

ORDINANCE NO. 111, 2020  
OF THE COUNCIL OF THE CITY OF FORT COLLINS  
AMENDING CHAPTER 25 OF THE CODE OF THE CITY OF FORT COLLINS  
REGARDING ECONOMIC NEXUS AND THE OBLIGATION OF REMOTE SELLERS  
TO COLLECT AND REMIT SALES TAX

WHEREAS, Fort Collins 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 tax 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 Council has adopted and enacted Article III of Chapter 25 of the City Code imposing a sales tax (the "Sales Tax 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 the *Wayfair* decision, under the Constitution and laws of the United States the retailer's obligation to collect and remit tax due and owing on Remote Sales is no longer based on the retailer's physical presence in the jurisdiction, and the City's Sales 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 as facilitated by the Colorado Municipal League; 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 City to unremitted taxes and permits an inequitable exception that prevents market participants from competing on an even playing field; and

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

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF FORT COLLINS as follows:

Section 1. That the City Council hereby makes and adopts the determinations and findings contained in the recitals set forth above.

Section 2. That Section 25-71 of the Code of the City of Fort Collins is hereby amended to add certain definitions and amend certain existing definitions, to read as follows:

...

Economic nexus shall mean the connection between the City and any retailer not having a physical nexus in the State of Colorado, which connection is established when the retailer meets any one of the following criteria:

(1) In the previous calendar year, the retailer has made retail sales of goods or services delivered into the State of Colorado exceeding the amount specified in C.R.S. § 39-26-102(3)(c), as amended; or

(2) In the current calendar year, ninety (90) days has passed following the month in which the retailer has made retail sales into the State of Colorado exceeding the amount specified in C.R.S. § 39-26-102(3)(c), as amended.

This definition does not apply to any person who is doing business in this state but otherwise applies to any other person.

Engaged in business in the City shall mean 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 or retailer:

(1) Directly, indirectly, or by a subsidiary maintaining a building, store, office, salesroom, warehouse, or other place of business within the taxing jurisdiction;

- (2) Sending one (1) 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) Maintaining one (1) or more employees, agents or commissioned sales persons on duty at a location within the taxing jurisdiction;
- (4) Owning, leasing, renting or otherwise exercising control over real or personal property within the taxing jurisdiction;
- (5) As a retailer, who has a physical presence in the State of Colorado, making more than one (1) retail sale of tangible personal property, products or services within a twelve (12) month period, where the property or product is delivered by any means, including common carrier, to a location within the City, or the service rendered occurs within the City; or
- (6) Making retail sales sufficient to meet the definitional requirements of economic nexus as defined in this Article.

...

Marketplace shall mean 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 shall mean 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 or a marketplace operated by the person;
- (2) Engages directly or indirectly, through one or more affiliated persons, in transmitting or otherwise communicating the offer or acceptance between a purchaser or consumer and the marketplace seller or multichannel seller; and
- (3) Either directly or indirectly, through agreements or arrangements with third parties, collects or accepts and processes payment from the purchaser or consumer on behalf of the seller.

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

Marketplace seller shall mean a person, regardless of whether or not the person is engaged in business in the City, who 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 shall mean a retailer 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.

Retailer shall mean 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:

- (1) Auctioneer;
- (2) Salesperson, representative, peddler or canvasser, who makes sales as a direct or indirect agent of or obtains such property or services sold from a dealer, distributor, supervisor or employer;
- (3) Charitable organization or governmental entity which makes sales of tangible personal property to the public, notwithstanding the fact that the merchandise sold may have been acquired by gift or donation or that the proceeds are to be used for charitable or governmental purposes; and
- (4) Marketplace facilitator, marketplace seller, or multichannel seller.

...  
Section 3. That Section 25-73 of the Code of the City of Fort Collins is hereby amended to read as follows:

...  
(b) Taxable transactions and items. The sales tax shall apply, without limitation, as follows:

- ...
- (11) Upon all sales of preprinted newspaper supplements;
  - (12) Upon the purchase price paid for food, but only at the tax rate of two and twenty-five hundredths (2.25) percent of the purchase price; and
  - (13) Upon marketplace sales, pursuant to § 25-131.

Section 4. That a new Section 25-131 of the Code of the City of Fort Collins is hereby added to read as follows:

Sec. 25-131. Marketplace sales.

(a) Obligation to collect and remit tax.

(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 retailer as defined in this Article. 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 under this Article if it also offers for sale tangible personal property, products, or services through other means.

(4) A marketplace seller shall be subject to all the same licensing, collection, remittance, filing and recordkeeping requirements as any other retailer under this Article for retail sales made on its own behalf and not facilitated by or through a licensed marketplace facilitator in a marketplace.

(b) Marketplace seller relief. 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:

(1) 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

(2) 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.

(c) 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.

(d) No retroactive application. The obligations to collect and remit the sales tax required by this Section apply to taxable transactions occurring on or after the effective date of this Section.

Section 5. If any provision of this Ordinance, or the application of such provision to any person or circumstance, is held to be unconstitutional or invalid for any reason, then the remainder of this Ordinance, and the application of the such provisions to any person or circumstance, shall not be affected thereby. The City Council hereby declares that it would have passed this ordinance and each part or parts thereof irrespective of the fact that any one part or parts be declared unconstitutional or invalid.

Section 6. The requirements set forth in this Ordinance shall become effective on November 1, 2020.

Introduced, considered favorably on first reading, and ordered published this 1st day of September, A.D. 2020, and to be presented for final passage on the 15th day of September, A.D. 2020.


  
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Mayor

ATTEST:

  
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City Clerk



Passed and adopted on final reading on this 15th day of September, A.D. 2020.

  
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Mayor

ATTEST:

  
\_\_\_\_\_  
City Clerk

