



City of
Golden

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Council Memorandum

To: City Council
From: Jeff Hansen, Finance Director
Through: Jason Slowinski, City Manager
Date: June 26, 2020
Re: Amendments to the Sales Tax Code – Economic Nexus & Remote Sellers

Attached, for Council's consideration, is Ordinance 2139, amending Chapter 3 of the Golden Municipal Code (GMC) regarding the Sales Tax Standardized Definitions Project as it relates to economic nexus, remote sellers and marketplace sellers and facilitators.

Background:

In 2018, the United States Supreme Court issued a decision in *South Dakota v. Wayfair* ("the Wayfair decision") that overturned the physical nexus requirement and allowed for remote sellers to be required to collect and remit state and local sales taxes based on economic nexus. The decision also articulated that South Dakota had made reasonable efforts to not place an undue burden on businesses and also established reasonable criteria that provides for a small seller exemption.

As a result of this decision, self-collecting home-rule municipalities have worked with the Colorado Municipal League (CML) to create and adopt a model ordinance that requires remote sellers to collect and remit appropriate city local sales taxes, along with adopting the small seller exemption criteria that has already been adopted by the State of Colorado. The model ordinance also addresses the use of marketplaces (a means of conducting remote sales primarily at various internet sites) and the responsibilities of marketplace sellers and facilitators to collect and remit sales tax from these remote sales.

One of the aspects of the Wayfair decision is that the establishment of a single point of remittance is one of the criteria that eases the burden on business. Given that Colorado has over 70 home-rule municipalities that collect their own sales tax, this criteria wasn't going to be achieved overnight. Over the last two years, the State of Colorado has taken on this task, issuing an RFP and selecting two vendors to create

a portal that provides for a single point of collection for state and local sales and use taxes within Colorado (the “SUTS System”). The portal also provides an address locator and taxability matrix for each jurisdiction that participates in the portal. On June 12, 2020, the City signed on as a participant to the SUTS System. It’s important to note that the SUTS System is just another option for businesses to remit taxes owed to the City. Businesses are not required to use the SUTS System, but it is available to them if they choose to use it. We continue to allow payment to be made online through our website, by mail through our lock box, and in person at City Hall.

It’s also important to recognize that these transactions have always been considered taxable by the City – either for the business to collect and remit sales tax, or as use tax to the purchaser if sales tax was not charged. Since the Wayfair decision, the City has encouraged voluntary compliance from remote sellers. With the passage of this Ordinance, compliance will be required.

The Ordinance also addresses issues for these remote sellers related to the City’s licensing requirements. The consensus through the CML working group and from the State’s Sales Tax Simplification Task Force was that requiring remote sellers to pay each city’s license fee and adhere to license renewal requirements potentially placed an undue burden on those businesses. So, we will require remote sellers to license with us and provide basic business and contact information, waive the license fee and the renewal requirements, while still requiring the businesses to inform us of any changes to the business name, DBA, contact information, etc. within 30 days of such changes.

Recommendations:

Staff recommends approval of Ordinance 2139 to amend Chapter 3 of the GMC, adopting the recommended changes to various sections of Chapter 3 to require collection and remittance of Golden sales tax by remote sellers.

Staff also recommends that in the discussion of this agenda item, Council addresses for the record that in adopting this Ordinance that there is no intention of creating any tax policy changes to the Code as a result of this Ordinance. This Ordinance simply identifies and further clarifies the responsibility of certain individuals and businesses to collect and remit city tax on transactions that the City has always considered taxable.

As always, if you have any questions, please call me at 303-384-8020.

ORDINANCE NO. 2139

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF GOLDEN,
COLORADO, AMENDING CHAPTERS 3.02, 3.04 AND 3.05 OF THE GOLDEN
MUNICIPAL CODE REGARDING ECONOMIC NEXUS AND THE OBLIGATION OF
REMOTE SELLERS TO COLLECT AND REMIT SALES TAX**

WHEREAS, the City of Golden, 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 Title 3 of the Golden Municipal Code, 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 3.02.010, “Words and phrases defined,” of the Golden Municipal Code 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 3.02.010.

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. Chapter 3.04, “Taxpayer Responsibilities,” of the Golden Municipal Code is amended by the addition of a new section 3.04.070, to read as follows:

Section 3.04.070 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 title. 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 title are in addition to any duties and responsibilities of the marketplace facilitator imposed under this title, 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 title, 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 title are applicable at the effective date of the ordinance from which this section was derived.

Section 3. Section 3.05.030, "Exemptions," of the Golden Municipal Code is hereby amended by the addition of a new subsection (f), to read as follows:

(f) Any retailer having only an economic nexus with the city and that has not established a physical presence in the city shall be exempt from the provisions of subsections 3.05.020(b) and (c) and the license renewal provisions of section 3.05.040 of this chapter; provided, however, such retailer furnishes in writing to the finance director any change to the name and address or contact information of the licensee or any other material change to the information submitted on an application for a license within 30 calendar days of such change.

Section 4. 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 5. 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 6. The repeal or modification of any provision of the Municipal Code of the City of Golden 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 7. This ordinance is deemed necessary for the protection of health, welfare and safety of the community.

Section 8. This ordinance shall be deemed effective September 1, 2020.

INTRODUCED, READ AND PASSED AS AN ORDINANCE, ON FIRST READING,
AT A REGULAR MEETING OF THE CITY COUNCIL OF THE CITY OF GOLDEN,
COLORADO, THE _____ DAY OF _____, 2020.

READ, PASSED AND ADOPTED AS AN ORDINANCE ON SECOND READING, AT A
REGULAR MEETING OF THE CITY COUNCIL OF THE CITY OF GOLDEN, COLORADO,
THE _____ DAY OF _____, 2020.

Laura M. Weinberg,
Mayor

ATTEST:

Monica S. Mendoza, CMC
City Clerk

APPROVED AS TO FORM:

David S. Williamson
City Attorney