FINANCE DEPARTMENT MEMORANDUM
#1-2021

DATE: Feb. 8, 2021

TO: Honorable Mayor Meredith Leighty and City Council Members

THROUGH: Heather Geyer, City Manager

FROM: Jason Loveland, Director of Finance

SUBJECT: CB-1968 – Define Economic Nexus and Update Methods for Collection and Remittance of Sales Tax

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PURPOSE
To consider CB-1968, an ordinance on first reading to amend Chapter 5 of the Municipal Code to define 'economic nexus' and other related terms associated with facilitating sales tax remittance of internet sales.

BACKGROUND
The ordinance will add language requiring businesses that have an economic connection with the City to collect and remit City sales taxes. The ordinance defines economic nexus as a connection between the City and a person not having a physical nexus in the State of Colorado that makes retail sales in the City.

The ability to require businesses with only an economic nexus to collect City sales taxes is permitted under the Supreme Court decision *Wayfair v. South Dakota* in June 2018. That decision also indicated that simplification measures should take place in order to avoid placing an undue burden on interstate commerce. Staff is currently working on the integration with the State's Sales and Use Tax Simplification System, which will address undue burden concerns.

This ordinance complies with requirements of the TABOR Amendment as the City is not enacting a new tax or tax policy change. The City's current tax code does not exempt retailers from collecting the tax, however, court rulings indicated that the City's code could not compel the retailers to collect the tax, as it may have placed an undue burden on the out-of-state retailers. The Supreme Court reversed this opinion in *Wayfair v. South Dakota*.

BUDGET/TIME IMPLICATIONS
The revenue impact of adding economic nexus language is difficult to quantify. Many large internet retailers are already licensed to collect the City's sales tax and are currently remitting tax.

If CB-1968 is approved on first reading, a public hearing and second reading of the proposed ordinance will be scheduled for Feb. 22, 2021. If approved on second reading, the effective date will be April 1, 2021.

STAFF RECOMMENDATION
Staff recommends approval of CB-1968 on first reading.

STAFF REFERENCE
If Council members have any questions, please contact Director of Finance Jason Loveland at jloveland@northglenn.org or 303.450.8817.

CB-1968 – Define Economic Nexus and Update Methods for Collection and Remittance of Sales Tax

SPONSORED BY: MAYOR LEIGHTY

COUNCILMAN'S BILL | ORDINANCE NO.

No. CB-1968 | _____
Series of 2021 | Series of 2021

A BILL FOR AN ORDINANCE AMENDING CHAPTER 5, ARTICLE 3 OF THE NORTHGLENN MUNICIPAL CODE TO DEFINE ECONOMIC NEXUS AND UPDATE METHODS FOR COLLECTION AND REMITTANCE OF SALES TAX

WHEREAS, the City of Northglenn is a home rule municipality, organized and existing under Article XX, Section 6 of the Colorado Constitution;

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;

WHEREAS, pursuant to such authority, the City has adopted and enacted a Sales 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;

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");

WHEREAS, based upon such decision, the retailer’s obligation to collect tax 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 Code needs to be amended to clearly reflect such obligation consistent with said decision;

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;

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;

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 on the simplification efforts of all the self-collecting home rule municipalities in Colorado;

WHEREAS, this ordinance provides a safe harbor to those who transact limited sales within the City;

WHEREAS, absent this 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;

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 as permitted in 2018 by the U.S. Supreme Court; and

WHEREAS, the State's adoption of economic nexus for state sales tax and state-collected municipal sales tax did not require voter approval under the Taxpayer's Bill of Rights ("TABOR"), Article X, § 20 of the Colorado Constitution, and, similarly, updating the City's methods to allow collection and remittance of sales tax to the full extent permitted by law does not require voter approval under TABOR.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF NORTHGLENN, COLORADO, THAT:

Section 1. Section 5-3-4 of the Northglenn Municipal Code is amended by the revision to or addition of the following defined terms, which shall appear and be numbered in alphabetical order:

> **"Economic nexus"** means the connection between the City and a person not having a physical nexus in the State of Colorado, which connection is established when the person or marketplace facilitator makes retail sales into the City, and:
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> 1. In the previous calendar year, the person, which includes a marketplace facilitator, has made retail sales into the state exceeding the amount specified in Section 39-26-102(3)(c), C.R.S., as amended; or
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> 2. In the current calendar year, 90 days has passed following the month in which the person, which includes a marketplace facilitator, has made retail sales into the state exceeding the amount specified in Section 39-26-102(3)(c), C.R.S., as amended.
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> 3. This definition does not apply to any person who is doing business in this state but otherwise applies to any other person.
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> "**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:

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 City within a 12-month period; or

6. Makes retail sales sufficient to meet the definitional requirements of economic nexus as set forth herein.

"**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 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;

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 or multichannel seller; and

3. Either directly or indirectly, through agreements or arrangements with third parties, collects payment from the purchaser on behalf of the seller.

This definition 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 City, 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**" or "**Vendor**" means any person selling, leasing, or renting or granting a license to use tangible personal property or services at retail. Retailer or Vendor 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; and

5. Marketplace facilitator, marketplace seller, or multichannel seller.

Section 2. Section 5-3-5(c) of the Northglenn Municipal Code is amended by the addition of the following new subsection (19):

Section 5-3-5. Taxable Transactions, Commodities and Services.

* * *

(c) The sales tax levied by Section 5-3-5 shall apply to the price of the following:

* * *

19. Marketplace Sales:

i. 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.

ii. A marketplace facilitator shall assume all the duties, responsibilities, and liabilities of a vendor 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.

iii. The liabilities, obligations, and rights set forth under this subsection 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.

iv. 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.

v. If a marketplace seller makes a sale that is not facilitated by a licensed 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.

vi. 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.

Section 3. No obligation to collect the sales and use tax required by this Ordinance may be applied retroactively. Responsibilities, duties and liabilities described in Section 2 of a marketplace facilitator, marketplace seller, or multichannel seller begin upon the earlier of when they became licensed to collect the City's sales tax or when they became legally obligated to collect the City's sales tax.

Section 4. This Ordinance shall become effective on the first day of the month that is at least thirty (30) days after date of its adoption.

INTRODUCED, READ AND ORDERED POSTED this ____ day of _____, 2021.

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MEREDITH LEIGHTY
Mayor

ATTEST:

_____
JOHANNA SMALL, CMC
City Clerk

PASSED ON SECOND AND FINAL READING this ____ day of _____, 2021.

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MEREDITH LEIGHTY
Mayor

ATTEST:

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JOHANNA SMALL, CMC
City Clerk

APPROVED AS TO FORM:

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COREY Y. HOFFMANN
City Attorney