

ORDINANCE NO. 20-_____

AN ORDINANCE AMENDING AND CREATING NEW SECTIONS WITHIN ARTICLE 7 (SALES AND USE TAX) OF CHAPTER 2 (BUSINESS LICENSING, LIQUOR REGULATION AND TAXATION) OF THE CODE OF THE CITY OF COLORADO SPRINGS 2001, AS AMENDED, PERTAINING TO SALES TAX MARKETPLACE FACILITATORS AND ECONOMIC NEXUS

WHEREAS, the City of Colorado Springs, Colorado, (the "City"), is a home rule municipality, organized and existing under Article XX, Section 6 of the Colorado Constitution; and

WHEREAS, pursuant to Article XX, Section 6 of the Colorado Constitution, the right to enact, administer and enforce sales taxes is clearly within the constitutional grant of power to the City and is necessary to raise revenue with which to conduct the affairs and render the services performed by the City; and

WHEREAS, pursuant to such authority, the City has adopted and enacted a Sales Tax Code (the "Code"), under which City sales tax is levied on all sales and purchases of tangible personal property or taxable services at retail unless prohibited, as applicable to the provision of this Ordinance, under the Constitution or laws of the United States; and

WHEREAS, the United States Supreme Court in *South Dakota v. Wayfair*, 138 S.Ct. 2080 (2018), overturned prior precedent and held that a State is not prohibited by the Commerce Clause from requiring a retailer to collect sales tax based solely on the fact that such retailer does not have a physical presence in the State ("Remote Sales"); and

WHEREAS, based upon such decision, the retailer's obligation to collect Remote Sales is no longer based on the retailer's physical presence in the jurisdiction by the Constitution or law of the United States, and the City's Sales and Use Tax Code needs to be amended to clearly reflect such obligation consistent with said decision; and

WHEREAS, the delivery of tangible personal property, products, or services into the City relies on and burdens local transportation systems, emergency and police services, waste disposal, utilities and other infrastructure and services; and

WHEREAS, the failure to tax remote sales creates incentives for businesses to avoid a physical presence in the State and its respective communities, resulting in fewer jobs and increasing the share of taxes to those consumers who buy from competitors with a physical presence in the State and its municipalities; and

WHEREAS, it is appropriate for Colorado municipalities to adopt uniform definitions within their sales tax codes to encompass marketplace facilitators, marketplace sellers, and multichannel sellers that do not have a physical presence in the City, but that still have a taxable connection with the City; and

WHEREAS, the goal of adopting this ordinance is to join in on the simplification efforts of all the self-collecting home rule municipalities in Colorado; and

WHEREAS, this ordinance provides a safe harbor to those who transact limited sales within the City; and

WHEREAS, absent such amendment, the continued failure of retailers to voluntarily apply and remit sales tax owed on remote sales exposes the municipality to unremitted taxes and permits an inequitable exception that prevents market participants from competing on an even playing field; and

WHEREAS, the City adopts this ordinance with the intent to address tax administration, and, in connection with, establish economic nexus for retailers or vendors without physical presence in the State and require the retailer or vendor to collect and remit sales tax for all sales made within the marketplace.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS:

Section 1. Section 104 (Words and Phrases Defined) of Part 1 (General Provisions) of Article 7 (Sales and Use Tax) of Chapter 2 (Business Licensing, Liquor Regulation And Taxation) of The Code of the City of Colorado Springs 2001, as amended, is amended to read as follows:

2.7.104: WORDS AND PHRASES DEFINED:

* * *

ECONOMIC NEXUS: The connection between the City and a person not having a physical nexus in the State of Colorado, which connection is established when the person or marketplace facilitator makes retail sales into the City, and:

(A) In the previous calendar year, the person, which includes a marketplace facilitator, has made retail sales into the state exceeding the amount specified in C.R.S. § 39-26-102(3)(c), as amended; or

(B) In the current calendar year, 90 days has passed following the month in which the person, which includes a marketplace facilitator, has made retail sales into the state exceeding the amount specified in C.R.S. § 39-26-102(3)(c), as amended.

ENGAGED IN BUSINESS IN THE CITY: Performing or providing services or selling, leasing, renting, delivering or installing tangible personal property, **products, or services** for storage, use or consumption within the City. Engaged in business in the City includes, but is not limited to, any one of the following activities by a person:

A. * * *

D. Owns, leases, rents or otherwise exercises control over real or personal property within the taxing jurisdiction; or

E. **Retailer or vendor in the state of Colorado that makes more than one delivery into the taxing jurisdiction within a twelve month period; or**~~Makes more than one delivery into the taxing jurisdiction within a twelve (12) month period; or~~

F. **Makes retail sales sufficient to meet the definitional requirements of economic nexus as set forth in this Section 2.7.104.**

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MARKETPLACE: A physical or electronic forum, including, but not limited to, a store, a booth, an internet website, a catalog, or a dedicated sales software application, where tangible personal property, taxable products, or taxable services are offered for sale.

MARKETPLACE FACILITATOR:

A. A person who:

1. Contracts with a marketplace seller or multichannel seller to facilitate for consideration, regardless of whether or not the consideration is deducted as fees from the transaction, the sale of the marketplace seller's tangible personal property, products, or services through the person's marketplace;

2. Engages directly or indirectly, through one or more affiliated persons, in transmitting or otherwise communicating the offer or acceptance between a purchaser and the marketplace seller or multichannel seller; and

3. Either directly or indirectly, through agreements or arrangements with third parties, collects payment from the purchaser on behalf of the seller.

B. "Marketplace Facilitator" does not include a person that exclusively provides internet advertising services or lists products for sale, and that does not otherwise meet this definition.

MARKETPLACE SELLER: means a person, regardless of whether or not the person is engaged in business in the city, which sells on its own platform or has an agreement with a marketplace facilitator and offers for sale tangible personal property, products, or services through a marketplace owned, operated, or controlled by a marketplace facilitator.

MULTICHANNEL SELLER: A retailer or vendor that offers for sale tangible personal property, commodities, or services through a marketplace owned, operated, or controlled by a marketplace facilitator, and through other means.

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RETAILER OR VENDOR: Any person selling, leasing, renting or granting a license to use tangible personal property or services at retail. Retailer shall include, but is not limited to, any:

A. * * *

D. Retailer-contractor, when acting in the capacity of a seller of building supplies, construction materials, and other tangible personal property;

E. Marketplace facilitator, marketplace seller, or multichannel seller.

Section 2. Section 315 (Marketplace Sales) of Part 3 (Taxable Transactions, Commodities and Services) of Article 7 (Sales and Use Tax) of Chapter 2 (Business Licensing, Liquor Regulation And Taxation) of The Code of the City of Colorado Springs 2001, as amended, is created to read as follows:

2.7.315: MARKETPLACE SALES

A.

1. A marketplace facilitator engaged in business in the city is required to collect and remit sales tax on all taxable sales made by the marketplace facilitator, or facilitated by it for marketplace sellers or multichannel sellers to customers in the city, whether or not the marketplace seller for whom sales are facilitated would have been required to collect sales tax had the sale not been facilitated by the marketplace facilitator.

2. A marketplace facilitator shall assume all the duties, responsibilities, and liabilities of a vendor under *[Drafter's Note: insert reference(s) to retailer or vendor definition]*. Marketplace facilitators shall be liable for the taxes collected from marketplace sellers or multichannel sellers. The City may recover any unpaid taxes, penalties, and interest from the marketplace facilitator that is responsible for collecting on behalf of marketplace sellers or multichannel sellers.

3. The liabilities, obligations, and rights set forth under this article are in addition to any duties and responsibilities of the marketplace facilitator has under this article if it also offers for sale tangible personal property, products, or services through other means.

4. A marketplace seller, with respect to sales of tangible personal property, products, or services made in or through a marketplace facilitator's marketplace, does not have the liabilities, obligations, or rights of a retailer under this article if the marketplace seller can show that such sale was facilitated by a marketplace facilitator:

a. With whom the marketplace seller has a contract that explicitly provides that the marketplace facilitator will collect and remit sales tax on all sales subject to tax under this article; or

b. From whom the marketplace seller requested and received in good faith a certification that the marketplace facilitator is registered to

collect sales tax and will collect sales tax on all sales subject to tax under this article made in or through the marketplace facilitator's marketplace.

5. If a marketplace seller makes a sale that is not facilitated by a licensed marketplace facilitator in a marketplace, the marketplace seller is subject to all of the same licensing, collection, remittance, filing and recordkeeping requirements as any other retailer.

B. Auditing. With respect to any sale, the city shall solely audit the marketplace facilitator for sales made by marketplace sellers or multichannel sellers but facilitated by the marketplace. The city will not audit or otherwise assess tax against marketplace sellers or multichannel sellers for sales facilitated by a marketplace facilitator.

Section 3. Section 508 (Sales Tax License Exemption) of Part 5 (Licenses) of Article 7 (Sales and Use Tax) of Chapter 2 (Business Licensing, Liquor Regulation And Taxation) of The Code of the City of Colorado Springs 2001, as amended, is created to read as follows:

2.7.508: SALES TAX LICENSE EXEMPTION:

Any person engaged in business in the City whose obligation to collect City tax is solely established by economic nexus and has no physical presence in the City and the person registers and remits City tax through the Colorado Department of Revenue Sales and Use Tax System (SUTS), is not required to obtain a City Sales Tax License.

Section 4. Section 801 (Reporting and Remittance Periods) of Part 8 (Tax Returns and Payments) of Article 7 (Sales and Use Tax) of Chapter 2 (Business Licensing, Liquor Regulation And Taxation) of The Code of the City of Colorado Springs 2001, as amended, is amended to read as follows:

2.7.801: REPORTING AND REMITTANCE PERIODS:

* * *

B. If the accounting methods regularly employed by the retailer or licensed consumer in the transaction of business, or other conditions are such that the returns aforesaid made on a calendar month basis will impose unnecessary hardship, the Director may, upon written request of the retailer or licensed consumer, accept returns at intervals as will, in the Director's opinion, better suit the convenience of the taxpayer and will not jeopardize the collection of the tax, provided that the Director may by rule permit a retailer or licensed consumer whose monthly City tax liability is less than ~~two~~**three** hundred dollars (\$~~200~~**300**.00) to make returns and pay taxes at intervals not greater than every three (3) months or whose ~~annual~~**monthly** City tax liability is ~~thirteen~~**fifteen**

(\$15.00) or less ~~less than fifty dollars (\$50.00)~~ to make returns and pay taxes on an annual basis, or as approved by the Director. Tax returns filed on a quarterly or annual basis shall be filed with the Director on or before the twentieth day of the month following the end of the reporting period.

C. Every retailer who files exclusively through the Colorado Department of Revenue Sales and Use Tax System (SUTS) is permitted to follow the State of Colorado's filing frequency requirements.

Section 5. No obligation to collect the sales and use tax required by this article may be applied retroactively. Responsibilities, duties and liabilities described in Section 2.7.315 of a marketplace facilitator, marketplace seller, or multichannel seller begin upon the earlier of when they became licensed to collect the city's sales tax or when they became legally obligated to collect the city's sales tax under Section 2.7.315.

Section 6. If any provision of this ordinance, or the application of such provision to any person or circumstance, is held to be unconstitutional, then the remainder of this ordinance, and the application of the provisions of such to any person or circumstance, shall not be affected thereby.

Section 7. This ordinance shall become effective on the first day of the month that is at least thirty (30) days after date of its adoption.

Section 8. This ordinance shall be in full force and effect from and after its final adoption and publication as provided by Charter.

Section 9. Council deems it appropriate that this ordinance be published by title and summary prepared by the City Clerk and that this ordinance be available for inspection and acquisition in the office of the City Clerk.

Introduced, read, passed on first reading and ordered published this ____ day of _____, 2020.

Finally passed: _____

Council President

Mayor's Action:

- Approved on _____.
- Disapproved on _____, based on the following objections:

Mayor

Council Action After Disapproval:

- Council did not act to override the Mayor's veto.
- Finally adopted on a vote of _____, on _____.
- Council action on _____ failed to override the Mayor's veto.

Council President

ATTEST:

Sarah B. Johnson, City Clerk