



# *Town of Brookline*

## *Massachusetts*

**Department of Planning and  
Community Development**

Town Hall, 3<sup>rd</sup> Floor  
333 Washington Street  
Brookline, MA 02445-6899  
(617) 730-2130 Fax (617) 730-2442  
TTY (617) 730-2327

**Alison Steinfeld**  
Director

**To:** Select Board and Town Administrator Mel Kleckner  
**From:** Kara Brewton, Economic Development Director  
**CC:** Alison Steinfeld, Meredith Mooney, Toirm Miller; Brookline Chamber of Commerce, Coolidge Corner Merchants Association, Brookline Village Merchants Association  
**Date:** April 24, 2020  
**Re:** Limiting Third Party Delivery Service Fees to Restaurants

---

**Overview:**

The Massachusetts Restaurant Association (MRA) has called on City Councils in Boston and Cambridge, urging legislative action on third party delivery fees related to restaurants (MRA letter attached). Toirm Miller, the co-founder of Stoked Wood Fired Pizza Co., forwarded a proposed City of Cambridge policy order limiting fees to the Select Board last week, requesting the Select Board take this proposal under consideration.

The Select Board, through the Town Administrator, has asked our office what the sentiment about this type of regulation is among Brookline business organizations and what the policy and practical impacts of a limitation on delivery charges would be on persons who rely upon delivery of food and related products during the current public health emergency.

As further explained below, at this time ***I recommend the Select Board:***

- 1) Learn more from the Chamber of Commerce's ongoing data gathering from Brookline restaurants before moving forward with local emergency orders or local legislative action;
- 2) Send a letter to our legislators to consider limiting delivery commission rates through state-wide action once more data is available from the Chamber;
- 3) Ask the Massachusetts Restaurant Association to immediately launch a public campaign so consumers are better informed about how to best financially support restaurants during the COVID-19 public health emergency; and
- 4) Consider emergency local action *following* actions by larger, adjacent municipalities, fully understanding any legal clarification provided by Town Counsel.

### **More Background on the Issue for Restaurants:**

In addition to speaking with Toirm Miller, I gathered the following information from Kerry Miller, Vice President of Operations for the MRA, and a summary of restaurant interviews to date by Debbie Miller. In the coming week, I will also discuss this issue with other Brookline business organizations. I spoke with six different representatives of two different delivery services, both ending in a request for me to send an email to a marketing division; I have not yet received a response.

Many restaurants feel compelled to use delivery services such as Grubhub, Door Dash, and Caviar primarily because of their marketing services. Commission rates for these three online ordering and delivery services are 30% of the overall customer purchase in addition to a credit card processing fee. Restaurant margins are notoriously thin, nationally reported as 3.7%; even those with very successful open book management policies report periods of net operating margins *up to* 18 to 20%<sup>1</sup>. For some restaurants, using these services at a loss prior to COVID still made overall financial sense because: (i) the costs were offset by revenue from dine-in customer, which often included alcohol sales; and (ii) they noted seeing new dine-in customers that they believed were a result of the marketing aspect of these online delivery services. Some restaurants would prefer consumers ordering food outside of these online delivery applications and instead consider curbside pick-up, if customers feel comfortable doing so. Restaurants are also concerned about individually advocating their customers to do so, as they are concerned this may cause backlash or cancellation with the delivery services they are still utilizing.

The attached Massachusetts Restaurant Association letter lays out several complaints from their members, noting that some of these delivery companies have been named in a class action lawsuit in violation of federal antitrust laws. Additionally, Grubhub recently launched a campaign to “help restaurants”, when in fact the restaurants bore the cost of the discounted meals and Grubhub’s commission remained stable, based on the pre-discounted sales price. Locally, our restaurants had varying experiences in understanding the details of this recent campaign before participating. The Chamber of Commerce and our office are also letting all of our businesses know about the Attorney General’s anti-gouging complaint process in case that may be applicable<sup>2</sup>. Neither the MRA nor local conversations have yet exposed any general commission rate change<sup>3</sup> during the COVID public health emergency.

Restaurants and the MRA are concerned about how Grubhub might respond to legislation capping commissions. The MRA reported that in the San Francisco area, Grubhub has already stated that it would likely increase fees to the customer, which could risk the overall sales to restaurants. Additionally, some restaurants are concerned that delivery companies may pull out of markets all together. If a single community takes action to cap delivery commissions and the delivery service either increases customer costs or stops service to restaurants in that community, consumers may simply choose delivery from a neighboring municipality. Neither we nor the MRA are aware of any pending state legislation at this time.

### **Next Steps by Staff & Community Partners:**

- 1) The Chamber of Commerce is currently collecting more data from restaurants to quickly document ***what specific*** lower delivery commission rate might be more feasible for them while they are fighting to survive. This information will then be immediately sent to the Select Board, Massachusetts Restaurant Association and our legislators to consider specific, immediate action at the state level.
- 2) Our office will continue to track the impacts in communities where legislation has been enacted; to date, we believe only San Francisco has enacted an emergency order capping commission fees to 15%, which is still effectively in a grace period through April 27<sup>th</sup><sup>3</sup>.

---

1 <https://www.bostonglobe.com/business/2015/10/14/can-open-book-management-help-both-restaurants-and-workers/71L1ujpPASaiFyxyNezVI/story.html>

2 <https://www.mass.gov/guides/resources-during-covid-19#-protect-yourself-from-scams-and-fraud->

3 <https://sfmayor.org/sites/default/files/NinthMayoralSupplement.pdf>

April 17, 2020

Dear Members of the Boston City Council-

On behalf of the Massachusetts Restaurant Association, we are urging you to consider implementing an ordinance which would cap commission rates that third party delivery systems can charge restaurants, as your colleagues in San Francisco did last week. Additionally, ordinances have been filed across the country including in New York, Chicago and Providence.

As you know, the restaurant industry in Massachusetts has been dealt a devastating blow during the COVID-19 crisis. The Massachusetts restaurant industry has lost nearly \$1 billion in sales and approximately 200,000 employees have been laid off. This is felt particularly hard in Boston, where activity was brought to a standstill even before the official government shutdown. Under normal circumstances, take-out and delivery account for less than 20% of sales at most restaurants and there are those operations with no history of take out, it is hard to build a platform from scratch.

Even before the pandemic, third party delivery companies were a source of frustration for our industry, with many of these delivery platforms charging up to 30% commission on individual orders. Many of these platforms have faced lawsuits from the industry, after implementing various businesses practices designed to upcharge commissions for local restaurants. Some of these tactics include fake domains that resemble real restaurants, listing restaurants that haven't yet agree to partner, and swapping out phone numbers for third-party delivery platform-affiliated ones to bill higher commissions.

Due to the current situation, regulating these platforms is more important than ever. As restaurants look for new ways to survive solely on takeout and delivery, third party delivery companies have seen this as an opportunity to further exploit the industry. Many of these companies have launched PR campaigns, positioning themselves in the public's eye as good community partners to struggling small businesses.

Last month, Grubhub made an announcement stating that it was "helping" the industry by "temporarily foregoing" its usual commission rates for restaurants. However, a few days later, they were forced to clarify that they weren't forgiving these payments – only deferring them. By then, they had reaped the benefits of a misleading ad campaign with the public, but leaving the restaurants to read the very fine print on the offer. Grubhub also announced a promotion to customers, offering consumer discounts for orders placed during certain times, however they neglected to tell the customer that the restaurant itself was being forced to pay for the promotional offering, and then went on to base its commission based on the total cost of the order before the discount.

It should be noted that earlier this month, DoorDash announced that it would reduce all commission fees for restaurants with five or less locations by 50 percent between April 13, 2020 and the end of May. While this action is appreciated by the local restaurant community, it is important that these protections remain in place permanently.

Earlier this month, third party delivery companies, Grubhub, DoorDash, UberEats and Postmates have been named in a class action lawsuit alleging that the companies are in violation of federal antitrust laws by requiring that the restaurants charge customers the same price for dining in and delivery. The customers have also taken issue with the high commission fee third party services charge restaurants.

As we prepare for this pandemic to stretch on for an undetermined period of time, restaurants are now facing the daunting prospect of developing a business plan for a new reality. We hope that the Council will consider working to ensure that small restaurant businesses are protected from predatory actions of national corporations looking to profit from a crisis.

Please do not hesitate to contact the MRA if we can provide further information.

Bob Luz  
President & CEO  
MA Restaurant Association