

New Jersey Issues Ominously Vague Guidance on New Click-Through Nexus Law

McDermott
Will & Emery

Article By

[Catherine A. Battin](#)

[McDermott Will & Emery](#)

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The **New Jersey Division of Taxation** [issued a Notice](#) last week that is hardly reassuring to remote sellers. The Notice basically paraphrases the new click-through statute, noting that the statutory definition of “seller” was amended to create a rebuttable presumption that an out-of-state seller, who makes taxable sales of goods or services, is soliciting business and has nexus in New Jersey if it (1) enters into an agreement with a representative located in New Jersey for compensation in exchange for referring customers via a link on its website and (2) has sales from those referrals to customers in New Jersey in excess of \$10,000 for the four prior quarterly periods.

The Notice provides no guidance for sellers on how they can prove that their New Jersey independent contractors or representatives did not engage in any solicitation on their behalf in New Jersey. The Notice states that the out-of-state seller may provide proof that the representative did not engage in solicitation, but it does not include any details on what type of proof will be acceptable to the Division.

More troubling is that the Notice does not provide specific relief to arrangements

where affiliates are paid on a **cost-per-click basis** (compensation based solely on the number of clicks rather than a commission on sales resulting from clicks). States such as **California, New York** and **Pennsylvania** have said that such arrangements are indicative of advertising rather than solicitation. The one example given in New Jersey's Notice describes a commissioned click-through arrangement; the Notice is silent as to cost-per-click advertising.

It is unclear whether New Jersey will issue additional guidance, but given that the Notice does not provide relief for remote sellers with cost-per-click arrangements, they should not simply rely on California's and New York's guidance in the interim. Instead, they should obtain documentation from all their New Jersey independent contractors and representatives that they are not soliciting business in New Jersey on their behalf, even if they are only compensated on a cost-per-click basis.

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