
ORDINANCE No.

Adopt permanent commission caps; other requirements for Third-Party Food Platforms (Ordinance; add Code Section 7.27)

The City of Portland ordains:

Section 1. The Council finds:

1. Restaurants are vital to the culture and economy of the City of Portland (“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.
2. Portland’s culinary scene is an important part of the social and economic fabric across all the City’s business districts and neighborhoods. Portland’s restaurants are also integral to Portland’s reputation and tourism. Portland is consistently ranked as one of the country’s best cities for dining due to its numerous, eclectic, and exceptional restaurants.
3. Most Portland restaurants are small businesses, and many are owned or operated by people of color, LGBTQ+, and recent immigrant community members. Supporting these small, diverse businesses strengthens both the economy and the social health of the City.
4. The COVID-19 emergency worsened the economic picture for City restaurants. Due to a ban on dine-in restaurant service to prevent the spread of COVID-19, the prevalence of remote work, and the general decline of dining out, many restaurants continue to struggle from the pandemic’s impacts. Hundreds of restaurants have closed and many commercial districts in Portland continue to struggle due to these restaurant closures.
5. Related to the decline of in-person dining, sixty percent of American consumers order takeout or delivery at least once per week. This percentage is even higher in urban markets such as Portland. In April 2022, over half of U.S. consumers had ordered food using a meal delivery service; up five percentage points from a year ago. As a result of the changes in customer behavior, many Portland restaurants have become dependent on delivery and takeout orders. This dependency makes them increasingly vulnerable to unfair contract terms demanded by third-party food platforms.
6. Third-party food platforms, which arrange for delivery or takeout of food prepared by restaurants, have become a global market worth more than \$150 billion, having more than tripled in size since 2017. In the United States, the market has more than doubled during the Covid-19 pandemic, following a historical growth rate of 8 percent. During this time, DoorDash, one of the largest third-party food

platforms made its public market debut with one of the biggest initial public offerings of 2020.

7. This booming market is highly concentrated in just a handful of businesses. As of November 2019, just four third-party food platform services controlled approximately 98% of the entire market. Since that time, Uber has acquired Postmates, further consolidating this market.
8. The increasing market dominance of a small number of third-party food platforms coupled with the increasingly difficult economic conditions for City restaurants, means restaurants often must contract with these companies if they wish to access the growing share of customers who rely on third-party food platforms to obtain meals. About 77% of U.S. restaurants offer service through third party food platforms.
9. Market dominance also gives these companies disproportionate leverage in contract negotiations with restaurants. These companies may use this leverage to extract high fees from restaurants – totaling in some instances, as much as 30%, or more, of an order total – and thereby diminishing restaurants’ already-narrow profit margins.
10. In addition to high commissions, third-party food platforms 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 these companies. The companies also 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.
11. On June 29, 2020, the Portland City Council adopted Ordinance 190032 (“Temporary Cap”), which capped fees that a third-party food platform could charge a restaurant at 10% of the purchase price for delivery orders and 5% of the purchase price for orders that do not include deliveries. Since adoption, the City received minimal complaints from either third-party food platforms or restaurants regarding compliance with the Temporary Cap.
12. The Temporary Cap has remained in place in the City throughout the COVID-19 pandemic, but is set to expire on June 29, 2022, due to the expiration of the City’s state of emergency.
13. The three largest third-party food platforms currently advertise their lowest cost fees for delivery services between 10% and 20%. These same platforms offer their lowest fees for takeout orders between 5% and 10%.
14. Capping the fees third-party food platforms can charge restaurants for delivery and takeout services and prohibiting these companies from imposing unfair

“telephone order charges” unconnected with any customer purchase are important steps to ensure that restaurants can thrive in Portland and continue to nurture vibrant, distinctive commercial districts.

15. Since June 29, 2020, third-party food platforms have operated within lower and more rigid commission caps in Portland. These same companies also nationally advertise opportunities for similar commissions for basic delivery and takeout services. Given their current operations, a higher and more flexible fee cap on delivery and takeout service fees charged to restaurants is a reasonable, permanent step to protect restaurants from financial collapse without unduly constraining third-party food platforms’ businesses.
16. Prohibiting third-party food platforms 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.

NOW, THEREFORE, the Council directs:

- a. City Code Chapter 7 is amended by adding a new section 7.27 to establish requirements for Third-Party Food Platforms as described in the attached Exhibit A.
- b. This Ordinance takes effect on June 29, 2022, upon expiration of Ordinance No. 190032.
- c. If any section, subsection, sentence, clause of phrase of this Ordinance, or any of the code amendments it adopts, is for any reason held to be invalid or unconstitutional, that shall not affect the validity of any of the remaining portions of the Portland City Code, including but not limited to any remaining provisions of Portland City Code Chapter 7. Council expressly declares that it would have passed the Portland City Code, and each section, subsection, sentence, clause, and phrase thereof, including but not limited to any remaining provisions of Portland City Code Chapter 7, regardless of the fact that any one or more sections, subsections, sentences, clauses, or phrases of this Ordinance may be found to be invalid or unconstitutional.

Section 2. The Council declares that an emergency exists because of the imminent expiration of the Temporary Cap related to the COVID-19 emergency, which is set to expire on June 29, 2022. Therefore, upon passage this Ordinance shall be in full force and effect on June 29, 2022.

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EXHIBIT A

7.27 Regulation of Third-Party Food Platforms

7.27.010 Definitions.

For the purpose of this Chapter, the following words and terms are defined and shall be construed as hereinafter set forth:

- A. "Delivery Fee" means a fee charged by a Third-Party Food Platform for providing a Restaurant with a service that delivers food or beverages from the Restaurant to customers. The term does not include any other fee that may be charged by a Third-Party Food Platform to a Restaurant, such as fees for marketing or advertising the Restaurant on the Third-Party Food Platform or a Transaction Fee.
- B. "Restaurant" has the meaning set forth in ORS 624.010.
- C. "Director" means the Director of the Revenue Division.
- D. "Order" means a Telephone Order or an order placed by a customer through a Third-Party Food Platform for delivery or pickup within the City of Portland ("City").
- E. "Take-Out Fee" means a fee charged by a Third-Party Food Platform for providing a Restaurant with a service in which a customer places an Order with the Restaurant through the Third-Party Food Platform, but such Order does not include delivery. The term does not include any other fee that may be charged by the Third-Party Food Platform to a Restaurant, such as fees for marketing or advertising on the Third-Party Food Platform or Transaction Fees.
- F. "Purchase Price" means the menu price of an Order excluding taxes, gratuities, or any other fees that may make up the total cost to the customer of an Order.
- G. "Telephone Order" means an order placed by a customer to a Restaurant through a telephone call forwarded by a call system provided by a Third-Party Food Platform for delivery or pickup within the City.
- H. "Third-Party Food Platform" means any website, mobile application, or other internet platform that offers or arranges for the sale and the same-day delivery or same-day pickup of food and beverages from a Restaurant.
- I. "Transaction Fee" means a charge for the processing of a payment for an Order imposed upon a Third-Party Food Platform by a third-party payment processor.

7.27.020 Third-Party Food Platform Standards.

- A. A Third-Party Food Platform shall not disclose any information about a Restaurant, including but not limited to listing the Restaurant's menu, address, or contact information, or perform any services on behalf of or in association with the Restaurant, without the consent of the Restaurant.
- B. A Third-Party Food Platform shall not charge any fee to a Restaurant that the Restaurant has not voluntarily agreed to pay.
- C. A Third-Party Food Platform shall not charge a Restaurant a Delivery Fee that exceeds fifteen (15) percent of the Purchase Price per Order.

The limitation of fifteen (15) percent of a Purchase Price per Order for delivery services shall not apply to Orders that have a Purchase Price of less than \$10.

- D. A Third-Party Food Platform shall not charge a Restaurant a Take-Out Fee that exceeds five (5) percent of the Purchase Price per Order.
- E. In addition to the fifteen (15) percent Delivery Fee cap and the five (5) percent Take-Out Fee cap established in Sections (C) and (D) above, a Third-Party Food Platform may pass onto the Restaurant a Transaction Fee in the amount charged by the payment processor but not to exceed three (3) percent of the Purchase Price per Order. Notwithstanding such limit, a Transaction Fee may exceed three (3) percent if the fee is the same amount a third-party payment processor charges the Third-Party Food Platform, and the Third-Party Food Platform discloses the higher Transaction Fee in its contract with the Restaurant.
- F. Notwithstanding the above stated caps on Delivery Fees, Take-Out Fees, and Transaction Fees, (collectively "Capped Fees") a Third-Party Food Platform may offer, and a Restaurant may voluntarily agree to pay other fees beyond such Capped Fees to access additional services including but not limited to advertising, marketing, or promotional services (collectively "Additional Fees"). A Third-Party Food Platform may offer packages that bundle together services that incur a Capped Fee with services that incur Additional Fees, thereby exceeding the Capped Fees, so long as the pricing is transparent and Restaurant participation is voluntary.

Notwithstanding the option to offer these additional services for Additional Fees, a Third-Party Food Platform must give Restaurants the option of obtaining services through the platform for delivery and take-out that do not exceed the Capped Fees. A Third-Party Food Platform is prohibited from refusing to provide delivery or to process an Order for take-out on behalf of a Restaurant based solely on the Restaurant's decision to select only services that fall within the Capped Fees. The name, address, and contact information for all Restaurants that contract for services must be searchable, categorized and visibly listed on the Third-Party Food Platform's website, including those Restaurants that only contract for services with Capped Fees.

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- G. A Third-Party Food Platform shall not reduce the compensation rate paid to a delivery service driver or request that a delivery service driver accept lower compensation in the future or garnish gratuities to comply with the terms of this Chapter.
 - H. At the time a final price is disclosed to a customer for the intended Order from a Restaurant through a Third-Party Food Platform and before that transaction is completed by the customer, the Third-Party Food Platform shall disclose to the customer, in plain language and in a conspicuous manner, any commission, fee, or any other monetary payment charged to the customer by the Third-Party Food Platform.
 - I. After a transaction occurs for an Order from a Restaurant through a Third-Party Food Platform, the Third-Party Food Platform shall provide an electronic or printed receipt to the customer. The receipt shall disclose, in plain and simple language and in a conspicuous manner:
 - 1. The Purchase Price.
 - 2. Any delivery charge, gratuity, or service fee imposed on and collected from the customer by the Third-Party Food Platform.
 - 3. Any delivery charge, gratuity, or service fee imposed on and collected from the customer by the Restaurant, in addition to the Purchase Price.
 - 4. Any tip or gratuity that will be paid to the person delivering the food, and not to the Third-Party Food Platform or Restaurant, that was added into the transaction when it occurred.
 - J. A Third-Party Food Platform shall not charge any fee from a Restaurant for a Telephone Order if a telephone call between such Restaurant and a customer does not result in an actual transaction during such telephone call.
 - K. A Third-Party Food Platform must terminate a Restaurant service contract within 72-hours of receipt of notice from the Restaurant.

7.27.030 Authority, Complaints and Investigation.

- A. The Director is authorized to adopt, amend, repeal and enforce administrative rules interpreting, applying, and administering the provisions of this Chapter.
 - B. The Director is authorized and directed to enforce all provisions of this Chapter. The Director may delegate any or all authority granted under this Section to any Revenue Division officer, employee or agent (“designee”).
 - C. The Director may receive complaints from Restaurants and delivery service drivers by telephone or in writing.
 - D. The Director shall have the power to investigate any and all complaints regarding alleged violations of this Chapter or the administrative rules.
 - E. The Director shall have the authority to administer an administrative subpoena for the purpose of collecting any information necessary to
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investigate complaints and enforce any provisions of this Chapter. The Director may inspect, examine, and copy any books, papers, records, invoices and other data needed to investigate a complaint. Third-Party Food Platforms shall maintain books and records, including but not limited to all written agreements with Restaurants and delivery service drivers, records listing itemized fees the Third-Party Food Platform has charged to Restaurants, and records demonstrating compliance with this Chapter, sufficient for the Director to investigate complaints and issue a decision. Such books and records shall be made available to the Director immediately upon demand.

- F. Upon completing an investigation into allegations in a complaint, the Director or designee shall issue a decision that includes written findings of fact and conclusions of law to support all decisions. Such decision may also include remedies.

7.27.040 Remedies.

- A. Failure to comply with any part of this Chapter or the administrative rules may be punishable by civil penalties and payment of restitution imposed by order of the Director or designee. The Director or designee may impose a civil penalty of up to \$1000 per violation and may order payment of restitution in an amount determined by the Director or designee. For purposes of assessing penalties for violations of this Chapter, a separate violation shall accrue each time an Order is processed, a Restaurant is charged a fee, or a delivery service driver is compensated, or is asked to accept reduced compensation, in a manner that violates one or more of the provisions of this Chapter or the administrative rules.
- B. Civil penalties shall be payable to the City of Portland. Restitution shall be payable to the Restaurant or delivery service driver.
- C. Nothing in this Section is intended to prevent any person from pursuing any available legal remedies. Any Restaurant or delivery service driver claiming to be aggrieved by a Third-Party Food Platform's noncompliance with this Chapter has a cause of action in any court of competent jurisdiction for damages and such other remedies as may be appropriate.

7.27.050 Appeals.

- A. Any Third-Party Food Platform upon which a civil penalty or restitution has been imposed by the Director or designee, may appeal to the Director for review and issuance of a final determination. Written notice of the appeal must be received by the Division within 30 days after the Division mailed or delivered the notice of decision to the Third-Party Food Platform. The time to file an appeal may be extended by the Director for good cause. Requests for extensions of time must be received prior to the expiration of the original 30-day deadline. The appeal must state the name and address of the Third-Party

Food Platform, include a copy of the decision being appealed, and provide an explanation of the grounds for the appeal.

- B. The Director will respond within sixty (60) days after the appeal is filed with a final determination unless such time is extended by the Director for good cause. If this time is extended, written notice will be given to the Third-Party Food Platform, prior to the expiration of the original 60-day deadline. The Director's determination must include written findings of fact and conclusions of law to support the final determination.

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