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Report regarding the expiration of Urgency Ordinance 1603-2020 temporarily capping commissions charged by third-party delivery and pick-up service platforms. *(Katie Donner, Management Analyst I)*

RECOMMENDATION

Staff recommends that City Council receive a presentation and provide direction on potential options for legislation replacing Urgency Ordinance 1603-2020, which expires on August 27, 2023. Enacted during the COVID-19 pandemic, Urgency Ordinance 1603-2020 placed a temporary cap on commissions charged by third-party delivery and pick-up service platforms for restaurants. Options for Council to consider include:

1. **Creating a tiered fee model for third-party delivery and pick-up service platforms that allows businesses to opt in for additional services offered, such as marketing or guaranteed customers or**
2. **Allowing the Urgency Ordinance to expire on August 27, 2023 and remove any further temporary restrictions on third-party commissions charged to local businesses.**

BACKGROUND

On August 26, 2020, City Council approved Urgency Ordinance 1603-2020 (Attachment 1) establishing a temporary cap on commissions charged by third-party food delivery and pick-up services affecting local restaurants during the COVID-19 pandemic. The ordinance placed a temporary cap on delivery service fees at fifteen percent (15%) and pick-up services at ten percent (10%) per order. The Urgency Ordinance will expire on August 27, 2023, 180 days after the City Council ended the local state of emergency.

Section 4 of the Urgency Ordinance states that Council shall review the ordinance prior to its expiration and determine if the extension of its provisions is necessary. On February 22, 2023, City Council discussed the expiration of the Urgency Ordinance and asked staff to engage the restaurant business community to get a sense of how the restaurants are still using third-party applications three years later, if there is appetite for a permanent commission cap on third-party application fees, or if they are okay with the ordinance sunsetting with no further action.

DISCUSSION

Based on Council direction, staff conducted outreach to local restaurants. The full survey results can be found in Attachment 2. Please note, the survey results are shown as of June 8, 2023. The survey will be open until the study session on June 14, 2023, and staff will present all the findings of the survey to City Council during the study session.

Outreach to Local Businesses

The survey was sent to 111 restaurant contacts via email, posted on the Economic & Community Development Facebook and Twitter pages, and flyers in English and Spanish advertising the survey were distributed by staff to businesses on Grand Avenue. Most restaurant merchants reported that they rely heavily on service platforms for a significant portion of their business, namely DoorDash, GrubHub, and Uber Eats. In addition to these service platforms, the merchants use their own online ordering system because it is cheaper. Businesses report they are currently paying 20%-45% in fees for delivery and 6%-15% in fees for pick-up orders and are not receiving any additional support from the service platform (such as more marketing, guaranteed customers, etc.). The majority of business owners that responded to the survey urge City Council to consider adopting a permanent ordinance on commission caps for these service platforms, but they are divided down the middle on how they feel about the tiered cap system.

Options after Urgency Ordinance 1603-2020 Expires
Staff requests Council's feedback on which of the following three options is preferred.

1. ***Creating a tiered fee model for third-party delivery and pick-up service platforms that allows businesses to opt in for additional services offered, such as marketing or guaranteed customers;***

    The City and County of San Francisco ("San Francisco") adopted a permanent commission cap for third -party delivery and pick-up service platforms in June 2021. In July 2021, DoorDash and GrubHub sued San Francisco for this legislation claiming the commission cap was unnecessary, harmful, and unconstitutional. San Francisco came to an agreement with DoorDash, GrubHub, and other third-party delivery and pick-up service platforms to have a tiered fee cap providing flexibility on how businesses use their services. Specifically, San Francisco's tiered system has 15%, 25%, and 30% caps for delivery, based on additional support services, such as larger delivery areas, guaranteed customers, enhanced advertising, coupon discounts for customers, etc. The 15% charge is the standard, placing an additional delivery fee onto the customer, and has a limited delivery radius. The 25% charge has a larger delivery radius and eliminates the delivery fees for the customer. The 30% charge has the largest delivery radius, no delivery fees for the customer, and guarantees the business twenty (20) orders per month. For pick-up orders that the customer is picking up themselves but ordering through these applications, it is a flat 6% fee for the business.

    City staff spoke with DoorDash, GrubHub, and Uber Eats to discuss the possibilities of a tiered fee cap system and what their plans are regarding fees once the South San Francisco emergency ordinance expires. Since the pandemic, DoorDash has implemented their own tiered system and businesses already operate under this system. The basic partnership plan is a 15% delivery commission and 6% delivery commission. The plus partnership plan is a 25% delivery commission and 6% pickup commission, access to DashPass customers*, and a bigger delivery area to reach more customers. The premium partnership plan is a 30% delivery commission and 6% pickup commission, with the same perks as the plus partnership plan, as well as a guaranteed twenty (20) orders per month or pay zero (0) commissions for that month.

    **DashPass customers pay $9.99/month or $96/year for unlimited deliveries for a $0 delivery fee on orders over $12.*

    GrubHub was already working under a tiered model prior to the pandemic. GrubHub's basic plan charges the restaurant 15%, which places a higher delivery fee onto the customer and has a free point of sale integration for the business. The plus plan charges the restaurant 20%, guarantees 35% more orders than the basic plan, standard delivery fees for the customer, free point of sale integration, permanent access to GH+ diners* and assisted diner marketing (specific promotion for the restaurant). The premium plan charges the restaurant 25%, guarantees 45% more orders than the basic plan, offers the same perks as the plus plan and additionally has lowest delivery fees for the customer, ability to run promotions, free pickup for customers and respond to ratings and reviews.

**GH+ diners pay $9.99/month for unlimited deliveries for a $0 delivery fee on orders over $12, exclusive perks and rewards, and a donation match to charity.*

Uber Eats did not join DoorDash and GrubHub in the lawsuit against the City and County of San Francisco. Uber Eats also has their own tiered system, similar to DoorDash and GrubHub. The lite plan charges the business a 15% fee for delivery orders and a 6% fee for pickup orders. There is discoverability in the Uber Eats app when customers search for a restaurant. The plus plan charges the business a 25% fee for delivery orders and a 6% fee for pickup orders. The same perks apply in the lite plan to the plus plan, and additionally, Uber One benefits ($0 delivery fee and discounts) apply to member customers ordering from the business. The premium plan charges the business a 30% fee for delivery orders and a 6% fee for pickup orders. The same perks apply from the plus plan to the premium plan, and additionally, for the first six (6) months, the business pays 0% fees for each month that you don't get at least twenty (20) orders and receive matching of ads spending up to $100 per month.

Per the City Attorney's Office, issuance of a permanent cap would likely put the City at risk of a lawsuit, given that the two jurisdictions that have adopted permanent caps have subsequently been sued (San Francisco and New York City). Moreover, in their review of the San Francisco lawsuit, the City Attorney noted that San Francisco tried to get the Takings and Due Process claims dismissed, but failed. Thus, if the City were to be sued as a result of instituting a permanent fee cap, there is meaningful risk that a court could conclude a permanent cap violates laws that would result in the City having to pay plaintiffs' attorneys' fees.

Staff surveyed other jurisdictions in the region on the status of their fee caps. The City of Milpitas has ended their fee cap and will not be instituting a permanent one. The businesses were notified of the end of the fee cap and no businesses have reached out to express concerns or frustrations. The City of Fremont's temporary fee cap ended when the State of California's State of Emergency was lifted.

2. ***Allowing the Urgency Ordinance to expire on August 27, 2023, and remove any further temporary restrictions on third-party commissions charged to local businesses.***

   If Council directs staff to pursue option number two (2), no further action is required. The three major service platforms that South San Francisco restaurant merchants use currently offer a 15% charge option which aligns with the temporary urgency ordinance cap. Business owners likely would not notice a financial impact from the expiration of this urgency ordinance with no further action taken.

FISCAL IMPACT

There is no fiscal impact on the General Fund as this is a study session item.

RELATIONSHIP TO THE STATEGIC PLAN

This report meets the City's strategic planning goal #5, Economic Vitality.

CONCLUSION

Staff recommends that City Council receive a presentation and provide direction on potential options for legislation replacing Urgency Ordinance 1603-2020, which expires on August 27, 2023. Urgency Ordinance 1603-2020 placed a temporary cap on commissions charged by third-party delivery and pick-up service platforms for restaurants enacted during the COVID-19 pandemic. Options for Council to consider include:

1. Creating a tiered fee model for third-party delivery and pick-up service platforms that allows businesses

to opt in for additional services offered, such as marketing or guaranteed customers or

2. Allowing the Urgency Ordinance to expire on August 27, 2023 and remove any further temporary restrictions on third-party commissions charged to local businesses.

Attachments:

1. Urgency Ordinance 1603-2020
2. Survey Results