772508021/files/doc\\_financials/2019/q3/October-2019-Shareholder-Letter.pdf](https://s2.q4cdn.com/772508021/files/doc_financials/2019/q3/October-2019-Shareholder-Letter.pdf) Last visited June 3, 2020.

<sup>7</sup> Xu, Tony. "Combining two great companies: DoorDash to acquire Caviar" Dated August 1, 2019 at <https://blog.doordash.com/combining-two-great-companies-doordash-to-acquire-caviar-9c427721f775> Last visited June 3, 2020.

<sup>8</sup> Lombardo, Cara. "Uber Technologies Makes Takeover Approach to Grubhub" Dated May 12, 2020 at <https://www.wsj.com/articles/uber-technologies-makes-takeover-approach-to-grubhub-11589296216> Last visited June 3, 2020.

<sup>9</sup> Mancall-Bital, Nick. "The Fine Print of Grubhub's \$100 Million Relief Program for Ailing Restaurants" Dated March 17, 2020 at <https://www.eater.com/2020/3/17/21183899/grubhub-coronavirus-relief-100-million-fee-deferral-fine-print> Last visited June 3, 2020.

## *Overview of Delivery Fee Limits*

### San Francisco

On April 10, 2020 San Francisco Mayor London Breed issued the “Ninth Supplement to Mayoral Proclamation Declaring the Existence of a Local Emergency Dated February 25, 2020” (the “San Francisco Order”). The San Francisco Order limits third-party food delivery services fees to not more than 15% of the purchase price of the order, for any order for delivery or pickup within the City of San Francisco. The San Francisco Order does not apply to any restaurant that meets the City of San Francisco’s definition of a “Formula Retail Use”, which is a business with 11 or more locations worldwide with standardized signage, color scheme, trademark or other features.

The San Francisco Order became effective on April 13, 2020 (three days after issuance) and extends for as long as dine-in service is prohibited. For third-party food delivery services that exceed the 15% fee maximum for the period April 13, 2020 to April 20, 2020, those services are required to refund any fees over 15% by April 27, 2020.

Enforcement is accomplished entirely through a private right of action, with no involvement of the City or use of City resources. Instead, the restaurants covered by the San Francisco Order may bring a private action against the third party platform. If a third-party food delivery service violates the San Francisco Order, the affected restaurant is to provide a written request for a refund to the third-party food delivery service, which has seven days to provide the refund. If the refund is not provided, the restaurant may bring a civil action against the third-party food delivery service for damages and injunctive relief, with the prevailing party in any such action entitled to an award of reasonable attorney fees.

The Golden Gate Restaurant Association advocated for the San Francisco Order as a result of the pandemic and had not taken a position on this policy area prior to the pandemic. According to staff from the City of San Francisco’s Office of Economic and Workforce Development (“OEWD”), the limit has been well-received by businesses. It is uncertain whether any claims of violations of the San Francisco Order have been pursued by restaurants. OEWD staff also cited structural issues with the third-party food delivery industry, noting that the profitability of these companies has been limited and consolidation is occurring, raising questions on the current business models used by these platforms.

In a controversial move, Uber Eats discontinued delivery service to Treasure Island, citing the San Francisco Order<sup>10</sup>. Treasure Island had been added to Uber Eats service area in early April 2020 as a response to pressure from Treasure Island residents and a San Francisco Supervisor. Accordingly, Treasure Island was served by Uber Eats for approximately three weeks.

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<sup>10</sup> Fitzgerald Rodriguez, Joe. “SF vs. Uber Eats: Service stops food delivery to Treasure Island citing fee cap” Dated April 24, 2020 at <https://www.sfexaminer.com/news/sf-vs-uber-eats-service-stops-food-delivery-to-treasure-island-citing-fee-cap/> Last visited June 3, 2020.

### Seattle

On April 24, 2020, Seattle Mayor Jenny Durkan issued a Civil Emergency Order Restricting Restaurant Delivery And Pick-Up Commission Fees (the “Seattle Order”). Similar to the San Francisco Order, the Seattle Order limits third-party food delivery services fees to not more than 15% of the purchase price of the order, for any order for delivery or pickup within the City of Seattle. The Seattle Order also specifies that third-party food delivery services may not reduce the compensation rates paid to delivery service drivers as a result of the Seattle Order. The Seattle Order applies to all restaurants (eating and drinking establishments) as defined by the Seattle Land Use Code.

The Seattle Order became effective on April 24, 2020 and remains in effect until restaurants are allowed to offer unrestricted dine-in service and the state’s “Stay Home – Stay Healthy” order is rescinded or the Mayoral Proclamation of Civil Emergency dated March 3, 2020 is rescinded, whichever occurs later.

Unlike the San Francisco Order, enforcement of the Seattle Order is accomplished by the city. Violations of the Seattle Order are punishable by a fine of up to \$500 or imprisonment for up to 180 days or both.

### Los Angeles

On May 20, 2020 the Los Angeles City Council passed a motion directing the Los Angeles City Attorney to prepare an ordinance limiting third-party food delivery fees to 15% of the order price and limiting fees on takeout orders to 5% of the order price. The motion also directs the ordinance to require that 100% of tips given within the platform must be given to the driver who actually distributes the food. On June 3, 2020 the Los Angeles City Council is scheduled to consider the first reading of an ordinance establishing a temporary limit on the charges imposed by third-party delivery services during the COVID-19 pandemic (the “Los Angeles Ordinance”)

The Los Angeles Ordinance as currently drafted limits delivery fees to 15% of the purchase price of the order, limits all other fees to 5% of the purchase price of the order, and prohibits third-party delivery services from charging a customer a purchase price that is higher than the price set by the restaurant on the third party delivery service’s platform. If no price is set by the restaurant, the third-party delivery service cannot exceed the purchase price listed on the restaurant’s own menu. These restrictions are effective until 90 days after the City’s prohibition on indoor dining are lifted. The Los Angeles Ordinance also includes disclosure requirements for third-party delivery services, requiring them to itemize fees, commissions, costs and tips on customer receipts.

Enforcement is accomplished via a right to private action after a written notice by the restaurant to the violating third-party delivery service, which then has 15 days to cure the violation.

In its early discussions on the matter, the Los Angeles City Council raised the possibility of limiting the Los Angeles Ordinance to cover only restaurants with less than five locations, but this provision was not included in the motion to prepare an ordinance due

to concerns that such a limitation would be a strong disincentive for third-party delivery platforms to transact with small restaurants.

The Los Angeles City Council received a petition opposing the policy, which was facilitated by third-party delivery platform Postmates and signed by over 20 restaurants. The petition indicated that if fee revenue to third-party delivery platforms is reduced, the third-party delivery platforms would cut services to restaurants, drivers pay, or increase fees paid by customers. Additionally, concerns were raised that third-party delivery services would stop serving the area as a result of the commission fee limits.

### New York City

On May 26, 2020, New York City Mayor Bill DeBlasio signed legislation amending the Administrative Code of the City of New York to add Subchapter 22 titled Third-Party Food Delivery Services (the “New York Law”). The New York Law sets a fee limit of 15% of the order price for delivery fees, which is defined to exclude any other fees such as listing, advertising or processing fees, and a fee limit of 5% for any other fees (i.e. including takeout). Accordingly, this results in a maximum fee limit of 20% to restaurants using delivery service.

The New York Law took effect on June 2, 2020. Rather than corresponding to emergency orders specific to the COVID-19 pandemic, the fee limits apply during declared emergencies and for a period of 90 days after the end of a declared emergency.

Violations of the New York Law are subject to a civil penalty of up to \$1,000 per violation, with violations accruing on a daily basis for every day and for each restaurant the violating fees are charged. The New York Law also provides for a right to private action for restaurants, with remedies including injunctive relief, restitution in the amount of fees exceeding the limits, and attorney fees as deemed appropriate by the court.

This legislation was originally introduced in February 2020 and included a 10% cap on all fees and a requirement for third-party delivery platforms to be licensed by the New York City Consumer Affairs Department to operate. The legislation was considered on April 29, 2020 with the 10% fee limit and a \$10,000 per infraction civil penalty, but as a result of deliberations, the legislation that ultimately passed in May included the higher fee limit and lower penalties as described above. Media accounts suggest that the changes were made due to concerns that third-party delivery platforms would lower driver compensation to offset revenues lost due to the fee limits. Grubhub, specifically, indicated in a statement that “Delivery workers would have fewer work opportunities and lower earnings. We also believe that any cap on fees represents an overstep by local officials and will not withstand a legal challenge.”<sup>11</sup>

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<sup>11</sup> Adams, Erika. “City Council Doubles Delivery Fee Cap to 20 Percent for Some Restaurants”. Eater New York, dated May 12, 2020 at <https://ny.eater.com/2020/5/12/21256244/food-delivery-fee-cap-legislation-nyc> Last visited June 2, 2020.

### Jersey City

On May 6, 2020 the Jersey City City Council considered the first reading of an ordinance amending Jersey City's food-handling establishments ordinance to include restrictions on fees charged to restaurants by third-party delivery services during declared states of emergency (the "Jersey City Ordinance"). On May 7, 2020, Jersey City Mayor Steve Fulop signed an executive order mirroring the provisions of the Jersey City Ordinance, which made the provisions of the Jersey City Ordinance effective immediately, rather than 30 days after a second reading as is customary.

The Jersey City Ordinance limits third-party delivery commission fees to 10% of the order price and applies to any orders for delivery or takeout within Jersey City. The Jersey City Ordinance also prohibits reducing compensation to drivers as a result of the order. The Jersey City Ordinance applies during all Federal, State and/or Local States of Emergency.

Violations of the Jersey City Ordinance are subject to a fine of up to \$2,000, and/or imprisonment for a period of up to 90 days, and/or up to 90 days of community service, pursuant to the General Penalty provisions of the Jersey City Code of Ordinances.

The Jersey City Ordinance was opposed by third-party delivery companies. On May 8, 2020 (the day after the mayor's executive order) Uber Eats announced a three-dollar surcharge for Jersey City customers ordering through its platform. Uber Eats noted that, because the surcharge only applies to restaurants in Jersey City, customers could order from restaurants in surrounding areas to avoid the surcharge<sup>12</sup>. On May 20, the Jersey City City Council heard the second reading of the Jersey City Ordinance and tabled the matter for a future meeting without substantive discussion.

### *Issues to Consider*

Reviewing the experiences of other cities that have established third-party delivery service fee limits raises several issues for consideration as applied to the City of Emeryville. Restaurant businesses appreciate the relief, particularly those that did not have a strong delivery revenue stream prior to the onset of the pandemic. Those businesses have had to pivot to delivery and build a customer base in order to generate revenues, and third-party delivery services are critical to these efforts, particularly due to their ability to advertise to customers regionally. Limiting the fees during this difficult time would provide assistance to struggling restaurant businesses.

However, this policy approach could present some risks and unintended consequences. Most of the cities that have adopted fee limits are large, with a large number of both restaurants and customers. Emeryville's size and economy result in two key differences: First, the number of Emeryville restaurants is small in the market area due to the number of restaurants in Oakland and Berkeley. Second, Emeryville has many restaurants relative to its population (customers).

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<sup>12</sup> Rosario, Joshua. "Uber Eats slaps surcharge on customers of Jersey City eateries in response to 10% commission cap". The Jersey Journal, dated May 8, 2020 at <https://www.nj.com/hudson/2020/05/uber-eats-slaps-surcharge-on-customers-of-jersey-city-eateries-in-response-to-10-commission-cap.html> last visited June 2, 2020.



These factors present a risk that third-party delivery services could withdraw from the Emeryville market with less consequence than they would experience from withdrawing from a larger city's market. Alternatively, if the City restricts fees for orders delivered or picked up in Emeryville, a third-party delivery service could institute a surcharge that would be borne by Emeryville customers, similar to the experience in Jersey City. This could put Emeryville restaurants at a disadvantage to Oakland or Berkeley restaurants for local customers. Additionally, since Emeryville restaurants exist in a competitive regional market, third-party delivery services could decline to provide services to Emeryville restaurants and/or customers entirely, without significant consequence to customers since many other restaurants offer similar products in neighboring jurisdictions.

These risks may be partially mitigated through a number of policy features, including the duration of the fee limits (only while dine-in service is prohibited, vs. 90 days after dine-in is allowed, vs. during any declared emergency), the stringency of the fee limits (10% or higher, applicability to pick-up orders), or other provisions. In summary, the City Council should consider the tradeoffs of benefits and risks of a third-party delivery fee limit in evaluating whether and how to advance a policy.

If the City Council wishes to adopt a limit on fees charged, consideration should also be given to enforcement. Some cities such as San Francisco and Los Angeles have adopted a private right of action model, which does not require additional city resources for enforcement. Others such as Seattle and New York do require city resources to investigate and prosecute violations. For those cities that involve city enforcement, staff does not have data on the number of violations or the amount of staff resources required for enforcement to date.

## **FISCAL IMPACT**

Existing staff resources were used to produce the analysis in this report. The fiscal impacts of a third-party delivery service limit would depend on the specifics of the policy implemented, including the duration of the policy, the enforcement mechanism, and third-party delivery services' potential reaction to the policy.

## **STAFF COMMUNICATION WITH THE PUBLIC**

Staff has discussed the topic of third-party delivery service fees generally with restaurants, restaurant associations and staff members in other cities.

## **CONCLUSION**

Staff recommends the City Council receive this report and discuss the issue of third-party delivery service fee limits in the context of the COVID-19 pandemic.

**PREPARED BY:** Chadrick Smalley, Economic Development and Housing Manager

**APPROVED AND FORWARDED TO THE  
CITY COUNCIL OF THE CITY OF EMERYVILLE:**



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Christine Daniel, City Manager