

# CML Model Ordinance – Frequently Asked Questions

## Spring 2020

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### 1. What is the model ordinance?

This ordinance is a model ordinance for all 72 home rule municipalities that self-collect taxes in their jurisdiction. The ordinance gives the legal authority for the home rule municipality to collect taxes for businesses that are only tied to the jurisdiction with economic nexus and for marketplace facilitators to collect taxes on behalf of marketplace sellers.

This ordinance is for those self-collecting home rule municipalities who will be adopting the state single point of remittance portal created by the state Department of Revenue. If you are in a home rule municipality and are not signing on to the optional state portal, we recommend your municipality continue with voluntary compliance and not adopt the ordinance. If you wish to take a different route other than these two options, we strongly encourage you to speak with your municipal attorney to weigh the risk of a constitutional challenge in court under the Commerce Clause of the U.S. Constitution.

## 2. Why is this necessary?

This ordinance allows for municipalities to collect taxes from two types of businesses: marketplace facilitators who collect on behalf of third party sellers and businesses that are only connected to the municipality by economic presence rather than physical presence. The ordinance adds new definitions to tax codes and provides guardrails for marketplace facilitators.

## 3. Why is this an ordinance now?

This model ordinance was drafted in response to the U.S. Supreme Court's decision in *Wayfair v. South Dakota*, 138 S.Ct. 2080 (2018). In this case, the Court held that sellers who engage in a significant quantity of business within a state may be required to collect and remit taxes, despite not having a physical presence in the state. Prior to this decision, jurisdictions could only collect sales taxes from businesses who had physical presence.

The Court did hold that the system in South Dakota had several protections in place that removed the burden on interstate commerce, including a safe harbor for those who do minimal transactions in the state (a threshold), a clause eliminating taxes from being paid retroactively, a state-level tax administration, and standard definitions. Self-collecting home rule municipalities decided as a collective to allow for voluntary collection. If a businesses was willing to collect taxes and remit to the jurisdiction, the municipality would accept it. At the same time, the State of Colorado worked to start a single point of remittance for businesses to pay taxes in one location. As this system comes online, the model ordinance is intended to allow those municipalities who want to sign up with the state system to collect taxes from (1) marketplace facilitators who collect on behalf of third party sellers, and (2) businesses that are only connected to the municipality by economic presence.

## 4. Who should adopt this model ordinance?

This model ordinance is only for home rule municipalities that self-collect taxes in their jurisdiction. This ordinance should be adopted if the municipality is joining the optional state single point of remittance. If a municipality is choosing not to participate in the optional state program, the League recommends that municipality continue with voluntary compliance from the business community. If you require businesses to remit directly to your jurisdiction without the portal, there could be a constitutional challenge under the Commerce Clause of the U.S. Constitution. We

recommend speaking with your municipal attorney before moving forward with any option.

## 5. Do state-collected municipalities need to worry about this?

No. Municipalities who have their taxes collected by the state already have economic nexus and marketplace facilitators covered in state statute. State-collected municipalities do not need to do anything to see these taxes.

## 6. Is there a risk that my municipality could be sued if we adopt this ordinance?

Yes. Compared with the state the Supreme Court looked at to determine that collection of taxes was not a burden on interstate commerce (South Dakota), Colorado has a very complicated taxing jurisdiction. As one business put it, if a business *feels* it is being overburdened, it could sue. Our goal with a model ordinance and encouraging the use of the state single point of remittance is to lessen the risk of a constitutional challenge as much as possible. Everyone adopting the same language should lessen the burden on businesses, along with using the state portal. There is still a risk and it is worth talking over with your municipal attorney.

## 7. Who is regulated by this ordinance?

This ordinance applies to businesses that meet the definition of economic nexus, marketplace facilitators, multichannel sellers, and marketplace sellers.

## 8. Who put this ordinance together?

This ordinance was a group effort to ensure all interested parties had an opportunity to raise concerns. The ordinance was drafted by a group of finance staff from self-collecting home rule municipalities along with CML staff. All members of the CML Sales Tax Simplification Committee had a chance to review, as well as a group of attorneys representing self-collecting home rule municipalities. It was sent out to the Department of Revenue and stakeholders from the business community.

If you are a staff member in the finance department of a self-collecting home rule municipality and are not on our Sales Tax Simplification Committee, please email Laurel Witt, CML associate counsel, to join: [lwitt@cml.org](mailto:lwitt@cml.org).

## 9. Can I make changes to the ordinance before adopting?

It is strongly recommend that you only make changes to the whereas clauses and any numbering provisions. Uniformity among the cities on this ordinance will help in any constitutional challenge. If you have questions or wish to discuss, please contact Laurel Witt, CML associate counsel, [lwitt@cml.org](mailto:lwitt@cml.org).

## 10. Why does it say to wait a month before enforcing?

This delay assists both municipalities and regulated businesses. If municipalities have time to get out the word before complying and inform businesses that they are now using the state single point of remittance portal in addition to accepting payment directly to the municipality, it gives businesses time to adjust.

## 11. Can we adopt just the marketplace facilitator portion of the ordinance if we are not going to join the SUTS portal or are not ready yet?

Absolutely. We recommend you still adopt all the remaining portions including retroactivity and the month waiting period. This ordinance was built to allow you to adopt marketplace facilitator should you wish to. Before parsing out portions of the ordinance, we recommend speaking with your city or town attorney.

## 12. Is this the same as the state SUTS portal, originating in Senate Bill 19-006?

No. The state portal is the single point of remittance (commonly referred to as "SUTS") being run by the state. While this ordinance works in conjunction with that system, they are different. This ordinance is specifically for adoption when a municipality does sign on with the SUTS. If you have questions about the SUTS, please see <https://www.colorado.gov/pacific/tax/file-sales-tax>.

## 13. If I have questions about the state portal, who should I contact?

If you have questions, contact the liaison for the Department of Revenue on this project: Tracy Winchester, [Tracy.Winchester@state.co.us](mailto:Tracy.Winchester@state.co.us).

## 14. Where do I go if I have questions about this ordinance?

If you have questions after reading through this FAQ and the ordinance, please contact Laurel Witt, CML associate counsel, at [lwitt@cml.org](mailto:lwitt@cml.org).