

## **BILL ANALYSIS**

Senate Research Center  
87R2455 JES-F

S.B. 911  
By: Hancock  
Business & Commerce  
3/12/2021  
As Filed

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

The Alcoholic Beverage Code does not contain a definition for a restaurant. As a response to mitigating the spread of COVID-19, Governor Abbott defined a restaurant as an establishment that has less than 51 percent of its gross receipts come from the sale of alcoholic beverages. Therefore, restaurants that exceeded 51 percent were unable to operate dine-in services. The lack of regulatory consistencies within the restaurant industry has caused financial strain on the industry.

Third party delivery companies have become the delivery middleman between consumers and restaurants, and the use of these services has significantly increased during COVID-19. Restaurants partner with delivery companies by signing a contract that provides a platform to facilitate the transmission of orders by consumers to restaurants for pickup or delivery by a contractor. When a restaurant is added to a delivery company's platform without a partnership, the company tasks the driver with ordering food ahead of time or at the restaurant before delivery. A restaurant that does not have an agreement with a delivery company must contact the delivery company and ask to be removed from the company's platform. It is not uncommon for a platform to remove the restaurant and add the restaurant back on to the platform. In these instances, restaurants have had to send cease and desist letters to these delivery companies.

Restaurants contend that the unauthorized use of a restaurant's menu or trademark misleads consumers into believing that there is an endorsement or agreement for use by the restaurants when no such agreement exists. Restaurants also state that the menus third party delivery companies obtain from a restaurants website run the risk of obtaining menus with out-of-date prices or hours of operation. These problematic business practices are hurting restaurants and their consumers.

This bill creates a clear definition of a restaurant in the Alcoholic Beverage Code. Additionally, the bill prohibits third party delivery companies from the following: using deceptive advertising to suggest the restaurant sponsors or endorses the service, shifting liability to a restaurant for harm caused by the third-party delivery service or its agents or employees, and prohibits cities from enacting local regulations to the extent that they conflict with contractual agreements between third-party delivery services and restaurants. The bill also requires third-party delivery companies to remove non-contracted restaurants from their services within 10 days of receiving a removal request, provides a clear mechanism to express concerns directly to the delivery service, and creates an optional statewide education program for third-party delivery companies to utilize when training agents or employees.

The committee substitute will provide businesses that qualify as a restaurant, under the newly created definition of a restaurant, an alternative way to obtain a food and beverage certificate. The committee substitute will also remove language that requires the alteration of a restaurant's pricing to be clearly expressed to the consumer as a separate charge from the price of the food or beverage.

As proposed, S.B. 911 amends current law relating to the regulation of restaurants and third-party food delivery services, including the issuance of certain permits to restaurants.

### **RULEMAKING AUTHORITY**

Rulemaking authority previously granted to the Texas Alcoholic Beverage Commission is rescinded in SECTION 2 (Section 25.13, Alcoholic Beverage Code), SECTION 3 (Section 28.18, Alcoholic Beverage Code), SECTION 4 (Section 32.23, Alcoholic Beverage Code), and SECTION 5 (Section 69.16, Alcoholic Beverage Commission) of this bill.

Rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 7 (Section 438.0432, Health and Safety Code) of this bill.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 1.04, Alcoholic Beverage Code, by adding Subdivision (29), to define "restaurant."

SECTION 2. Amends Sections 25.13(a-1), (b-1), and (d), Alcoholic Beverage Code, as effective September 1, 2021, as follows:

(a-1) Authorizes a holder of a wine and malt beverage retailer's permit that is a restaurant, rather than authorizing a holder of a wine and malt beverage retailer's permit, to be issued a food and beverage certificate by the Texas Alcoholic Beverage Commission (TABC) if TABC finds that the receipts from the sale of alcoholic beverages by the permit holder at the location are 60 percent or less of the total receipts from the location.

(b-1) Authorizes TABC to exempt permittees who are concessionaires in public entertainment venues such as sports stadiums and convention centers from the requirement that the permittee operate its own permanent food service facility with commercial cooking equipment on its premises, and the sales requirements under Subsection (a-1), rather than from Subsections (a-1) and (b). Deletes existing text requiring TABC to adopt rules requiring the holder of a food and beverage certificate to assure that permanent food service facilities for the preparation and service of multiple entrees for consumption at the location are available at the location.

(d) Authorizes a certificate to be canceled at any time, and the renewal of a certificate to be denied, if TABC finds that the holder of the certificate is in violation of Subsection (a-1), rather than in violation of Subsection (a-1) or (b) or a rule adopted under Subsection (b-1). Authorizes TABC, on finding that the permittee knowingly operated under a food and beverage certificate while not complying with this section, rather than not complying with this section or a rule adopted under Subsection (b-1), to cancel or deny the renewal of the permittee's wine and malt beverage retailer's permit.

SECTION 3. Amends Sections 28.18(a-1), (b-1), and (e), Alcoholic Beverage Code, as follows:

(a-1) Authorizes a holder of a mixed beverage permit that is a restaurant, rather than authorizing a holder of a mixed beverage permit, to be issued a food and beverage certificate by TABC if TABC finds that the receipts from the sale of alcoholic beverages by the permit holder at the location are 60 percent or less of the total receipts from the location.

(b-1) Authorizes TABC to exempt permittees who are concessionaires in public entertainment venues such as sports stadiums and convention centers from the requirement that the permittee operate its own permanent food service facility with commercial cooking equipment on its premises, and the sales requirements under Subsection (a-1), rather than from Subsections (a-1) and (b). Deletes existing text requiring TABC to adopt rules requiring the holder of a food and beverage certificate to assure that permanent food service facilities for the preparation and service of multiple entrees for consumption at the location are available at the location.

(e) Authorizes a certificate to be canceled at any time, and the renewal of a certificate to be denied, if TABC finds that the holder of the certificate is in violation of Subsection (a-1), rather than in violation of Subsection (a-1) or (b) or a rule adopted under

Subsection (b-1). Authorizes TABC, on finding that the permittee knowingly operated under a food and beverage certificate while not complying with this section, rather than not complying with this section or a rule adopted under Subsection (b-1), to cancel or deny the renewal of the permittee's mixed beverage permit.

SECTION 4. Amends Sections 32.23(a-1), (b-1), and (e), Alcoholic Beverage Code, as follows:

(a-1) Authorizes a holder of a private club registration permit that is a restaurant, rather than authorizing a holder of a private club registration permit, to be issued a food and beverage certificate by TABC if TABC finds that the receipts from the service of alcoholic beverages by the permit holder at the location are 60 percent or less of the total receipts from the location.

(b-1) Authorizes TABC to exempt permittees who are concessionaires in public entertainment venues such as sports stadiums and convention centers from the requirement that the permittee operate its own permanent food service facility with commercial cooking equipment on its premises, and the sales requirements under Subsection (a-1), rather than from Subsections (a-1) and (b). Deletes existing text requiring TABC to adopt rules requiring the holder of a food and beverage certificate to assure that permanent food service facilities for the preparation and service of multiple entrees for consumption at the location are available at the location.

(e) Authorizes a certificate to be canceled at any time, and the renewal of a certificate to be denied, if TABC finds that the holder of the certificate is in violation of Subsection (a-1), rather than in violation of Subsection (a-1) or (b) or a rule adopted under Subsection (b-1). Authorizes TABC, on finding that the permittee knowingly operated under a food and beverage certificate while not complying with this section, rather than not complying with this section or a rule adopted under Subsection (b-1), to cancel or deny the renewal of the permittee's private club registration permit.

SECTION 5. Amends Sections 69.16(a-1), (b-1), and (d), Alcoholic Beverage Code, as follows:

(a-1) Authorizes a holder of a retail dealer's on-premise license that is a restaurant, rather than authorizing a holder of a retail dealer's on-premise license, to be issued a food and beverage certificate by TABC if TABC finds that the receipts from the sale of alcoholic beverages by the license holder at the location are 60 percent or less of the total receipts from the location.

(b-1) Authorizes TABC to exempt licensees who are concessionaires in public entertainment venues such as sports stadiums and convention centers from the requirement that the permittee operate its own permanent food service facility with commercial cooking equipment on its premises, and the sales requirements under Subsection (a-1), rather than from Subsections (a-1) and (b). Deletes existing text requiring TABC to adopt rules requiring the holder of a food and beverage certificate to assure that permanent food service facilities for the preparation and service of multiple entrees for consumption at the location are available at the location.

(d) Authorizes a certificate to be canceled at any time, and the renewal of a certificate to be denied, if TABC finds that the holder of the certificate is in violation of Subsection (a-1), rather than in violation of Subsection (a-1) or (b) or a rule adopted under Subsection (b-1). Authorizes TABC, on finding that the licensee knowingly operated under a food and beverage certificate while not complying with this section, rather than not complying with this section or a rule adopted under Subsection (b-1), to cancel or deny the renewal of the licensee's retail dealer's on-premise license.

SECTION 6. Amends Subtitle C, Title 5, Business & Commerce Code, by adding Chapter 114, as follows:

#### CHAPTER 114. THIRD-PARTY FOOD DELIVERY SERVICES

Sec. 114.0001. DEFINITIONS. Defines "mark," "trade name," "restaurant," and "third-party food delivery service."

Sec. 114.0002. PROHIBITED ACTS. Prohibits a third-party food delivery service from:

(1) arranging for the delivery of food or beverages from a restaurant in this state unless the service has filed a certificate of formation or registration with the secretary of state;

(2) using a restaurant's mark or trade name in connection with the service in a misleading way that suggests the restaurant sponsors or endorses the service;

(3) altering a restaurant's pricing for a food or beverage ordered from the restaurant on the service, except that the service may charge additional fees for use of the service if the fees are clearly expressed to the consumer as a separate charge from the price of the food or beverage ordered from the restaurant; or

(4) charging a restaurant a fee in connection with the service's delivery of food or beverages from that restaurant unless the restaurant has agreed to pay a fee to the service under an agreement under Section 114.0004.

Sec. 114.0003. REQUIREMENTS FOR SERVICE. Requires a third-party food delivery service to:

(1) provide a consumer a clearly identified mechanism for the consumer to express concerns or complaints directly to the service regarding a delivery of food or beverages arranged through the service; and

(2) remove a restaurant from the service not later than the 10th day after the date the service receives a request from the restaurant to be removed from the service if the service does not have an agreement with the restaurant to provide the delivery service.

Sec. 114.0004. TERMS OF AGREEMENT WITH RESTAURANT. (a) Requires that an agreement between a third-party food delivery service and a restaurant:

(1) be in writing;

(2) expressly authorize the service to arrange for the delivery of food or beverages from that restaurant; and

(3) clearly state each fee, including a commission or other charge, that the restaurant will be required to pay or absorb in connection with the service's delivery of food from that restaurant.

(b) Prohibits the agreement from including any provision that requires the restaurant to indemnify the third-party food delivery service, including an employee or independent contractor of the service, for claims or liabilities resulting from acts or omissions of the service or of an employee or independent contractor of the service.

(c) Provides that a provision in an agreement that violates Subsection (b) is void and unenforceable.

Sec. 114.0005. PRIVATE CAUSE OF ACTION. (a) Authorizes a restaurant aggrieved by the violation, if a third-party food delivery service violates Section 114.0002 or 114.0003, to bring an action against the service for:

(1) injunctive relief; and

(2) damages in an amount equal to the restaurant's actual damages arising from the violation, or the service's profits arising from the violation.

(b) Authorizes the court, if the court finds that the defendant committed the violation knowingly or in bad faith, to award the plaintiff:

(1) exemplary damages in an amount that is not more than three times the sum of the plaintiff's actual damages, and the defendant's profits arising from the violation; and

(2) the plaintiff's reasonable attorney's fees.

SECTION 7. Amends Subchapter D, Chapter 438, Health and Safety Code, by adding Section 438.0432, as follows:

Sec. 438.0432. DELIVERY SERVICE FOOD SAFETY ACCREDITATION. (a) Defines "third-party food delivery service."

(b) Authorizes the Department of State Health Services (DSHS) as provided by this section, notwithstanding Section 438.043 (Requirements for Accreditation), to accredit an education program on basic food safety for third-party food delivery service employees and independent contractors who deliver food as authorized by Chapter 114, Business & Commerce Code.

(c) Requires the executive commissioner of the Health and Human Services Commission by rule to define the training on basic food safety required to be included in a third-party food delivery service course curriculum. Prohibits the course length from exceeding 30 minutes.

(d) Authorizes an education program accredited under this section to require a participant to achieve a passing score on an examination to successfully complete the course for certification.

(e) Authorizes an education program accredited under this section to be provided through the Internet or a mobile application.

(f) Prohibits DSHS or a local health authority from requiring a third-party food delivery service employee or independent contractor to complete an education program accredited under this section. Prohibits a local health authority from charging a fee to an employee or contractor who provides proof of completion of an education program accredited under this section.

SECTION 8. Amends Chapter 250, Local Government Code, by adding Section 250.011, as follows:

Sec. 250.011. THIRD-PARTY FOOD DELIVERY SERVICES. (a) Defines "third-party food delivery services."

(b) Prohibits a municipality or county, notwithstanding any other law, from adopting or enforcing an ordinance or regulation that:

(1) applies requirements to a third-party food delivery service that are more restrictive than the requirements that apply to the service under Chapter 114, Business & Commerce Code;

(2) affects the fees charged to a restaurant by a third-party food delivery service; or

(3) affects the terms of an agreement between a third-party food delivery service and a restaurant required under Section 114.0004, Business & Commerce Code.

SECTION 9. Repealer: Section 25.13(b) (relating to prohibiting a food and beverage certificate from being issued to the holder of a wine and malt beverage permit unless the location has permanent food service facilities for the preparation and service of multiple entrees for consumption at the location), Alcoholic Beverage Code, as effective September 1, 2021.

Repealer: Section 28.18(b) (relating to prohibiting a food and beverage certificate from being issued to the holder of a mixed beverage permit unless the location has permanent food service facilities for the preparation and service of multiple entrees for consumption at the location), Alcoholic Beverage Code.

Repealer: Section 32.23(b) (relating to prohibiting a food and beverage certificate from being issued to a private club unless the location has permanent food service facilities for the preparation and service of multiple entrees for consumption at the location), Alcoholic Beverage Code.

Repealer: Section 69.16(b) (relating to prohibiting a food and beverage certificate from being issued to a retail dealer unless the location has permanent food service facilities for the preparation and service of multiple entrees for consumption at the location), Alcoholic Beverage Code.

SECTION 10. Makes application of Section 114.0004, Business & Commerce Code, as added by this Act, prospective.

SECTION 11. Effective date: September 1, 2021.