



**DATE:** September 22, 2020

**TO:** Mayor and City Council

**FROM:** Deputy City Manager

**SUBJECT:** Temporary Limit on Third-Party Food Delivery Fees: Adoption of Emergency Ordinance Establishing a Temporary Limit of 15 Percent Limit on Fees of Food Delivery Service Providers to Support Restaurants in Hayward During the COVID-19 Pandemic

## **RECOMMENDATION**

That Council adopts an emergency ordinance that establishes a temporary 15 percent limit on fees charged by third-party food delivery service providers to Hayward restaurants during the COVID-19 pandemic.

## **SUMMARY**

As a result of the State of Emergency declarations and the Alameda County Shelter-in-Place Order during the COVID-19 pandemic outbreak, Hayward businesses have experienced severe disruptions to normal operations and revenue streams. The Order's restrictions have particularly impacted the restaurant industry, which relies heavily on indoor dining services for income. During this time, online ordering and delivery of food has become a critical lifeline for restaurants.

Restaurants are relying on third-party app-based service companies to facilitate mobile ordering for pick-up or delivery to the consumer. These third-party delivery service providers include companies such as DoorDash, Grubhub, Postmates, and Uber Eats. Several Hayward restaurants have indicated that between 30 and 40 percent of their total sales are now derived from orders placed through these platforms. Staff estimates approximately half of Hayward restaurants and food establishments subscribe to one or more third-party delivery platforms.

While these companies are providing a critical service for Hayward restaurants that do not have existing delivery service and/or online ordering capacity, the fees charged are impacting the sector's ability to survive during the pandemic. According to the San Francisco Chronicle, third-party delivery service providers charge commission fees that ranges from 10 to 30

percent of the total value of an order.<sup>1</sup> Interviews with restaurants owners and third-party delivery company representatives indicate fees can be as high as 35 percent. These fees eat away at restaurant profitability margins. During the pandemic, some Hayward restaurant owners are indicating they are losing money through these platforms. They are not recouping enough net revenue to cover the daily operating expenses and may end up closing permanently.

To ease the economic burden on restaurant and food businesses during the pandemic, staff recommends the adoption of an emergency ordinance, which limits the fees charged by third-party delivery service providers to 15 percent per order. The provisions of the proposed ordinance are consistent with those adopted by other communities in the Bay Area region and, in some cases, go further to provide protections to the struggling restaurant sector.

Enactment of an emergency ordinance would require at least five affirmative votes from the City Council. If only four Council members vote for the proposed ordinance, then adoption would occur at the next City Council meeting and the ordinance would go into effect 30 days after adoption.

## **BACKGROUND**

On March 1, 2020, the Alameda County Public Health Department and Solano County Public Health Department reported two presumptive cases of COVID-19, pending confirmatory testing by the Centers for Disease Control (CDC), prompting Alameda County to declare a local health emergency. On March 4, 2020, the Governor proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19.

On March 11, 2020, the City Manager, in her capacity as Director of Emergency Services, proclaimed a local emergency due to the spread of COVID-19, which was affirmed by the City Council on March 17, 2020.

On March 13, 2020, the President of the United States declared a National Emergency due to the COVID-19 pandemic.

On March 16, 2020, the Health Officer of Alameda County issued an Order directing all individuals to shelter in their homes to slow the progression of the COVID19 pandemic (hereinafter, "Shelter-In-Place order"). The order allowed restaurants to operate only for delivery and takeout options. The Health Officer of the County of Alameda has issued revised Shelter-In-Place Orders on March 31, 2020, May 18, 2020, June 5, 2020, June 18, 2020, July 15, 2020, and August 20, 2020, extending restrictions on activities and requiring individuals to shelter at home. On July 15, 2020, Alameda County's attestation to become a variance county was approved by the State, which allowed for outdoor dining to resume. This order is still in effect today.

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<sup>1</sup> Phillips, J. "San Francisco mayor caps Uber, Postmates, DoorDash delivery commissions" Dated April 10, 2020 at <https://www.sfchronicle.com/business/article/San-Francisco-mayor-caps-Uber-Postmates-15192738.php> Last accessed August 31, 2020.

### *Shelter-in-Place Order Impacts on Hayward Restaurants*

Based on an analysis of the City's business license database, there are approximately 340 restaurants and related food establishments in Hayward. This figure includes chain and independently-owned restaurants, fast food restaurants, cafes, and other prepared-food establishments such as bakeries and ice cream parlors. These businesses have been negatively impacted by the Shelter-in-Place Order. Dine-in services have been prohibited since mid-March with restaurants restricted to takeout or delivery service. These restrictions have severely reduced revenue, especially for those restaurants that did not have a strong delivery service model prior to the pandemic.

As a result, Hayward restaurants have turned to third-party delivery services to implement delivery services as a lifeline. These include companies such as DoorDash, Grubhub, Postmates, and Uber Eats. These third-party companies have grown in popularity because they offer consumers a single consistent platform to find restaurants, transact orders, and receive contactless delivery. Based on recent outreach to restaurants, staff estimates approximately 170 or half of the restaurants in Hayward subscribe to one or more of the third-party delivery service providers. Several of these businesses have indicated that between 30 and 40 percent of their total sales are attributed to online orders through these platforms.

While outdoor dining is currently permitted by the County, only approximately 27 Hayward restaurants offer outdoor seating. Over the last few months, Hayward restaurant owners have indicated to staff a reluctance to expand outdoors due to several factors. These include: 1) cost of rehiring staff, 2) availability of labor, 3) complexity and cost of compliance with State and County safe operating guidelines, 4) limited ability to expand outside due to lack of physical space in public right-of-way and/or private parking lots, 5) potential liability from worker or customer COVID-19 infections, and 6) uncertainty regarding their ability to generate sufficient revenue from outdoor operations to offset operating costs.

### *Third-Party Delivery Service Industry Overview*

While many Americans shelter in their homes during the pandemic, meal delivery sales are soaring. According to data published by Second Measure, a technology industry data analytics firm, sales for meal delivery services through the end of July have grown 150 percent year-over-year. This trend has led to the rise of third-party delivery services. Approximately, 95 percent of online sales are processed through four firms: Door Dash, Grubhub, Uber Eats, and Postmates. Transaction data available for the month of July indicates that in the San Francisco Bay Area, the shares of sales between these companies are as follows: Door Dash (65%), Grubhub (14%), Uber Eats (14%) and Postmates (6%).<sup>2</sup>

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<sup>2</sup> Second Measure, "Which company is winning the restaurant food delivery war?" Dated August 18, 2020 at <https://secondmeasure.com/datapoints/food-delivery-services-grubhub-uber-eats-doordash-postmates/> Last Accessed: August 31, 2020

The dramatic increase in sale transactions has led to growth and consolidation in this business sector. For example, Doordash acquired competitor Caviar in 2019. In May 2020, Uber launched a bid to acquire Grubhub, which would give the company a reported 55 percent of the delivery market share.<sup>3</sup> Additional industry consolidation could limit restaurants' ability to negotiate contract terms with third-party delivery service providers while, at the same time, making them more reliant on their services.

### *Third-Party Delivery Service Provider Fees*

Research shows that many third-party delivery service providers charge restaurants fees up to 30 percent of an order amount. The fees vary and are agreed upon between the restaurant and third-party delivery service provider. The fees can be paid by the restaurant while others are paid directly by the consumer. Fees also vary on a number of different factors including: what service package the business selected with the third-party delivery service; whether the order is placed through an app, through the delivery company website or business' own website; whether pick-up or delivery is selected; the distance of delivery; and whether the restaurant is paying for additional promotional or other services from the third-party delivery service provider.

The fees typically include a service fee, marketing, order processing, delivery, and credit card processing. Credit card processing fees are set by the credit card issuer (bank or financial institution), card network (e.g. Visa, Mastercard, American Express, etc.), and payments processor (a financial institution that securely processes payments). These fees currently range between 3 to 4 percent.

According to industry representatives, these fees are used for:

- Paying driver wages
- Background checks for drivers
- Providing customer support agents for restaurant and consumers
- Paying for insurance, including on-the-job injuries, auto and commercial insurance
- Advertising and marketing the restaurants
- Building and maintaining website and mobile platform

Third-party delivery service companies are supplying an essential service of providing consumers with food options and creating employment opportunities for drivers during the Shelter-in-Place Order.

### *Summary of Other Local Jurisdiction Fee Cap Ordinances*

In an effort to protect and support the struggling restaurant industry, several cities across the country have placed limits on the fees charged by third-party delivery service providers

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<sup>3</sup> Sorvino, Chloe, "Uber's Grubhub Play: A Desperate Bid To Save A Business Everyone Hates" Dated May 13, 2020 at <https://www.forbes.com/sites/chloesorvino/2020/05/13/ubers-grubhub-play-a-desperate-bid-to-save-a-business-everyone-hates/#6853eb464389> Last Accessed: September 1, 2020

including: San Francisco (15%), Los Angeles (15% for delivery orders, 10% for pick-up), Seattle (15%), and New York City (15% for delivery orders, 5% for all other fees). As shown in Table 1 below, five of the 14 cities in Alameda County have adopted local ordinances to place a temporary cap on these fees of between 15 and 20 percent. Staff at three other cities (Alameda, Dublin, and Newark) have indicated they are considering taking action on this topic.

**Table 1: Summary of Third-Party Food Delivery Service Fee Cap Ordinances in Alameda County\***

City	Fee Cap	Total Effective Cap	Grace Period	Termination Clause	Effective Date
<b>Alameda</b>	No**				
<b>Albany</b>	No				
<b>Berkeley</b>	15% on delivery orders No delivery fee on orders that do not involve delivery No more than 5% in other fees or costs	20%	None specified	Termination of local state of emergency	7/7/2020
<b>Dublin</b>	No**				
<b>Emeryville</b>	No				
<b>Fremont</b>	15%	15%	7 days	Termination of local state of emergency	7/23/2020
<b>Livermore</b>	15%	15%	7 days	When dine in service is permitted by the County	8/12/2020
<b>Newark</b>	No**				
<b>Oakland</b>	15% + credit card processing costs	18%-19%	30 days	90 days after end of local declared emergency	7/28/2020
<b>Piedmont</b>	No				
<b>Pleasanton</b>	No				
<b>San Leandro</b>	15%	15%	None	When dine in service is permitted by the County or termination of the state of emergency	7/13/2020
<b>Union City</b>	No				

\* Based on information available at time of report preparation

\*\* Agency reportedly considering fee cap, but no official action taken at time of report preparation.

## **DISCUSSION**

As a result of the State of Emergency declarations and Alameda Shelter-in-Place Order during the COVID-19 pandemic outbreak, Hayward businesses have experienced severe disruptions to revenue streams. The Order's restrictions have particularly impacted the restaurant and food service industry, which relies heavily on indoor dining for revenue. During this time, online ordering and delivery of food has become a critical lifeline for restaurants and food businesses. Many are relying on third-party food delivery service providers to facilitate ordering and delivery to the consumer.

Over the summer, Councilmembers Wahab, Lamnin, and Zermeno all independently expressed to the City Manager their support for Council consideration of a temporary limit on food service delivery fees based on the actions taken in surrounding communities. The City Manager then polled the remaining Councilmembers to determine if there were a majority of members in support of agendizing this item for Council consideration.

### *Summary of Proposed Ordinance*

Staff recommends the adoption of the proposed emergency ordinance, which limits the fees charged by third-party delivery service providers to 15 percent per order. This ordinance is required for the immediate preservation of public health and economic vitality in the restaurant sector. If restaurants permanently close, essential workers will be displaced, storefronts will be vacant, and residents will lose access to contactless delivery of locally prepared meals. Restaurants require immediate relief under the current local state of emergency, which can be accomplished through adoption of this emergency ordinance.

Key provisions of the proposed ordinance are as follows:

1. Limits the fees charged by third-party delivery service providers to 15 percent per order.
2. Establishes a grace period from the effective date of the ordinance to October 6, 2020, provided that third-party delivery service providers refund the portion of the fee exceeding the 15 percent limit. Refunds must be paid no later than 15 calendar days after the purchase date.
3. Establishes a process for restaurants to, within seven calendar days of the excessive charge, request from third-party delivery service providers a refund for fees charged above the limit. The third-party delivery service providers must repay the fee charged in excess of the limit within seven calendar days of the request.

4. Sets penalties for violations in accordance with section 623 of the Charter of the City of Hayward. The fine amount for any violation of any section of the Municipal Code is set forth in the FY 2021 Master Fee Schedule and is as follows:
  - First Violation - \$100.00
  - Second Violation - \$200.00
  - Third and Subsequent Violations \$500.00
5. Establishes an effective date and expiration date for the fee cap. The ordinance will be effective immediately upon adoption of the emergency ordinance and will terminate 90 days after the Hayward City Council terminates the declared local emergency.

It is important to note that the proposed ordinance goes a step further in providing protections for restaurants than some of our neighboring communities. The proposed 15 percent cap is inclusive of all the types of fees third-party delivery service providers charge a restaurant. As shown in Table 1, the City of Berkeley's ordinance established a 15 percent cap on delivery fees *and* a 5 percent cap on all other fees. This essentially establishes a fee cap of 20 percent. The City of Oakland's ordinance establishes a 15 percent fee cap on delivery fees and allows service providers to pass through actual costs of credit card processing fees, which currently range between 3 and 4 percent. This establishes a fee cap ranging between 18 and 19 percent.

Furthermore, the proposed ordinance provides greater recourse to covered establishments in the compliance and enforcement arena. As proposed, the ordinance sets forth the following options for enforcement:

1. Within seven days of the charge in excess of the fee limit, restaurants may request a refund, which the third-party delivery service providers must issue within seven days.
2. Restaurants may take civil action seeking damages and injunctive relief if a third-party delivery service provider refuses to provide a requested refund.
3. The City may issue fines for violations of the Municipal Code in accordance with section 623 of the Charter of the City of Hayward.

This enforcement approach goes beyond other local jurisdictions which only include provisions for restaurants to seek refunds and/or individually take civil action against third-party delivery service providers.

#### *Other Issues to Consider*

During the preparation of this proposed ordinance, staff engaged representatives of Grubhub and Doordash to understand their perspectives and identify other potential economic impacts of the regulation on the Hayward restaurant and resident community. These potential impacts include the following:

1. **A fee cap may reduce the level of marketing services by third-party delivery companies for Hayward restaurants and result in reduced sales.** According to

communications with GrubHub, restaurants in communities with capped commission fees on average received 20 percent fewer orders than restaurants with uncapped commission fees. Representatives noted that fees cover more than just the delivery costs. The fees are used to provide vital marketing and advertising services that drive orders to the small businesses.

2. **A fee cap may reduce driver tips.** Third-party delivery service providers argue that fee caps also impact the income of delivery drivers. Reduced sale volumes translates into reduced work opportunities for drivers. Industry representatives contend that their proprietary data shows that driver tips have been reduced in proportion to lower order volumes.

In New Jersey, for example, delivery service providers have instituted a diner or delivery surcharge paid by consumers that live further away from restaurant locations. Industry representatives contend these fees, which were necessary to recoup costs, have resulted in lower tips to drivers.

Data on the number of Hayward residents who work as food delivery drivers is not publicly available. However, one industry representative indicated there are “hundreds” of Hayward residents working as delivery drivers.

3. **Fee caps may result in discontinued delivery service in the City of Hayward.** In April, following the City of San Francisco’s enactment of a 15 percent cap on delivery service fees, Uber Eats discontinued all service to Treasure Island. Uber Eats argued that the fee cap made the food delivery business too expensive to deliver out to Treasure Island as they could not cover operational costs.<sup>4</sup> After a public outcry, delivery services were restored.

While staff believes a full withdrawal of these companies from the Hayward market is a low risk, it is worth noting that the Hayward restaurant industry does exist in a competitive regional market. Third-party delivery service providers could stop serving Hayward restaurants without major impacts to their revenue streams.

Overall, staff believes these risks to Hayward restaurants and residents are partially mitigated by elements in the proposed ordinance, specially the temporary duration of the fee cap, grace period, and a right to private action model.

## **ECONOMIC IMPACT**

The economic impact of the proposed ordinance cannot be quantified due to a lack of publicly available data on the total amount of fees paid by Hayward restaurants to third-party delivery service providers. However, it is reasonable to expect that the savings resulting from the fee

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<sup>4</sup> 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 Accessed September 3, 2020



cap will be a significant boost to an already struggling restaurant industry. Many restaurants report relying on third-party delivery service providers for up to 40 percent of their order volume and are paying up to 30 percent of total sales in fees to the third-party delivery service providers.

### **FISCAL IMPACT**

Existing staff resources were used to prepare this report. The potential fiscal impacts to the City pertaining to enforcement is unknown as comparative data on the number of violations or amount of staff resources to enforce this policy are not yet available from cities that have adopted similar fee limits.

### **STRATEGIC ROADMAP**

This agenda item supports the Strategy Priority of Grow the Economy. This item is not specially related to a project identified in the Strategic Roadmap. Staff is bringing this item forward because of the economic impacts of COVID-19 on residents, workers, and businesses. Staff will include this item in the next update to Council on the Strategic Roadmap.

### **PUBLIC CONTACT**

Economic Development staff conducted outreach to the Hayward restaurant community and third-party delivery service companies during preparation of this report. Staff contacted 220 restaurants via email addresses culled from the City's business license database to request comments. A request for comments was also sent to the Chamber of Commerce to distribute to their membership. At time of this report's preparation, staff received three written responses and received four calls from restaurant owners, all of whom supported adoption of the proposed fee limit.

### **NEXT STEPS**

If the proposed emergency ordinance is approved, Economic Development staff will send a notice to all Hayward restaurant owners, Hayward business associations, and major third-party delivery service providers.

*Prepared by:* Paul Nguyen, Economic Development Manager

*Recommended by:* Jennifer Ott, Deputy City Manager

*Approved by:*



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Kelly McAdoo, City Manager