

Sales and Use Tax for Remote Sellers: New Jersey

by Matthew T. Eyet, Eyet Law LLC, with Practical Law Commercial Transactions

Status: Law stated as of 20 Oct 2020 | Jurisdiction: New Jersey, United States

This document is published by Practical Law and can be found at: us.practicallaw.tr.com/w-018-3522

Request a free trial and demonstration at: us.practicallaw.tr.com/about/freetrial

A Q&A guide to remote sellers' exposure to sales and use tax in New Jersey after the US Supreme Court's decision in *South Dakota v. Wayfair, Inc.* in 2018. This Q&A addresses issues including nexus for remote sellers, taxability based on economic nexus, economic nexus thresholds (including the threshold measurement period), the Streamlined Sales and Use Tax Agreement (SSUTA), penalties for failure to comply with sales tax collection and remittance, and the taxation of marketplace sellers and hosts or facilitators.

This Q&A does not address temporary changes to the law related to the 2019 novel coronavirus disease (COVID-19). Please consult the state taxing authority's webpage for more information. For general information on COVID-19, please see the [Global Coronavirus Toolkit](#).

Scope of Sales and Use Tax

1. Does your state require remote sellers to collect sales and use tax on sales of goods or services made into your state? Specifically, please discuss:

- How your state determines nexus for sales tax purposes for remote sellers (for example, economic nexus, physical presence nexus, click-through-nexus, affiliate nexus, cookie or in-state software nexus, or a notice and reporting system).
- The particular goods or services that are taxable.
- Relevant statutes or legislation.
- Any significant case law.

In New Jersey, a **seller** generally means a party (including individuals and legal entities) making sales, leases, or rentals of personal property or services (N.J.S.A. 54:32B-2(i)).

The definition of seller, among others, includes any party (including **remote sellers**) that:

- Makes sales, leases, or rentals of tangible personal property, specified digital products, or services that are subject to New Jersey sales tax.
- Maintains a place of business in the state and makes taxable sales of tangible personal property, specified digital products, or services to parties in New Jersey (often referred to as physical presence nexus).
- Has an agent maintaining a place of business in the state that makes taxable sales of tangible personal property, specified digital products, or services to parties in New Jersey. A party is an agent of a seller in all cases (but not limited to these cases) that the party and seller:
 - have the relationship of a “related person” described in N.J.S.A. 54:10A-5.5; and
 - use an identical or substantially similar name, tradename, trademark, or goodwill to develop, promote, or maintain sales, or they pay for each other's services in whole or in part contingent on the volume or value of sales, or they share a common business plan or substantially coordinate their business plans, or the person provides services to, or that inure to the benefit of, the seller related to developing, promoting, or maintaining the seller's market.
- Makes sales of taxable tangible personal property, specified digital products, or services to parties in New Jersey by soliciting business through:



Sales and Use Tax for Remote Sellers: New Jersey

- employees, independent contractors, agents, or other representatives; or
- catalogs or other advertising matter.
- Makes sales of tangible personal property, specified digital products, or services to parties in New Jersey that are authorized to collect New Jersey sales tax.

(N.J.S.A. 54:32B-2(i)(1) and (2).)

The [New Jersey Division of Taxation](#) refers to a **remote seller** as a party that **both**:

- Makes **retail sales** of tangible personal property, specified digital products, or services for delivery into New Jersey via:
 - the internet;
 - catalog; or
 - telephone.
- Has no physical presence in New Jersey.

(See [New Jersey Division of Taxation: Sales Tax Information for Remote Sellers](#) and [New Jersey Sales Tax Remote Sellers Frequently Asked Questions](#).)

The term **retail sale** refers to any sale, lease, or rental for any purpose, other than for:

- Resale.
- Sublease.
- Subrent.

(N.J.S.A. 54:32B-2(e).)

As of November 1, 2018, remote sellers with taxable retail sales for delivery to a location in New Jersey that meet the economic threshold must register, collect, and remit New Jersey sales tax (N.J.S.A. 54:32B-3.5(a); see Question 2: Economic Threshold). Additionally, remote sellers that have click-through nexus or marketplace nexus may also be required to collect and remit New Jersey sales tax (see Nexus).

For information about registering to collect and remit New Jersey sales and use tax, see the [New Jersey Division of Revenue and Enterprise Services' website](#). Remote sellers may also submit their New Jersey sales tax registration using the [Streamlined Sales Tax Registration System \(SSTRS\)](#) (see Question 6).

Nexus

Nexus for sales and use tax purposes is the connection that a seller has with a state that requires it to collect and remit tax on sales made to that state. States have adopted

various nexus standards relating to the taxation of remote sellers. For a discussion of the various approaches used by states to determine nexus for sales tax purposes, including economic nexus, see [Practice Note, Sales and Use Tax for Remote Sellers: Sales Tax Nexus Approaches and Economic Nexus](#).

New Jersey finds nexus for sales tax purposes if a remote seller has:

- Economic nexus (see Economic Nexus).
- Click-through nexus (see Click-Through Nexus).
- Marketplace nexus (see Marketplace Sellers and Facilitators).

Economic Nexus

Economic nexus requires a remote seller to collect and remit sales or use tax on sales made to a state if its sales or transaction volume (or a combination of the two) to in-state customers exceeds specified thresholds, even if the seller lacks physical or any other type of presence in the state. In *South Dakota v. Wayfair, Inc.*, the US Supreme Court overruled the physical presence test and noted its approval of South Dakota's economic nexus statute (138 S. Ct. 2080 (2018)). For a discussion of the *Wayfair* decision, see [Legal Update, States Consider Next Steps on Taxing Remote Sellers After S. Dakota v. Wayfair](#).

Consistent with the decision in *South Dakota v. Wayfair, Inc.*, New Jersey applies an economic nexus standard in determining whether remote sellers must collect and remit New Jersey sales tax (138 S. Ct. 2080). If a remote seller makes retail sales delivered into New Jersey that meet the economic threshold, New Jersey:

- Considers the remote seller to have economic nexus with the state.
- Requires the remote seller to collect and remit New Jersey sales tax.

(N.J.S.A. 54:32B-2(i) and 54:32B-3.5(a).)

For information pertaining to the economic threshold, see Question 2: Economic Threshold.

Click-Through Nexus

New Jersey also applies a click-through nexus standard in certain instances for sales tax purposes. Under this standard, there is a rebuttable presumption that an out-of-state seller (which includes remote sellers) that makes taxable sales of tangible personal property, specified digital products, or services is soliciting business and has nexus in New Jersey if that seller both:

- Enters into an agreement with a New Jersey independent contractor or other representative for compensation in exchange for referring customers via a link on its website or otherwise to that out-of-state seller.
- Has sales from these referrals to customers in New Jersey in excess of \$10,000 for the prior four quarterly periods ending on the last day of March, June, September, and December.

(N.J.S.A. 54:32B-2(i)(1).)

Out-of-state sellers that meet both these conditions must register for New Jersey sales tax purposes and collect and remit sales tax on all sales delivered to New Jersey unless the seller provides proof that the independent contractor or representative did not engage in any solicitation on the seller's behalf in New Jersey.

For more information provided by the New Jersey Division of Taxation about click-through nexus, including examples, see [Technical Bulletin TB-76, Presumption of Soliciting Business in New Jersey by Out of State Seller and Notice - Sales and Use Tax Requirement for Out of State Sellers to Collect Sales Tax if Soliciting Business in New Jersey](#).

For more information on click-through nexus, see [Practice Note, Sales and Use Tax for Remote Sellers: Click-Through Nexus](#).

Marketplace Nexus

New Jersey also enacted marketplace nexus effective November 1, 2018. For more information, see [Marketplace Sellers and Facilitators](#).

Taxability of Goods and Services

Retail sales of any of the following by remote sellers are potentially subject to sales tax in New Jersey:

- Tangible personal property (as defined in N.J.S.A. 54:32B-2(g)).
 - Specified digital products, which means electronically transferred:
 - digital audio-visual works;
 - digital audio works; or
 - digital books.
- (N.J.S.A. 54:32B-2(z) to (ee).)
- Services (as defined in N.J.S.A. 54:32B-3(b)).

(N.J.S.A. 54:32B-3.) For additional guidance on the taxability of specific products and services in New Jersey, see [Tax Topic Bulletin S&U-4, New Jersey Sales Tax Guide](#).

Statutes and Legislation

Relevant authority related to this subject can be found in New Jersey's Sales and Use Tax Act (N.J.S.A. 54:32B-1 to 54:32B-55).

Significant Case Law

Because the legislation on this subject matter is recent, there are no significant New Jersey cases to date.

However, relevant US Supreme Court cases include *Wayfair* and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)(overruled by *Wayfair*).

Taxability Based on Economic Nexus

2. If your state currently does or intends to require remote sellers to collect sales tax for sales of goods or services into your state based on economic nexus, please:

- Provide the date this requirement either went into or is intended to go into effect.
- Discuss whether the requirement is retroactive.
- Discuss whether there is an economic threshold that remote sellers must meet before they are subject to the collection and remittance requirements.
- Discuss any amnesty opportunities.

Effective Date

N.J.S.A. 54:32B-3.5, which requires certain remote sellers to collect and remit New Jersey sales tax based on economic nexus, went into effect on November 1, 2018.

Retroactive Collection

The obligation of remote sellers to collect New Jersey sales tax based on economic nexus is **not** retroactive. It applies only to sales made on or after November 1, 2018 (N.J.S.A. 54:32B-3.5(e)).

Economic Threshold

New Jersey has adopted the same economic threshold for remote sellers set out in *South Dakota v. Wayfair*. Specifically, starting November 1, 2018, remote sellers must collect and remit New Jersey sales tax if they meet either (or both) of the following criteria:

- The remote seller has **gross revenue** from sales of tangible personal property, specified digital products, or services delivered into New Jersey during the current or prior calendar year, **in excess of \$100,000**. When calculating the \$100,000 gross revenue threshold, all sales delivered into New Jersey are included, including nontaxable retail sales.
- The remote seller sold tangible personal property, specified digital products, or services delivered into New Jersey in **200 or more separate transactions** during the current or prior calendar year.

(N.J.S.A. 54:32B-3.5(a); see also *Wayfair*, 138 S. Ct. at 2099.)

This economic threshold provides a safe harbor for remote sellers that do not meet either of the criteria.

Remote sellers that sell through their own website and through at least one marketplace must include their own website sales and all marketplace sales when calculating whether they meet the economic threshold ([New Jersey Division of Taxation: New Jersey Sales Tax Remote Sellers Frequently Asked Questions](#); for more information, see [Marketplace Sellers and Facilitators](#)).

Remote sellers making only nontaxable retail sales into New Jersey must still register if they meet the economic threshold. They can, however, request to be placed on a non-reporting basis by completing Form C-6205-ST (see [New Jersey Division of Taxation: New Jersey Sales Tax Remote Sellers Frequently Asked Questions](#)).

See Question 3, 4, and 5 for additional information pertaining to the economic threshold.

Amnesty Opportunities

The [New Jersey Division of Taxation](#) recently conducted a tax amnesty program from November 15, 2018 until January 15, 2019. During this time period, certain qualifying businesses and individuals that failed to pay New Jersey taxes (including sales tax) had an opportunity to come forward to pay unpaid tax liabilities.

Because the program only applied to tax returns due before September 1, 2017, no tax periods after the effective date of N.J.S.A. 54:32B-3.5 were eligible for the program. It is possible that the Division of Taxation may conduct additional amnesty programs in the future.

Although New Jersey does not currently have a tax amnesty program, it does have an ongoing Voluntary Disclosure Program. Taxpayers that meet all of the following conditions are eligible to participate in the program:

- The taxpayer must not have been previously contacted by the New Jersey Division of Taxation.
- The taxpayer must not be registered but must be willing to register for the specific tax that it wants to come forward for.
- The taxpayer must not be currently under any criminal investigation.
- The taxpayer must be willing to file requested returns and pay outstanding tax liabilities within an established timeframe.

In exchange for coming forward voluntarily, the New Jersey Division of Taxation offers a limited look back period and waiver of certain penalties.

For more information, see [New Jersey Division of Taxation: Voluntary Disclosure Program](#).

Economic Threshold

3. If your state has an economic threshold, what is the threshold measurement period?

New Jersey law provides that the threshold measurement period is the current and prior calendar year (N.J.S.A. 54:32B-3.5(a)). The remote seller:

- **Must** register and begin collecting and remitting New Jersey sales tax on taxable transactions that occur **after** the economic threshold is met.
- **Is not required** to collect and remit sales tax on transactions that occurred **before** meeting the economic threshold.

([New Jersey Division of Taxation: New Jersey Sales Tax Remote Sellers Frequently Asked Questions](#).)

The [New Jersey Division of Taxation](#) provides remote sellers a grace period up to 30 calendar days to register with the state and begin collecting and remitting sales tax once the economic threshold has been satisfied ([New Jersey Division of Taxation: New Jersey Sales Tax Remote Sellers Frequently Asked Questions](#)).

For additional information and examples provided by the New Jersey Division of Taxation, see [New Jersey Division of Taxation: New Jersey Sales Tax Remote Sellers Frequently Asked Questions](#).

See Question 2: Economic Threshold for the specific criteria relating to the economic threshold.

4. If a remote seller meets the economic threshold during the current year, does your state specify when and for how long the tax obligation applies (either by statute, regulation, or guidance)?

Guidance issued by the [New Jersey Division of Taxation](#) provides that once the economic threshold is met during any particular measurement period, the tax collection obligation continues for that year and the next year (see [New Jersey Division of Taxation: New Jersey Sales Tax Remote Sellers Frequently Asked Questions](#); see also Question 3).

5. If a remote seller does not meet the economic threshold in your state requiring the collection and remittance of sales tax, is it subject to notice and reporting requirements? If yes, please describe the requirements.

A remote seller that does **not** meet the economic threshold may voluntarily register to collect and remit New Jersey sales and use tax ([New Jersey Division of Taxation: Sales Tax Information for Remote Sellers](#)). If a remote seller does not collect sales tax on a taxable sale delivered to New Jersey, the purchaser must report and remit use tax (N.J.S.A. 54:32B-6).

New Jersey does not impose specific notice and reporting requirements for remote sellers that do not meet the economic threshold. However, guidance issued by the [New Jersey Division of Taxation](#) related to mail-order and internet sales states that if a seller is not required to collect sales tax, the seller:

- Should inform its New Jersey customers that they must pay use tax on their mail-order or internet purchases.
- May want to include a message on receipts for New Jersey customers that states "This purchase may be subject to your State's Use Tax."

([Tax Topic Bulletin S&U-5, Making Mail-Order and Internet Sales](#), p. 5.)

For additional information on New Jersey use tax, see [Publication ANJ-7, Use Tax in New Jersey](#).

Streamlined Sales and Use Tax Agreement (SSUTA)

6. Is your state a member of the Streamlined Sales and Use Tax Agreement (SSUTA)?

New Jersey has been a full member of SSUTA since 2005. Because New Jersey is a member of SSUTA, remote sellers may submit their New Jersey sales tax registration (as well as registration for all other member states) using the [Streamlined Sales Tax Registration System \(SSTRS\)](#).

For additional information about SSUTA, see [Practice Note, Sales and Use Tax for Remote Sellers: Streamlined Sales and Use Tax Agreement](#).

7. If your state is not a member of the Streamlined Sales and Use Tax Agreement (SSUTA), how does your state collect sales and use tax, both at the state and local level? Specifically, please discuss whether your state:

- Adheres to common tax base definitions provided in SSUTA.
- Provides base/rate lookup software for sellers.
- Offers immunity from reliance on software.
- Has uniformity between the state and local tax bases.
- Provides centralized administration by the state or otherwise for sales tax registration, filings, and tax remittance.

New Jersey is a member of the SSUTA (see Question 6).

Penalties

8. What are the penalties imposed on remote sellers by your state for failing to comply with sales and use tax collection, filing, and notice and reporting requirements?

New Jersey imposes the following penalties for failing to comply with sales and use tax filing and collection requirements:

- **Late filing penalty.** Unless the taxpayer can show reasonable cause for failing to file, the penalty for failing to file a sales and use tax return when due is:
 - \$100 for each month (or part of a month) the return is late; and
 - 5% of the underpayment for each month (or part of a month) the return is late, with a maximum penalty for late filing of 25%, unless a return has not been filed within 30 days of the date on which the first notice

of delinquency in filing the return was sent to the taxpayer, in which case the penalty is 5% per month or any part of a month of the total tax liability, not to exceed 25% of the total tax liability.

(N.J.S.A. 54:49-4(a); N.J.A.C. 18:2-2.3(a).)

- **Late payment penalty.** When sales tax payments are submitted late, a payment penalty of 5% of the unpaid tax is also charged unless the taxpayer can show that the failure to pay is due to reasonable cause (N.J.S.A. 54:49-4(a); N.J.A.C. 18:2-2.4(a)(2)).
- **Interest.** Interest is calculated at the annual rate of 3% above the prime rate for every month (or part of a month) the sales tax is unpaid, compounded annually (N.J.S.A. 54:49-3).
- **Penalty for failure to electronically file or pay.** Remote sellers that must use electronic filing for returns or make electronic payments that fail to do so are liable for a \$50 penalty for each failure to electronically file or pay (N.J.S.A. 54:49-4(b)).

New Jersey also imposes additional penalties and in certain instances, criminal charges, for fraud or serial offenses (for example, N.J.S.A. 54:49-9.1; N.J.A.C. 18:2-2.8).

Marketplace Sellers and Facilitators

9. How does your state handle the collection of sales and use tax for marketplace sellers and marketplace facilitators or hosts (such as Amazon, that sell directly, but also host other sellers on its website)? Is the treatment different between marketplace facilitators or hosts versus hosted (third-party) sellers?

Marketplace Facilitators (Hosts)

A **marketplace facilitator** (also referred to as a host) is a party (including any affiliate of the party) that **facilitates** a retail sale of tangible personal property, specified digital products, or taxable services for marketplace sellers (N.J.S.A. 54:32B-3.6(a); see also Marketplace Sellers).

In New Jersey, a sale is **facilitated** by a marketplace facilitator if **both** of the following requirements are met:

- The marketplace facilitator, directly or indirectly, does any of the following:

- provides the marketplace where the sale is made;
- lists, makes available, or advertises sales by marketplace sellers in a forum owned, operated, or controlled by the marketplace facilitator;
- transmits or communicates offers and acceptances between marketplace sellers and purchasers;
- owns, rents, licenses, makes available, or operates the infrastructure, or any property, process, method, copyright, trademark, or patent, that connects marketplace sellers to purchasers;
- provides fulfillment or storage services for marketplace sellers;
- determines the price of sales by marketplace sellers;
- provides or offers customers service, or accepts or assists with taking orders, returns, or exchanges for or on behalf of marketplace sellers;
- brands or identifies the sale as being made through a marketplace facilitator; or
- provides software development or research and development activities related to any activity described above, if the development activities are directly related to the physical or electronic marketplace provided by a marketplace facilitator.

- The marketplace facilitator, directly or indirectly, does any of the following:
 - collects or transmits payment (including through a third party);
 - provides payment processing services;
 - charges or collects a fee or other consideration for facilitating retail sales (including selling fees, listing fees, referral fees, and closing fees); or
 - provides virtual currency that purchasers can use for the sale.

(N.J.S.A. 54:32B-3.6(a); see also see [Technical Bulletin TB-83, Sales Through a Marketplace.](#))

The marketplace facilitator laws do not apply to parties that simply sell advertising space and are not otherwise involved in the transaction for the tangible personal property or services that are being advertised.

As of November 1, 2018, marketplace facilitators must collect and remit sales tax on sales of tangible personal property, specified digital products, and taxable services delivered into New Jersey, which are made by a marketplace seller through any physical or electronic marketplace:

Sales and Use Tax for Remote Sellers: New Jersey

- Owned by the marketplace facilitator.
- Operated by the marketplace facilitator.
- Controlled by the marketplace facilitator.

(N.J.S.A. 54:32B-3.6.)

A marketplace facilitator must collect sales tax on all sales it facilitates for a marketplace seller, regardless of whether the marketplace seller:

- Is registered with New Jersey to collect and remit sales tax.
- Meets the remote seller economic nexus threshold.
- Does not meet the economic nexus threshold.

(N.J.S.A. 54:32B-3.6(b).)

Marketplace sellers and facilitators, however, can agree to a different arrangement for the collection and remittance of sales tax (N.J.S.A. 54:32B-3.6(c)).

Marketplace facilitators that are already registered to collect sales tax in New Jersey must establish a sub-account to report and remit the tax collected for marketplace sellers ([Technical Bulletin TB-83, Sales Through a Marketplace](#)).

For more information on marketplace sellers, see [Technical Bulletin TB-83, Sales Through a Marketplace](#) and [Practice Note, Sales and Use Tax for Remote Sellers: Marketplace Sales Tax](#).

Marketplace Sellers

Marketplace sellers (which may be remote sellers or sellers with a physical presence in New Jersey) refer to sellers that make retail sales through any physical or electronic marketplace owned, operated, or controlled by a marketplace facilitator, even if the seller would not have been required to collect and pay the sales tax if the sale had not been made through the marketplace (N.J.S.A. § 54:32B-3.6(a)).

Marketplace sellers are **not** required to collect and remit sales tax on the sale of tangible personal property, specified digital products, or services delivered into New Jersey when sold through any physical or electronic marketplace:

- Owned by a marketplace facilitator.
- Operated by a marketplace facilitator.
- Controlled by a marketplace facilitator.

([Technical Bulletin TB-83, Sales Through a Marketplace](#).)

Marketplace sellers and facilitators, however, can agree to a different arrangement for the collection and remittance of sales tax (N.J.S.A. 54:32B-3.6(c)).

Remote sellers that meet the economic threshold but that sell solely through one or more physical or electronic marketplaces owned, operated, or controlled by marketplace facilitators:

- Must register for New Jersey sales tax purposes.
- When registering, may request to be placed on a non-reporting basis for sales tax because the marketplace facilitator must collect the tax on all marketplace transactions.

(See [New Jersey Division of Taxation: Sales Tax Information for Remote Sellers](#) and [New Jersey Sales Tax Remote Sellers Frequently Asked Questions](#); see Question 2: Economic Threshold.)

Remote sellers that sell through their own website and through at least one marketplace must include their own website sales and all marketplace sales when calculating whether they meet the economic threshold ([New Jersey Division of Taxation: New Jersey Sales Tax Remote Sellers Frequently Asked Questions](#); see Question 2: Economic Threshold). Remote sellers that meet the economic threshold are required to collect and remit sales tax on those taxable sales made into New Jersey through their own website.

Other Considerations

10. Does your state offer a FAQ page relating to remote sellers' exposure to sales tax? If so, please provide the website link.

The New Jersey Division of Taxation offers a [FAQ page](#) relating to remote sellers' exposure to sales tax.

About Practical Law

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call 1-800-733-2889 or e-mail referenceattorneys@tr.com.