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To: Finance Directors of Self-Collecting Municipalities  
From: Laurel Witt, CML Associate Counsel  
Date: May 29, 2020  
Subject: Economic Nexus and Marketplace Facilitator Model Ordinance Project

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The CML Model Ordinance on Economic Nexus and Marketplace Facilitators (attached to the announcement email, hereinafter “Model Ordinance”) was developed by municipal tax professionals as part of a sales tax simplification effort. It has long been recognized, by governments and businesses alike, that various home rule municipalities giving the same term different meanings is a source of complexity in our tax system for businesses that operate in multiple municipalities. Use of “standardized” definitions, such as those put into the Model Ordinance, can help minimize this complexity and provide clarity to those remitting taxes to local governments in Colorado.

The purpose of this memo is to briefly explain how and why the Model Ordinance was developed, so as to inform your possible adoption of it. If you have questions or would like more details do not hesitate to email or call me or Meghan Dollar at CML (contact information at the end).

#### **BACKGROUND**

While Colorado’s sales tax system is generally well received by taxpayers, and quite effective for municipalities as a revenue raiser, it is regarded by multi-jurisdictional businesses as complex and burdensome. CML has sought to engage the business community constructively by taking the lead in accomplishing simplifications. Simplification must also maintain the basic integrity of our principal revenue raising mechanism and preserve rights that home rules have derived from the Colorado Constitution.

The heavy lifting in all of our tax simplification projects is done by the municipal tax professionals on the CML Sales Tax Simplification Committee, who represent many of Colorado’s locally collecting municipalities.

#### **MODEL ORDINANCE PROJECT**

The discussion around clarification to marketplace facilitators and economic nexus began two years ago when the United States Supreme Court decided a case called *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018) (hereinafter “*Wayfair*”). South Dakota enacted a statute requiring internet sellers with no physical presence in the state to collect and remit sales tax, which was not allowed under prior Supreme Court rulings. The Supreme Court overturned their prior rulings and held that out-of-state seller’s physical presence in taxing state is not necessary for state to require seller to collect and remit its sales tax. South Dakota had showed that their ordinance did not place a burden on interstate commerce, therefore violating the Commerce Clause, by doing the following: enacting a threshold amount to not require small businesses to remit, using a single state level tax administration, creating uniform definitions of products and services, simplifying the tax rate structures, and other uniform rules.

Here in Colorado, the sales tax system is more complicated than South Dakota, however, the CML Sales Tax Simplification Committee strives to make the process easier for businesses while still allowing for the Constitutionally derived self-collection afforded to home rule municipalities. As such, while the state worked on a single point of remittance (see below), the Committee decided it needed to streamline appropriate definitions and encourage uniformity on this particular issue. In the meantime, the municipalities that make up the Committee agreed to allow for voluntary collection—those businesses who wished to remit to home rule municipalities could do so while the state and the Committee discussed the best path for moving forward.

Under the direction of both CML Legislative Advocacy Manager Meghan Dollar and myself, the CML Sales Tax Simplification Committee developed the enclosed Model Ordinance. A subcommittee of this larger Committee started with the state definitions of economic nexus and marketplace facilitators, and began to work in definitions that were clear and concise.

Once the Model Ordinance was developed, it was reviewed by a group of business tax experts and attorneys, as well as by a group of municipal attorneys. All parties were supportive of simplification with minor disagreements on the language of the Model Ordinance. Following these discussions, several final revisions were made to the Model Ordinance and it was finalized by the Standard Definitions Subcommittee of the CML Sales Tax Simplification Committee.

The goal of this Model Ordinance is clarify who can collect and remit taxes along with clarifying the authority given to taxing jurisdictions under *Wayfair*. This Ordinance is designed to be adopted by those municipalities that are joining the state single point of remittance portal. This Ordinance updates current allowed practices of collection and remittance, which is not a tax policy change. However, please check with your municipal attorney about any TABOR or related concerns.

Importantly, CML encourages only those who will be joining the state single point of remittance portal to adopt this model ordinance. Under *Wayfair*, part of the reason South Dakota did not overburden interstate commerce was due to an easy way for businesses to remit to all taxing jurisdictions. While it is not a requirement to join the state portal (and home rules can join at any time), we do believe that the risk of a challenge increases should a municipality enforce economic nexus language without using the portal. Should a municipality wish to just adopt the marketplace facilitator ordinance, then CML recommends the municipality sever any portions related to economic nexus. The municipality is then encouraged to continue with voluntary compliance for those businesses who only have economic nexus ties into the jurisdiction. Again, we recommend speaking with your municipal attorney(s) to weigh risks of adopting and not adopting.

#### **ADOPTION OF THE MODEL ORDINANCE**

This ordinance was designed to be adopted in its entirety (with some adjustments to the whereas clauses to meet the needs of your municipality). Having a uniform adoption will help with any potential challenge under the Commerce Clause (under *Wayfair*). The goal with this ordinance is uniformity and simplicity so that *all* municipalities in Colorado can collect from online or remote retailers.

Your municipality may be interested in only adopting the language around marketplace facilitators. If that is the case, we strongly urge you continue to use the same language for simplification for the business community and simply leave out the pieces related to economic nexus. This may be particularly palatable to those who do not want to join the state single point of remittance and will continue moving forward with voluntary compliance.

#### **SINGLE POINT OF REMITTANCE, SENATE BILL 19-006**

House Bill 006 (2019) gave the Department of Revenue and the Office of Information Technology the go ahead to contract with vendors and create a single point of remittance. The idea of a single

portal for businesses to remit has been proffered many times before by the business community. However, with the *Wayfair* decision that confirmed the importance of a single portal for remote sellers, and the state moved forward with the creation of this portal. The portal will allow businesses to go to one website and remit taxes to those taxing jurisdictions who have signed on to use this portal. The portal, according to the current agreements, do not stop a municipality from auditing, requiring licenses, and more. This portal is *not* limited to only remote/online retailers, Although it can capture revenue from those groups.

While this Model Ordinance and the portal are drafted to help clarify and administrate tax collection, they are not the same thing. The Model Ordinance clarifies administrative authority for home rule municipalities. As mentioned above, we encourage any self-collecting home rule to only adopt the ordinance in full if it will be using the state portal, to lessen the chance of a *Wayfair* challenge.

### **CONCLUSION**

If you do decide to use the state single point of remittance portal, we strongly recommend you adopt this model ordinance so as to clarify for businesses who can collect. Additionally, CML highly recommends your municipalities work directly with your attorneys when adopting the model ordinance. .

Enclosed in this email is an FAQ for additional information. If you are facing obstacles in adoption, please contact me at CML. When and if you adopt this ordinance or join the state SUTS program, please let us know so we can monitor the progress.

### **CONTACT**

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