

ORDINANCE NO. 20, Series 2020
INTRODUCED BY: MAYOR PRO TEM STEPHANIE WALTON

**AN ORDINANCE OF THE CITY COUNCIL OF LAFAYETTE,
COLORADO AMENDING CHAPTER 110 OF THE CODE OF
ORDINANCES, CITY OF LAFAYETTE, COLORADO REGARDING
ECONOMIC NEXUS AND THE OBLIGATION OF REMOTE SELLERS
TO COLLECT AND REMIT SALES TAX**

WHEREAS, the City of Lafayette, Colorado, (the “City”), 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 taxes 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 has adopted and enacted, as Article III of Chapter 110 of the Code of Ordinances, City of Lafayette, Colorado, a Sales and Use Tax Code (the “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 such decision, 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 by the Constitution or law of the United States, and the City’s Sales and Use 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;

WHEREAS, the goal of adopting this ordinance is to join in the simplification efforts of all the self-collecting home rule municipalities in Colorado; 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 municipality to unremitted taxes and permits an inequitable exception that prevents market participants from competing on an even playing field; and

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

Section 1. Section 110-37, "Definitions," of the Code of Ordinances, City of Lafayette, Colorado is amended by the deletion and addition of the following defined terms, to be inserted in alphabetical order, to read as follows:

Economic Nexus means the connection between the City and any retailer who does not have a physical presence 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, and the location at which property or a product is delivered or the service rendered is within the city; or
- (2) In the current calendar year, 90 days has passed following the month in which a 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, and the location at which property or a product is delivered or the service rendered is within the city.

Engaged in business in the city means performing or providing services or selling, leasing, renting, delivering, or installing tangible personal property 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 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 exercise control over real or personal property within the taxing jurisdiction; or
- (5) Any retailer who does have a physical presence in the State of Colorado, without having a physical presence within the city, that in the preceding calendar year or the current calendar year makes more than one retail sale of tangible personal property, products, or services, where the location at which property or a product is delivered by any means, including common carrier within the city, or the service rendered occurs within the city; or
- (6) Makes retail sales of tangible personal property, products, or services sufficient to meet the definitional requirements of economic nexus, as set forth in this Section 110-37.

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 that 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, and engages;

- (1) 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
- (2) Directly or indirectly, through agreements or arrangements with third parties, in collecting or accepting and processing payment from the purchaser or consumer on behalf of the marketplace seller or multichannel seller.

The term does not include a person that, with respect to the marketplace seller's or multichannel seller's products, exclusively provides internet advertising services or lists products for sale.

Marketplace Seller means a person, regardless of whether or not the person has a physical presence in the State of Colorado, 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.

Multichannel Seller means 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 means 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;
- (4) Retailer-contractor, when acting in the capacity of a seller of building supplies, construction materials, and other tangible personal property;
- (5) A marketplace facilitator, marketplace seller, or multichannel seller.

Section 2. Division 3 of Article III of Chapter 110 of the Code of Ordinances, City of Lafayette, Colorado is amended by the addition of a new section 110-134, to read as follows:

Section 110-134. -Marketplace Sales.

(a) *Obligation to collect 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 under 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 imposed 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 of 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 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 and use tax required by this article are applicable at the effective date of the ordinance from which this section was derived.

Section 3. If any article, section, paragraph, sentence, clause or phrase of this ordinance is held to be unconstitutional or invalid for any reason, such decision shall not affect the validity or constitutionality of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance and each part or parts hereof irrespective of the fact that any one part or parts be declared unconstitutional or invalid.

Section 4. All other ordinances or portions thereof inconsistent or conflicting with this ordinance or any portion hereof is hereby repealed to the extent of such inconsistency or conflict.

Section 5. The repeal or modification of any provision of the Code of Ordinances, City of Lafayette, Colorado by this ordinance shall not release, extinguish, alter, modify or change in whole or in part any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such provision. Each provision shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings and prosecutions for enforcement of the penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions.

Section 6. This ordinance is deemed necessary for the protection of health, welfare and safety of the community.

Section 7. This ordinance shall become effective upon the latter of the 10th day following enactment, or the day following final publication of the ordinance [This ordinance shall be deemed effective November 12, 2020].

INTRODUCED AND PASSED ON FIRST READING THIS 20th DAY OF OCTOBER 2020.

PASSED ON SECOND AND FINAL READING AND PUBLIC NOTICE ORDERED THIS 2ND DAY OF NOVEMBER 2020.

CITY OF LAFAYETTE, COLORADO

Jamie Harkins, Mayor

APPROVED AS TO FORM:

ATTEST:

Mary Lynn Macsalka, City Attorney

Lynnette Beck, CMC, City Clerk