

1 **BY AUTHORITY**

2 ORDINANCE NO. _____
3 SERIES OF 2020

COUNCIL BILL NO. CB20-1303
COMMITTEE OF REFERENCE:
Finance & Governance

5 **A BILL**

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

9
10 **WHEREAS**, the City and County of Denver, Colorado (the “city”), is a home rule municipality,
11 organized and existing under Article XX, Section 6 of the Colorado Constitution; and

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

16 **WHEREAS**, pursuant to such authority, the city has adopted and enacted the City Retail Sales
17 Tax Article, Article II, Chapter 53 of the Denver Revised Municipal Code (the “City Retail Sales Tax
18 Article), under which city sales tax is levied on all sales and purchases of taxable tangible personal
19 property, products, or services at retail unless prohibited, as applicable to the provision of this
20 Ordinance, under the Constitution or laws of the United States; and

21 **WHEREAS**, the United States Supreme Court in *South Dakota v. Wayfair*, 138 S.Ct. 2080
22 (2018), overturned prior precedent and held that a state is not prohibited by the Commerce Clause
23 from requiring a retailer to collect sales tax based solely on the fact that such retailer does not have
24 a physical presence in the state (“remote sales”); and

25 **WHEREAS**, based upon such decision, the retailer’s obligation to collect remote sales is no
26 longer based on the retailer’s physical presence in the jurisdiction by the Constitution or law of the
27 United States, and the City’s Retail Sales Tax Article needs to be amended to clearly reflect such
28 obligation consistent with said decision; and

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

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

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

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

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

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

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

21 **BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:**

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

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

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

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

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

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

(10.3) “Economic nexus” means 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.

(10.5) “Engaged in business in the city” means 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: (1) directly, indirectly, or by a subsidiary maintains a building, store, office, salesroom, warehouse, or other place of business within the taxing jurisdiction; (2) sends one or more employees, agents or commissioned sales persons into the taxing jurisdiction to solicit business or to install, assemble, repair, service, or assist in the use of its products, or for demonstration or other reasons; (3) maintains one or more employees,

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

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

9 (16.4) "Marketplace facilitator"

10 a. Means a person who:

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

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

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

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

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

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

1 **Section 3.** Section 53-53(a)(27), D.R.M.C., is amended by adding the language underlined
2 to read:

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

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

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

- 15 (a) *Marketplace Sales.*
- 16 (1) A marketplace facilitator engaged in business in the city is required to collect and remit
17 sales tax on all taxable sales made by the marketplace facilitator, or facilitated by it for
18 marketplace sellers or multichannel sellers to customers in the city, whether or not the
19 marketplace seller for whom sales are facilitated would have been required to collect
20 sales tax had the sale not been facilitated by the marketplace facilitator.
- 21 (2) A marketplace facilitator shall assume all the duties, responsibilities, and liabilities of a
22 retailer under articles I and II of this chapter. Marketplace facilitators shall be liable for
23 the taxes collected from marketplace sellers or multichannel sellers. The city may
24 recover any unpaid taxes, penalties, and interest from the marketplace facilitator that
25 is responsible for collecting on behalf of marketplace sellers or multichannel sellers.
- 26 (3) The liabilities, obligations, and rights set forth under this article are in addition to any
27 duties and responsibilities of the marketplace facilitator has under articles I and II of
28 this chapter if it also offers for sale tangible personal property, products, or services
29 through other means.
- 30 (4) A marketplace seller, with respect to sales of tangible personal property, products, or
31 services made in or through a marketplace facilitator’s marketplace, does not have the
32 liabilities, obligations, or rights of a retailer under articles I and II of this chapter if the
33 marketplace seller can show that such sale was facilitated by a marketplace facilitator:

- 1 a. With whom the marketplace seller has a contract that explicitly provides that the
2 marketplace facilitator will collect and remit sales tax on all sales subject to tax
3 under this article; or
4 b. From whom the marketplace seller requested and received in good faith a
5 certification that the marketplace facilitator is registered to collect sales tax and
6 will collect sales tax on all sales subject to tax under this article made in or
7 through the marketplace facilitator's marketplace.

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

11 (b) *Auditing.* With respect to any marketplace sale, the city shall solely audit the
12 marketplace facilitator for sales made by marketplace sellers or multichannel sellers but facilitated
13 by the marketplace. The city will not audit or otherwise assess tax against marketplace sellers or
14 multichannel sellers for sales facilitated by a marketplace facilitator.

15 (c) No obligation to collect the tax required by this article may be applied retroactively.
16 Responsibilities, duties and liabilities described in subsection (a) of a marketplace facilitator,
17 marketplace seller, or multichannel seller shall begin upon the earlier of when they became licensed
18 to collect the city's sales tax or when they became legally obligated to collect the city's sales tax.

19 **Section 5.** If any provision of this ordinance, or the application of such provision to any person
20 or circumstance, is held to be unconstitutional, then the remainder of this ordinance, and the
21 application of the provisions of such to any person or circumstance, shall not be affected thereby.

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

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25 **BALANCE OF PAGE INTENTIONALLY LEFT BLANK**
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1 COMMITTEE APPROVAL DATE: November 17, 2020 by Consent
2 MAYOR-COUNCIL DATE: November 24, 2020 by Consent
3 PASSED BY THE COUNCIL: _____
4 _____ - PRESIDENT
5 APPROVED: _____ - MAYOR _____
6 ATTEST: _____ - CLERK AND RECORDER,
7 EX-OFFICIO CLERK OF THE
8 CITY AND COUNTY OF DENVER
9 NOTICE PUBLISHED IN THE DAILY JOURNAL _____;
10 PREPARED BY: Charles T. Solomon, Assistant City Attorney DATE: November 25, 2020
11 Pursuant to section 13-12, D.R.M.C., this proposed ordinance has been reviewed by the Office of
12 the City Attorney. We find no irregularity as to form, and have no legal objection to the proposed
13 ordinance. The proposed ordinance is not submitted to the City Council for approval pursuant to §
14 3.2.6 of the Charter.
15
16 Kristin M. Bronson, Denver City Attorney
17
18 BY: *Jonathan Griffin*, Assistant City Attorney DATE: Nov 25, 2020