

RESOLUTION NO. .

EMERGENCY REGULATION NO. 2020-005

BOARD OF SUPERVISORS, COUNTY OF SAN MATEO, STATE OF CALIFORNIA

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**EMERGENCY REGULATION OF THE COUNTY OF SAN MATEO TO ESTABLISH
A TEMPORARY CAP ON COMMISSIONS AND FEES CHARGED BY THIRD-
PARTY FOOD DELIVERY SERVICES ON LOCAL RESTAURANTS DURING THE
TIME PERIOD IN WHICH THE PROCLAMATION OF LOCAL EMERGENCY
RELATED TO COVID-19 PANDEMIC REMAINS IN EFFECT**

SECTION 1. Findings

The Board of Supervisors of the County of San Mateo hereby makes the following findings in support of the adoption and immediate application of this Emergency Regulation:

WHEREAS, international, national, state, and local health and governmental authorities are responding to an outbreak of respiratory disease caused by a novel coronavirus named "SARS-CoV-2," and the disease it causes has been named "coronavirus disease 2019," abbreviated COVID-19, ("COVID-19"); and

WHEREAS, on March 3, 2020, the County of San Mateo Director of Emergency Services issued a proclamation Declaring the Existence of a Local Emergency in the County and the County of San Mateo Health Officer issued a Declaration of Local Health Emergency Regarding Novel Coronavirus 2019 (COVID-19); and

WHEREAS, on March 10, 2020, the Board of Supervisors of the County of

San Mateo adopted a resolution Ratifying and Extending the Declaration of Local Emergency and the Declaration of Local Health Emergency and both the Declaration of Local Emergency and the Declaration of Local Health Emergency remain in effect; and

WHEREAS, on March 13, 2020, the President of the United States of America declared a national emergency and announced that the federal government would make emergency funding available to assist state and local governments in preventing the spread of COVID-19; and

WHEREAS, on March 19, 2020, Governor Newsom issued Executive Order N-33-20, which imposed a State Shelter Order requiring individuals to remain in their places of residence except as needed to maintain continuity of operations of critical infrastructure, access necessities such as food, prescriptions and healthcare, or engage in other authorized activities; and

WHEREAS, on July 13, 2020, all counties statewide were mandated to shut down indoor activities, such as museums, zoos, dining and theaters, and bars, both inside and outside, were also required to close, and the State Public Health Officer issued an order closing all indoor restaurant dining; and

WHEREAS, both large and smaller events across the Bay Area were cancelled or postponed due to the County's and State's Orders and recommendations at all levels of government were to cancel large gatherings amid concerns over spread of the virus; and

WHEREAS, these cancellations and postponements have caused losses in revenue directly related to the events, as well as losses to local businesses in the County, including eating and drinking establishments that rely on such events to bring patrons to their businesses; and

WHEREAS, with closures or reduced indoor/outdoor dining capacity imposed by orders of State and local health authorities, many restaurants are increasingly reliant on carry-out and delivery offerings, placing a sudden and severe financial strain on the food service industry, especially on restaurants that are small businesses, that even under ordinary circumstances operate on thin margins; and

WHEREAS, the continued viability of the County's restaurants is critical to ensure the availability of essential food services to the residents of San Mateo County and to sustain the vitality of the local economy and the sources of employment and neighborhood vitality that San Mateo County's restaurants provide in the County; and

WHEREAS, many restaurant customers use third-party applications and websites to place orders with restaurants for delivery and takeout, and these third-party platforms charge restaurants fees; service agreements between restaurants and some third-party platforms call for restaurants to pay the platforms charges as high as thirty percent (30%) of the purchase price per order; and

WHEREAS, restaurants, especially those that are small businesses, have limited ability to negotiate lower fees with third-party platforms given the market saturation of third-party platforms, the need of restaurants to access delivery customers owing to COVID-19, and the financial straits many restaurants face during this period of emergency; and

WHEREAS, given that a relatively small number of third-party platform companies provide such delivery services, small restaurants that do not operate their own delivery service lack alternatives to contracting with these companies; and

WHEREAS, capping delivery service fees at fifteen percent (15%) of the cost of an order and fees for non-delivery services at ten percent (10%) per order, will further the public purpose of supporting the continued operation of local restaurants and third-party platforms during the period of emergency; and these caps are based on experiences of other local jurisdictions, in California and nationwide, that have adopted similar caps on third party restaurant delivery fees in response to the COVID-19 as emergency regulations, often working in collaboration with companies providing food delivery services; and

WHEREAS, the California Constitution, Article XI, Section 7, vests cities and counties with the authority to enact ordinances to protect the health, safety, and general welfare, of their citizens; and

WHEREAS, Section 8634 of the Government Code provides that during a local emergency, the governing body of a political subdivision of the State “may promulgate orders and regulations necessary to provide for the protection of life and property,” and that section requires that such orders “shall be in writing and shall be given widespread publicity and notice;” and

WHEREAS, the California Attorney General has opined that when a county has declared a local emergency within its jurisdictional boundaries in an area that includes both unincorporated and incorporated territory, the county may adopt emergency rules and regulations pursuant to Section 8634 of the Government Code that will be effective in both unincorporated and incorporated areas (62 Ops. Cal. Atty. Gen. 701 (1979)); and

WHEREAS, the County of San Mateo, pursuant to its police powers and its powers under the Emergency Services Act, has broad authority to maintain public peace, health, and safety of its community and preserve quality of life for residents throughout the County; and

WHEREAS, the Board of Supervisors finds and determines that there is an immediate need to preserve public health, safety and welfare given the negative economic impacts resulting from the COVID-19 pandemic; and

WHEREAS, it is in the public interest to take action to ensure the ongoing availability of essential prepared food from San Mateo County restaurants to residents of San Mateo County and to ensure that restaurants derive a level of

revenue from takeout and delivery orders that will allow them to remain viable during the COVID-19 emergency, thereby allowing these businesses to survive this crisis and remain as sources of employment and neighborhood vitality in the County; and

WHEREAS, as restaurants return to modified, lower capacity in -restaurant service, it is unclear how restaurants will fare, as they try to create new, physically distanced dining areas and implement, at significant expense, increased training and sanitation measures, and they will likely remain significantly dependent on delivery orders; and

WHEREAS, it is unclear how quickly restaurant patrons will return to in-restaurant dining and restaurants may continue to see a significant loss of revenue for an ongoing period of time; and

WHEREAS, this Emergency Regulation is temporary and intended to promote stability and safe and healthy operations within the County's restaurant sector during the COVID-19 state of emergency, and to minimize closures of viable restaurant businesses, thereby addressing the Covid-19 emergency, serving the public peace, health, safety, and public welfare, and ensuring jobs and economic vitality within the County while also preventing further spread of the virus; and

WHEREAS, an emergency regulation that is effective immediately is necessary to avoid the continuing and immediate threat to public peace, health,

and safety, and to protect life and property, as failure to adopt this Emergency Regulation would result in the avoidable displacement or exposure to COVID-19 of the County's small businesses and to the amplification of the factors that lead to the spread of the virus, as described in these findings.

SECTION 2. Jurisdiction

Pursuant to the County's emergency and police powers during a declared local emergency as set forth in Government Code Sections 8630 and 8634, and Chapter 2.46 of the County Ordinance Code, this Emergency Regulation shall apply throughout the entire geographic boundary of the County, including all incorporated cities and unincorporated areas.

SECTION 3. Definitions

For the purposes of this Emergency Regulation, the following definitions shall apply:

1. "County" means the entire geographic area of the County of San Mateo, including both incorporated and unincorporated areas of the County.
2. "Customer" means any person, firm, or association who makes use of a Third-party Food Delivery Service for the purpose of obtaining food or beverage items from a Retail Food Establishment located within the County.
3. "Listing Services" means services offered by a Third-party Food Delivery Service to list the information and/or menu of a Retail Food Establishment located within the County and processing Online Orders including paying any credit card processing fees.
4. "Marketing Services" means services offered by a Third-party Food Delivery Service to a Retail Food Establishment located within the County for the purposes of promoting, advertising, or otherwise strengthening the business or performance of the Retail Food Establishment on the mobile application, website or other internet services of the Third-party Food

Delivery Service.

5. "Online Order" means an order for a consumer food item placed through a platform provided by a Third-party Food Delivery Service for delivery or pickup from a Retail Food Establishment located within the County.
6. "Purchase Price" means the menu price of an Online Order, excluding taxes, gratuities, and any other fees which may contribute to the total cost to the Customer of an Online Order.
7. "Retail Food Establishment" means a restaurant, delicatessen, bakery, coffee shop, or other establishment that provides eat-in or carry-out service of processed or prepared food or beverages that is located within the jurisdictional boundaries of the County.
8. "Third-party Food Delivery Service" means any individual, firm, association, corporation or entity through website, mobile application or other internet service that offers or arranges for the sale of consumer food or beverage items for same-day delivery or same-day pickup from a Retail Food Establishment located within the County.

SECTION 4. Commissions Cap on Delivery and Non-Delivery Services

- A. Commissions Cap and Prohibitions. During the period of the proclaimed local emergency related to Covid-19, it shall be unlawful for any Third-party Food Delivery Service to do any of the following:
 1. Charge a Retail Food Establishment:
 - a. Fees, commissions or costs that when combined total more than fifteen percent (15%) of the Purchase Price per Online Order where the order is delivered to the Customer; or
 - b. Fees, commissions or costs that when combined total more than ten percent (10%) of the Purchase Price per Online Order for non-delivery services, such as Listing Services or Marketing Services, where the order is not delivered to the Customer.
 - c. Any fee, commission or cost for use of any of its services other than as permitted in subsection a. or b. above.
 - d. As used in this section, fees, commissions or costs includes fees, commissions or costs charged for delivery, Listing Services, Marketing Services, or any other service.
 2. Limit or impede in any manner the ability of any Retail Food Establishment to otherwise determine the Purchase Price for food or

beverage items listed in the Retail Food Establishment's menu.

3. Charge a Customer any Purchase Price for any food or beverage item that is higher than the price set by the Retail Food Establishment.
4. List any Retail Food Establishment, or the menu of the Retail Food Establishment, on the delivery service's website, mobile application or other internet service, without the written consent of the Retail Food Establishment.

B. Tips and Gratuities: no reduction of compensation

1. A Third-party Food Delivery Service shall offer customers the option, as a part of an Online Order for delivery or non-delivery service, to authorize a tip or gratuity to be paid to food delivery service workers and any Retail Food Establishment from which the Customer places an order through the Third- party Food Delivery Service.
2. It shall be unlawful for a Third-party Food Delivery Service to reduce the compensation, including any tip or gratuity, paid to any food delivery service worker, or to reduce any tip or gratuity authorized by a Customer to be paid to any Retail Food Establishment, as a result of the provisions set forth in this Emergency Regulation.

C. Disclosures

The Third- Party Food Delivery Service shall disclose to the Customer an accurate and clearly itemized cost breakdown of each transaction, including but not limited to the Purchase Price of the food and beverages at the cost listed on the Retail Food Establishment's menu; the delivery fee charged to such Retail Food Establishment, each other fee commission or charge other than a delivery fee charged to such Retail Food Establishment, and each fee, commission or cost other than the Purchase Price of the food, charged to the Customer, and any tip or gratuity to be paid to the person delivering the food or beverage or the Retail Food Establishment.

D. Enforcement

1. Violation of this Emergency Regulation subjects the violator to a civil action to recover all actual damages resulting from the violation, and for injunctive relief.

2. A Retail Food Establishment or food delivery service worker

claiming a violation of this Emergency Regulation shall first provide written notice to the Third-party Food Delivery Service of the specific provisions of the Emergency Regulation which is alleged to have been violated and the facts to support the alleged violation. The Third-party Food Delivery Service shall have seven (7) business days from the date of receipt of the written notice to cure any alleged violation including, but not limited to, by providing a refund of any charges exceeding the caps imposed herein and by ceasing such violation of this Emergency Regulation.

3. If, after written notice is provided pursuant to subsection (D)(I) above and the Third-party Food Delivery Service fails to cure the alleged violation including, but not limited to, by failing to provide a refund or continuing to charge fees or otherwise act in violation of this Emergency Regulation, the person or entity claiming a violation of this ordinance may bring a civil action for damages and/or injunctive relief. The prevailing party in any such action shall be entitled to an award of reasonable attorney's fees.

SECTION 5. No Mandatory Duty

Nothing in this Emergency Regulation is intended to create a mandatory duty on the part of the County, County employees, any Cities or City employees, to protect persons or property from a violation of the provisions of this Emergency Regulation. This Regulation is not intended to, and does not, create any rights or benefit, substantive or procedural, enforceable at law or equity, against the County.

SECTION 6. Severability

If any provision of this Emergency Regulation or the application thereof to any person or circumstance is held invalid, the remainder of this Emergency Regulation and the application of such provision to other persons or circumstances shall not be affected thereby.

SECTION 7. Effective Date and Term

This Emergency Regulation shall take effect and be in full force immediately and shall remain in effect until the San Mateo County Board of Supervisors terminates the local emergency related to COVID-19, or this Emergency Regulation is modified or revoked by this Board.

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