

TOWN OF SILVERTHORNE, COLORADO

ORDINANCE NO. 2020 - 10

AN ORDINANCE OF THE TOWN OF SILVERTHORNE, COLORADO, AMENDING CHAPTER 1, ARTICLE 10 OF THE SILVERTHORNE MUNICIPAL CODE TO PROVIDE FOR THE COLLECTION OF TAXES ON REMOTE SALES

WHEREAS, the Town of Silverthorne (“Silverthorne” or the “Town”) is a home-rule municipality organized under Article XX of the Colorado Constitution and with the authority of the Silverthorne Home Rule Charter; and

WHEREAS, pursuant to Article XX, Section 6 of the Colorado Constitution, the right to enact, administer and enforce sales 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 enacted a Sales Tax 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 law 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 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 Town’s Sales 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 Town 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 results in the creation of 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 who do not have physical presence in the Town, but do have a taxable connection with the Town; and

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

WHEREAS, absent such amendment, the continued failure of retailers to voluntarily apply and remit sales tax owed on remote sales will unfairly allow remote sale transactions to evade a lawful tax and will permit an inequitable exception that prevents market participant from competing on an even playing field; and

WHEREAS, the Town 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; and

WHEREAS, the Town Council finds and declares that the amendments to the Definitions in the Town Retail Sales Tax Code contained in Section 1-10-1 regarding remote sales tax collection set forth herein are proper and necessary to advance the public health, safety and welfare of the Town's residents.

NOW, THEREFORE, THE COUNCIL OF THE TOWN OF SILVERTHORNE, COLORADO, ORDAINS:

Section 1. The foregoing recitals are incorporated herein as if set forth in full.

Section 2. Section 1-10-1 of the Silverthorne Municipal Code is hereby amended as follows, with double underlined text added and ~~strike-through language deleted~~:

Section 1-10-1 – Definitions

When not clearly indicated otherwise by the context, the following words and phrases, as used in this Article, shall have the following meanings:* * *

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 this person or marketplace facilitator makes retail sales into the Town, and:

- a. In the previous calendar year, the person, which includes a marketplace facilitator, has made retail sales into the state exceeding the amount specified in C.R.S. § 39-26-102(3)(c); or
- b. 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 C.R.S. § 39-26-102(3)(c).

This definition does not apply to any person who is doing business in this state but otherwise applies to any other person.

* * *

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:

- a. Directly, indirectly or by a subsidiary maintains a building, store, office, salesroom, warehouse or other place of business within the taxing jurisdiction;
- b. Sends one (1) 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;
- c. Maintains one (1) or more employees, agents or commissioned sales persons on duty at a location within the taxing jurisdiction;
- d. Owns, leases, rents or otherwise exercises control over real or personal property within the taxing jurisdiction;
- e. Retailer or vendor in the state of Colorado that Makes more than one (1) delivery into the taxing jurisdiction within a twelve-month period ~~by means other than a common carrier;~~ or
- f. 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

- a. 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.

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 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.

* * *

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, 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:

- a. Auctioneer;
- b. 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;
- c. 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;

d. Retailer-contractor, when acting in the capacity of a seller of building supplies, construction materials, and other tangible personal property;

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

Section 3. A new Section 1-10-88.5 of the Silverthorne Municipal Code is hereby adopted to read as follows.

Sec. 1-10-88.5. Marketplace Sales

a.

1. A marketplace facilitator or multichannel seller engaged in business in the Town is required to collect and remit sales tax on all taxable sales made by the marketplace facilitator, or facilitated for it by marketplace sellers or multichannel sellers to customers in the Town, whether or not the marketplace seller or multichannel 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 vendor under Chapter 1, Article 10 of this Code. 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 the marketplace facilitator has under this article if it also offers for sale tangible personal property, products, or services through other means.
4. 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:

- i. 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
 - ii. 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.
5. A marketplace 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.
- b. 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.

Section 4. No obligation to collect the sales and use tax required by this Ordinance may be applied retroactively. Responsibilities, duties and liabilities described in Section 3(A) of a marketplace facilitator, marketplace seller, or multichannel seller begin upon licensure or when the municipal sales taxes were first collected from taxable sales made to retail customers prior to licensure.

Section 5. If any provision of this Ordinance, or the application of such provision to any person or circumstance, is held to be unconstitutional, then the remainder of this ordinance, and the application of the provisions of such to any person or circumstance, shall not be affected thereby.

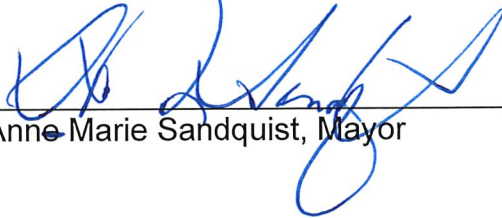
Section 6. This ordinance shall become effective on July 1, 2020, which is the first day of the month which is at least thirty days after date of its adoption and effective date.

Section 7. The Town Manager and Town Attorney are hereby authorized to make such technical and clerical corrections to this Ordinance as are necessary prior to its codification, in order to align its contents with that final model ordinance approved by the Colorado Municipal League Sales Tax Simplification Committee.

READ AND PASSED ON FIRST READING THIS 13th DAY OF MAY 2020.

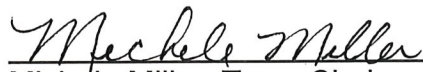
ADOPTED ON SECOND AND FINAL READING THIS 27th DAY OF MAY 2020.

TOWN OF SILVERTHORNE, COLORADO



Anne Marie Sandquist, Mayor

ATTEST:



Michele Miller, Town Clerk

Approved on the first reading: 5-13, 2020

Published by title only: 5-22, 2020

Approved on the second reading: 5-27, 2020

Published by title only: 6-5, 2020 (with amendments, if amended on second reading): _____, 2020