

CITY OF EVANS, COLORADO

ORDINANCE NO. 728-20

AN ORDINANCE AMENDING TITLE 3, CHAPTER 3.04 OF THE EVANS MUNICIPAL CODE TO ESTABLISH ECONOMIC NEXUS FOR RETAILERS WITHOUT PHYSICAL PRESENCE IN THE STATE; REQUIRE MARKETPLACE FACILITATORS TO COLLECT; AND REMIT SALES TAXES FOR SALES MADE BY MARKETPLACE SELLERS ON THE MARKETPLACE FACILITATOR'S MARKETPLACE.

WHEREAS, the City of Evans Colorado, (the “City”), is a home rule municipality, organized and existing under Article XX, Section 6 of the Colorado Constitution; and

WHEREAS, the City Council of the City of Evans, Colorado, pursuant to Colorado statute and the Evans City Charter, is vested with the authority of administering the affairs of the City of Evans, Colorado; 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 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 a Sales and Use Tax Code (the “Code”), under which City 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 such decision, the retailer’s obligation to collect sales tax on Remote Sales is no longer based on the retailer’s physical presence in the City 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 goods and services into the City 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 City, but do have a taxable connection with the City;

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 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 City Council 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 CITY COUNCIL OF THE CITY OF EVANS, COLORADO AS FOLLOWS:

Section 1: Title 3, Chapter 3.04, Section 3.04.030 of the Evans Municipal Code is hereby amended to add the following underlined language:

“Engaged in Business in the City” 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 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; ~~or~~ (5) Makes more than one delivery into the taxing jurisdiction within a twelve month period by any means other than a common carrier; or (6) Makes retail sales sufficient to meet the definitional requirements of economic nexus.

Section 2: Title 3, Chapter 3.04, Section 3.04.030 of the Evans Municipal Code is hereby further amended to add the following underlined language:

“Retailer” means any vendor or person selling, leasing, renting, or granting a license to use tangible personal property or services at retail or otherwise selling articles of tangible personal property or taxable services to purchasers, as defined herein. The term “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 city.

Section 3: Title 3, Chapter 3.04, Section 3.04.030 of the Code is hereby further amended by the addition of the following definitions:

“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 makes retail sales into the City, and:

- (A) In the previous calendar year, the person has made retail sales into the state exceeding the state threshold; 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 exceeding the state threshold.

“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”

(A) 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.

(B) “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 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.

Section 4: Title 3, Chapter 3.04, Section 3.04.030 of the Code is hereby further amended by deleting the definition of the term *Vendor* as follows:

~~*Vendor* means a retailer, merchant, jobber, dealer or any other person selling articles of tangible personal property or taxable services to purchasers, as defined herein.~~

Section 5: Title 3, Chapter 3.04 of the Evans Municipal Code is hereby amended by the addition of Section 3.04.270 to read in its entirety as follows:

**Title 3, Chapter 3.04, Section 3.04.270
Marketplace Sales**

- Sec. 3.04.270(A) Marketplace Facilitator Liability.
- Sec. 3.04.270(B) Exception to Marketplace Facilitator Liability.
- Sec. 3.04.270(C) Marketplace Seller Liability.

(A)

- (1) A marketplace facilitator engaged in business in the city 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 city, 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 Chapter 3.04 of the City of Evans Municipal Code.
- (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)

- (1) If a marketplace facilitator demonstrates to the satisfaction of the Treasurer 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 Treasurer 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 a marketplace seller makes 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 6: This ordinance shall become effective on the first day of the month that is at least thirty (30) days after date of its adoption.

Section 7: Severability. 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 thereof irrespective of the fact that any one part or parts be declared unconstitutional or invalid.

Section 8. Repeal. Existing ordinances or parts of ordinances covering the same matters embraced in this ordinance are hereby repealed and all ordinances or parts of ordinances inconsistent with the provisions of this ordinance are hereby repealed except that this repeal shall not affect or prevent the prosecution or punishment of any person for any act done or committed in violation of any ordinance hereby repealed prior to the effective date of this ordinance.

INTRODUCED AND PASSED AT A REGULAR MEETING OF THE CITY COUNCIL OF THE CITY OF EVANS ON THIS 21st DAY OF JULY , 2020.

ATTEST: CITY OF EVANS, COLORADO

Karen Frawley, City Clerk

BY: _____
Brian Rudy, Mayor

PASSED AND ADOPTED ON A SECOND READING THIS ____ DAY OF _____, 2020.

ATTEST: CITY OF EVANS, COLORADO

Karen Frawley, City Clerk

BY: _____
Brian Rudy, Mayor