

BY AUTHORITY

RESOLUTION NO. _____
SERIES OF 2020

COMMITTEE OF REFERENCE:
Finance & Governance

A BILL

For an ordinance amending Chapters 32 and 53 of the Denver Revised Municipal Code to adopt the model on-line seller ordinance developed and recommended by the Colorado Municipal League.

WHEREAS, the City and County of Denver, 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 the City Retail Sales Tax Article, Article II, Chapter 53 of the Denver Revised Municipal Code (the “City Retail Sales Tax Article), under which city sales tax is levied on all sales and purchases of taxable tangible personal property, products, or 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 Retail Sales Tax Article 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

1 increasing the share of taxes to those consumers who buy from competitors with a physical
2 presence in the state and its municipalities; and

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

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

9 **WHEREAS**, this ordinance provides a safe harbor to those who transact limited sales within
10 the city; and

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

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

19 **BE IT RESOLVED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:**

20 **Section 1:** Section 32-107(1)(c), D.R.M.C., is amended by adding the underlined language
21 and deleting the stricken language to read as follows:

22 **Sec. 32-107. - Retail sales license, retail use tax license, and lodger's tax license.**

23 (c) Except as otherwise provided in subsection (1)(c)(1) below, ~~F~~for each license issued,
24 a fee of fifty dollars (\$50.00) shall be paid, which fee shall accompany the application.
25 A further fee of fifty dollars (\$50.00) shall be paid for each two-year period beginning
26 in even-numbered years for which such license is renewed. Notwithstanding the
27 provisions of section 32-6 of this Code, payment of a fee for such a license issued
28 after June thirtieth of even-numbered years shall be prorated in decrements of twelve
29 dollars and fifty cents (\$12.50) for each succeeding six-month period following June
30 thirtieth of the even-numbered year as set forth in the following table:

Dates of Application for License			
Even-Numbered Years		Odd-Numbered Years	
January 1—June 30	July 1—December 31	January 1—June 30	July 1—December 31
\$50.00	\$37.50	\$25.00	\$12.50

1 All licenses shall be renewed on a biennial basis, effective January 1, 1994.

2 (1) No fee shall be paid for a retail sales license issued to a marketplace facilitator,
3 marketplace seller, or multichannel seller, provided they have no physical
4 nexus with the city and their sole nexus with the city is economic nexus.

5 **Section 2.** Section 53-53(a), D.R.M.C., is amended to include the following new definitions
6 to read as follows:

7 (10.3) “Economic nexus” means the connection between the city and a person not having a
8 physical nexus in the State of Colorado, which connection is established when the
9 person or marketplace facilitator makes retail sales into the city, and:

- 10 a. In the previous calendar year, the person, which includes a marketplace
11 facilitator, has made retail sales into the state exceeding the amount specified
12 in C.R.S. § 39-26-102(3)(c), as amended; or
- 13 b. In the current calendar year, 90 days has passed following the month in which
14 the person, which includes a marketplace facilitator, has made retail sales into
15 the state exceeding the amount specified in C.R.S. § 39-26-102(3)(c), as
16 amended.

17 (10.5) “Engaged in business in the city” means performing or providing services or selling,
18 leasing, renting, delivering or installing tangible personal property, products, or
19 services for storage, use or consumption, within the city. Engaged in business in the
20 city includes, but is not limited to, any one of the following activities by a person: (1)
21 directly, indirectly, or by a subsidiary maintains a building, store, office, salesroom,
22 warehouse, or other place of business within the taxing jurisdiction; (2) sends one or
23 more employees, agents or commissioned sales persons into the taxing jurisdiction to
24 solicit business or to install, assemble, repair, service, or assist in the use of its
25 products, or for demonstration or other reasons; (3) maintains one or more employees,
26 agents or commissioned sales persons on duty at a location within the taxing

1 jurisdiction; (4) owns, leases, rents or otherwise exercises control over real or personal
2 property within the taxing jurisdiction; or (5) makes retail sales sufficient to meet the
3 definitional requirements of economic nexus as set forth in section 53-53(a)(10.3).

4 (16.2) "Marketplace" means a physical or electronic forum, including, but not limited to, a
5 store, a booth, an internet website, a catalog, or a dedicated sales software application,
6 where tangible personal property, taxable products, or taxable services are offered for
7 sale.

8 (16.4) "Marketplace facilitator"

9 a. Means a person who:

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

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

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

21 b. "Marketplace facilitator" does not include a person that exclusively provides
22 internet advertising services or lists products for sale, and that does not
23 otherwise meet this definition.

24 (16.6) "Marketplace seller" means a person, regardless of whether or not the person is
25 engaged in business in the city, which has an agreement with a marketplace facilitator
26 and offers for sale tangible personal property, products, or services through a
27 marketplace owned, operated, or controlled by a marketplace facilitator.

28 (16.8) "Multichannel seller" means a retailer that offers for sale tangible personal property,
29 commodities, or services through a marketplace owned, operated, or controlled by a
30 marketplace facilitator, and through other means.

31 **Section 3.** Section 53-53(a)(27), D.R.M.C., is amended by adding the language underlined

32 to read:

1 (27) "Retailer or Vendor" means any person selling, leasing, renting, or granting a license
2 to use tangible personal property or services at retail. The terms "retailer" shall include,
3 but is not limited to, any: (1) auctioneer; (2) salesperson, representative, peddler or
4 canvasser, who makes sales as a direct or indirect agent of or obtains such property
5 or services sold from a dealer, distributor, supervisor or employer; (3) charitable
6 organization or governmental entity which makes sales of tangible personal property
7 to the public, notwithstanding the fact that the merchandise sold may have been
8 acquired by gift or donation or that the proceeds are to be used for charitable or
9 governmental purposes; (4) marketplace facilitator, marketplace seller, or multichannel
10 seller.

11 **Section 4.** Section 53-57.1, D.R.M.C., is enacted and added to read as follows:

12 **Sec. 53-57.1 – Marketplace Sales**

13 (a) *Marketplace Sales.*

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

19 (2) A marketplace facilitator shall assume all the duties, responsibilities, and liabilities of a
20 retailer under articles I and II of this chapter. Marketplace facilitators shall be liable for
21 the taxes collected from marketplace sellers or multichannel sellers. The city may
22 recover any unpaid taxes, penalties, and interest from the marketplace facilitator that
23 is responsible for collecting on behalf of marketplace sellers or multichannel sellers.

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

28 (4) A marketplace seller, with respect to sales of tangible personal property, products, or
29 services made in or through a marketplace facilitator's marketplace, does not have the
30 liabilities, obligations, or rights of a retailer under articles I and II of this chapter if the
31 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) A marketplace seller makes 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 marketplace 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.

(c) No obligation to collect the tax required by this article may be applied retroactively. Responsibilities, duties and liabilities described in subsection (a) of a marketplace facilitator, marketplace seller, or multichannel seller shall 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.

Section 5. 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 6: This ordinance shall become effective on the first day of the month that is at least thirty (30) days after date of its adoption.

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1 COMMITTEE APPROVAL DATE: _____, 2020

2 MAYOR-COUNCIL DATE: _____, 2020

3 PASSED BY THE COUNCIL: _____

4 _____ - PRESIDENT

5 ATTEST: _____ - CLERK AND RECORDER,
6 EX-OFFICIO CLERK OF THE
7 CITY AND COUNTY OF DENVER

8 PREPARED BY: Charles T. Solomon, Assistant City Attorney DATE: August __, 2020

9 Pursuant to section 13-12, D.R.M.C., this proposed resolution has been reviewed by the Office of
10 the City Attorney. We find no irregularity as to form, and have no legal objection to the proposed
11 resolution. The proposed resolution is not submitted to the City Council for approval pursuant to §
12 3.2.6 of the Charter.

13
14 Kristin M. Bronson, Denver City Attorney

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16 BY: _____, Assistant City Attorney DATE: _____