

TOWN OF WINDSOR

ORDINANCE NO. 2020-1611

AN ORDINANCE AMENDING CHAPTER 4, ARTICLE III OF THE *WINDSOR MUNICIPAL CODE* TO EXTEND THE TOWN'S SALES TAX COLLECTION, REMITTANCE AND REPORTING REQUIREMENTS TO ON-LINE TRANSACTIONS AND ON-LINE VENDORS

WHEREAS, the Town of Windsor, Colorado, ("Town"), 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 and use tax is clearly within the constitutional grant of power to the Town and is necessary to raise revenue with which to conduct the affairs and render the services performed by the Town; and

WHEREAS, pursuant to such authority, the Town has adopted and adopted its Sales and Use Tax Code, codified at Chapter 4, Article III of the *Windsor Municipal Code* ("Code"), under which Town sales tax is levied on all sales and purchases of tangible personal property 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, the retailer's obligation to collect Remote Sales is no longer based on the retailer's physical presence in the locality by the Constitution or law of the United States; and

WHEREAS, the Town's current Sales and Use Tax Code does not expressly provide for taxation of Remote Sales; and

WHEREAS, the Town Board has concluded that an amendment to the Town's Sales and Use Tax Code is necessary to clearly reflect the taxable status of Remote Sales consistent with the *Wayfair* decision; and

WHEREAS, the delivery of goods and services into the Town rely on and burden 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 Town, but do have a taxable connection with the Town;

WHEREAS, this ordinance provides a safe harbor to remote sellers who transact limited sales within the Town; and

WHEREAS, absent the amendment of the Town's Sales and Use Tax Code as set forth herein, the continued failure of retailers to voluntarily apply and remit sales tax owed on Remote Sales would allow Remote Sale customers to unfairly evade a lawful tax and permit an inequitable exception that prevents market participants from competing on an even playing field; and

WHEREAS, the Town Board adopts this Ordinance with the intent to address tax administration, and, in connection with, establish economic nexus for retailers without physical presence in the State and require marketplace facilitators to collect and remit sales tax for sales made by marketplace sellers on the marketplace facilitator's marketplace.

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN BOARD OF THE TOWN OF WINDSOR, COLORADO:

Section 1. The definition of *Engaged in Business in the Town* as set forth in Section 4-3-30 of the *Windsor Municipal Code* is hereby repealed, amended and re-adopted to read as follows:

Engaged in Business in the Town 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 Town. Engaged in Business in the Town 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, agents or commissioned sales persons on duty at a location within the taxing jurisdiction; (4) Owns, leases, rents or otherwise exercises control over real or personal property within the taxing jurisdiction; (5) retailer or vendor in the state of Colorado that makes more than one delivery into the taxing jurisdiction within a twelve month period; or (6) makes retail sales sufficient to meet the definitional requirements of economic nexus as set forth in Section 4-3-30 below.

Section 2. The definition of *Retailer* as set forth in Section 4-3-30 of the *Windsor Municipal Code* is hereby repealed, amended and re-adopted to read as follows:

Retailer or Vendor means any person selling, leasing, renting, or granting a license to use tangible personal property or services at retail. The terms “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;
- (4) Retailer-contractor, when acting in the capacity of a seller of building supplies, construction materials, and other tangible personal property;
- (5) Marketplace facilitator or marketplace seller engaged in business in the Town.

Section 3. Section 4-3-30 of the *Windsor Municipal Code* is hereby amended to include the following new definitions, to appear in alphabetical sequence within the whole of Section 4-3-30:

Economic Nexus means the connection between the Town and a person not having a physical nexus in the State of Colorado, which connection is established when the person makes retail sales into the Town, and:

- (A) In the previous calendar year, the person has made retail sales into the State of Colorado 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 has made retail sales into the State of Colorado exceeding the amount specified in C.R.S. § 39-26-102(3)(c), as amended.

Marketplace means 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 means a person who

- (1) Contracts with a marketplace 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;

- (2) Engages directly or indirectly, through one or more affiliated persons, in transmitting or otherwise communicating the offer or acceptance between a purchaser and the marketplace seller; and
- (3) Either directly or indirectly, through agreements or arrangements with third parties, collects the payment from the purchaser and transmits the payment to the marketplace seller.

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

Marketplace Seller means a person, regardless of whether or not the person is engaged in business in the Town, which 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.

Section 4. Chapter 4, Article III, Part 2 of the *Windsor Municipal Code* is hereby amended by the addition of the following new Section 4-3-220:

Sec. 4-3-220. - Marketplace Sales

(A) Rights and Obligations, generally.

- (1) A marketplace facilitator engaged in business in the Town is required to collect and remit sales or use tax on all taxable sales made by the marketplace facilitator, or facilitated for marketplace sellers to customers in the Town, whether or not the marketplace seller for whom sales are facilitated would have been required to collect sales or use tax had the sale not been facilitated by the marketplace facilitator. A marketplace facilitator has all the liabilities, obligations, and rights of a retailer under this Article.
- (2) The liabilities, obligations, and rights set forth under this article are in addition to any duties and responsibilities of the marketplace facilitator has under this article if it also offers for sale tangible personal property, products, or services through other means.
- (3) Except as provided in subsection (B)(1) of this section, 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:
 - 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.

(B) Marketplace facilitator excused.

- (1) If a marketplace facilitator demonstrates to the satisfaction of the Finance Director that the marketplace facilitator made a reasonable effort to obtain accurate information regarding the obligation to collect tax from the marketplace seller and that the failure to collect tax on any tangible personal property, products, or services sold was due to incorrect information provided to the marketplace facilitator by the marketplace seller, then the marketplace facilitator, but not the marketplace seller, is relieved of liability under this section for the amount of the tax the marketplace facilitator failed to collect, plus applicable penalties and interest. The Finance Director will determine the length of time that the marketplace facilitator is relieved of liability to remit tax hereunder.
- (2) If a marketplace facilitator is relieved of liability under subsection (B)(1) of this section, the marketplace seller is liable under this section for tax the marketplace facilitator failed to collect, plus applicable penalties and interest.
- (3) This subsection (B) does not apply to any sale by a marketplace facilitator that is not facilitated on behalf of a marketplace seller or that is facilitated on behalf of a marketplace seller that is an affiliate of the marketplace facilitator.

- (C) With respect to any sale made by a marketplace seller that is not facilitated by a 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.

Section 5. No obligation to collect the sales and use tax required by this Article may be applied retroactively. Responsibilities, duties and liabilities described in Section 4(A) of a marketplace facilitator, marketplace seller, or multichannel seller begin upon the earlier of when they became licensed to collect the Town's sales tax or when they became legally obligated to collect the Town's sales tax under Section 3.

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 final adoption below, but in no event prior to the effective date of an intergovernmental agreement between the Town and the Colorado Department of Revenue for collection and disbursement of sales tax *via* the Sales and Use Tax Software ("SUTS") system.

Introduced and passed on first reading and ordered published this 27th day of July, 2020.

TOWN OF WINDSOR, COLORADO

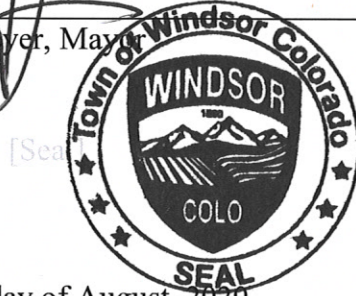


Paul Rennemeyer, Mayor

ATTEST:



Karen Frawley, Town Clerk



Passed on second reading, and ordered published this 10th day of August, 2020.

TOWN OF WINDSOR, COLORADO



Paul Rennemeyer, Mayor

ATTEST:



Karen Frawley, Town Clerk

