

Explanation of  
Tax @ Buyer's Location

Background: In 2018 the US Supreme Court's decision in ***South Dakota v. Wayfair, et al*** opened the door for states to tax retail sales made to their residents by out-of-state vendors lacking physical presence in the state. A number of conditions seem to be attached. Prime is that a state may not impose a higher rate on an out-of-state vendor than on any competing in-state seller. For New Mexico, this means that all vendors selling to an in-state buyer must face the same gross receipts tax rate. If local option taxes are to apply to the transaction, then the applicable rate on the transaction must be that prevailing at the *buyer's* location—conceptually a major change to New Mexico's gross receipts tax system.

Summary: The bill makes a start at revising New Mexico gross receipts tax system to allow levying of local option gross receipts taxes on retail sales to New Mexico residents by remote out-of-state vendors. Both state and local gross receipts taxes remain imposed on the vendors, who remain responsible for reporting and paying the taxes. Applicable rates, however, **for retail sales** depend on the location of the buyer, not the seller's business location. Makes e-commerce vendors providing platforms for others responsible for reporting gross receipts and remitting taxes on transactions of the others through the platform. Applicable rates for all other sales, such as wholesale/distributor level transactions and sales of inputs and equipment to manufacturers, continue to be sourced to the seller's business location.

Bill Section	NMSA Section	Description
1	7-1-14	Since the foundation of the local option tax system is accurate reporting by taxing jurisdiction, reporting by local jurisdiction is imposed by statute, rather than left to rulemaking of TRD. Tax increment development districts are added formally to the list of local jurisdictions for which reporting is required. A new statement links the sourcing of gross receipts to places of business for reporting purposes.
2	7-9-3	Adds a definition of "retail sale" (from SSUTA) and "marketplace facilitator", "marketplace seller", "platform", "referral", "referrer" and "remote seller" (all derived from State of Washington)
3	7-9-4.4	[New] Declares remote sellers to be engaged in business in NM and subject to the Gross Receipts & Compensating Tax Act if the remote seller has revenue over \$100,000 from NM sales or 200 or more transactions into NM.
4	7-9-5.1	[New] Assigns sourcing rules to various types of transactions (from SSUTA):

		A(1): all transactions other than those described in A(2) though A(5) – seller’s place of business.
		A(2): retail sales of personal property or services. If transaction is at seller’s place of business, then seller’s place of business. Otherwise at buyer’s location Levels of evidence prioritized.
		A(3): Rental/lease of tangible personal property other than A(4) or A(5). In general, sourced to primary property location of lease/renter but first payment of a periodic payment must be sourced in accordance with A(2).
		A(4): Rental/lease of motor vehicles, trailers, semi-trailers and aircraft. In general, primary property location of the lease/renter.
		A(5): Rental/leases of transportation equipment. Sourced same as in A(2).
		B. Defines “transportation equipment” -- Locomotives, rail cars, trucks, truck-tractors, aircraft and containers engaging in the carriage of persons or property in interstate commerce.
5	7-9-5.2	[New] Requires marketplace facilitators providing platforms for other marketplace sellers to report the gross receipts and pay the appropriate tax from transactions through the platform by the sellers. Payment by the facilitator relieves the seller of its obligation to report and pay. If the marketplace seller is registered to report gross receipts with NM, then the seller must notify the facilitator of that fact and either may arrange for the facilitator to continue reporting and paying on the platform transactions or for the seller to report and pay on those transactions.
6	7-9-5.3	Referrers are required to report and pay only with respect to their own transactions but are required to provide, upon request, information about marketplace sellers they accommodate on their platform.
7	---	Provisions of this act do not apply to marketplace facilitators and referrers with respect to any transactions occurring prior to the effective date of this act but also do not affect the terms of any agreement TRD and the facilitators or referrers may have entered into covering those transactions.
8	---	Effective Date: January 1, 2020.

Note: Much of the new language is lifted from the Streamlined Sales and Use Tax Agreement (SSUTA)<sup>i</sup> since the terminology has been agreed upon by 24 states (including neighbors Arizona, Oklahoma and Utah). South Dakota is a SSUTA signatory and so its sales tax aligns with SSUTA. The Court noted approvingly many of the South Dakota tax’s features. The definition of “retail sale” and all of Section 7-9-5.1, except Paragraph A(1), come from SSUTA.

<sup>i</sup> See <http://www.streamlinedsalestax.org/>

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Bill

**54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019**

INTRODUCED BY

AN ACT

RELATING TO TAXATION; AMENDING THE TAX ADMINISTRATION ACT AND THE GROSS RECEIPTS AND COMPENSATING TAX ACT TO CHANGE THE JURISDICTIONS WITH RESPECT TO WHICH CERTAIN RECEIPTS ARE REPORTED; SUBJECTING CERTAIN OUT-OF-STATE VENDORS TO GROSS RECEIPTS TAX; AMENDING, ENACTING AND REPEALING CERTAIN SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**SECTION 1.** Section 7-1-14 NMSA 1978 (being Laws 1969, Chapter 145, Section 1, as amended) is amended to read:

“7-1-14. SECRETARY MAY DETERMINE WHERE CERTAIN GROSS RECEIPTS ARE TO BE REPORTED-- PLACE OF BUSINESS FOR CONSTRUCTION PROJECTS AND CERTAIN REAL PROPERTY SALES. --

A. [~~By regulation, the secretary may require any~~] A person maintaining one or more places of business [~~to~~] shall

1 report the person's taxable gross receipts and deductions for each  
2 municipality, ~~[or]~~ county, tax increment development district or  
3 area within an Indian reservation or pueblo grant in which the  
4 person maintains a place of business.

5 B. For persons engaged in the construction business,  
6 the place where the construction project is performed is a "place  
7 of business", and all receipts from that project are to be  
8 reported from that place of business.

9 C. ~~[The secretary may, by regulation, also require any]~~  
10 A person maintaining a business outside the boundaries of a  
11 municipality on land owned by that municipality ~~[to]~~ shall report  
12 the person's taxable gross receipts for that municipality.

13 D. For a person engaged in the business of selling real  
14 estate, the location of the real property sold is the "place of  
15 business", and all receipts from that sale are to be reported from  
16 that place of business.

17 E. All gross receipts sourced to a place of business  
18 are to be reported from that place of business."

19 **SECTION 2.** Section 7-9-3 NMSA 1978 (being Laws 1978, Chapter  
20 46, Section 1, as amended) is amended to read:

21 "7-9-3. DEFINITIONS. -- As used in the Gross Receipts and  
22 Compensating Tax Act:

23 A. "buying" or "selling" means a transfer of property  
24 for consideration or the performance of service for consideration;

25 B. "department" means the taxation and revenue

1 department, the secretary of taxation and revenue or an employee  
2 of the department exercising authority lawfully delegated to that  
3 employee by the secretary;

4 C. "financial corporation" means a savings and loan  
5 association or an incorporated savings and loan company, trust  
6 company, mortgage banking company, consumer finance company or  
7 other financial corporation;

8 D. "initial use" or "initially used" means the first  
9 employment for the intended purpose and does not include the  
10 following activities:

11 (1) observation of tests conducted by the  
12 performer of services;

13 (2) participation in progress reviews, briefings,  
14 consultations and conferences conducted by the performer of  
15 services;

16 (3) review of preliminary drafts, drawings and  
17 other materials prepared by the performer of the services;

18 (4) inspection of preliminary prototypes developed  
19 by the performer of services; or

20 (5) similar activities;

21 E. "leasing" means an arrangement whereby, for a  
22 consideration, property is employed for or by any person other  
23 than the owner of the property, except that the granting of a  
24 license to use property is licensing and is not a lease;

25 F. "local option gross receipts tax" means a tax

1 authorized to be imposed by a county or municipality upon the  
2 taxpayer's gross receipts and required to be collected by the  
3 department at the same time and in the same manner as the gross  
4 receipts tax; "local option gross receipts tax" includes the taxes  
5 imposed pursuant to the Municipal Local Option Gross Receipts  
6 Taxes Act, Supplemental Municipal Gross Receipts Tax Act, County  
7 Local Option Gross Receipts Taxes Act, Local Hospital Gross  
8 Receipts Tax Act, County Correctional Facility Gross Receipts Tax  
9 Act and such other acts as may be enacted authorizing counties or  
10 municipalities to impose taxes on gross receipts, which taxes are  
11 to be collected by the department;

12 G. "manufactured home" means a movable or portable  
13 housing structure for human occupancy that exceeds either a width  
14 of eight feet or a length of forty feet constructed to be towed on  
15 its own chassis and designed to be installed with or without a  
16 permanent foundation;

17 H. "manufacturing" means combining or processing  
18 components or materials to increase their value for sale in the  
19 ordinary course of business, but does not include construction;

20 I. "marketplace facilitator" means a person that  
21 contracts with sellers to facilitate for consideration, regardless  
22 of whether deducted as fees from the transaction, the sale of the  
23 seller's products through a physical or electronic marketplace  
24 operated by the person, and engages:

25 (a) Directly or indirectly, through one or more

1 affiliated persons in any of the following:

2 (i) Transmitting or otherwise communicating  
3 the offer or acceptance between the buyer and seller;

4 (ii) Owning or operating the infrastructure,  
5 electronic or physical, or technology that brings buyers and  
6 sellers together;

7 (iii) Providing a virtual currency that  
8 buyers are allowed or required to use to purchase products from  
9 the seller; or

10 (iv) Software development or research and  
11 development activities related to any of the activities described  
12 in Paragraph (b) of this subsection, if such activities are  
13 directly related to a physical or electronic marketplace operated  
14 by the person or an affiliated person; and

15 (b) In any of the following activities with  
16 respect to the seller's products:

17 (i) Payment processing services;

18 (ii) Fulfillment or storage services;

19 (iii) Listing products for sale;

20 (iv) Setting prices;

21 (v) Branding sales as those of the

22 marketplace facilitator;

23 (vi) Order taking;

24 (vii) Advertising or promotion; or

25 (viii) Providing customer service or

1 accepting or assisting with returns or exchanges:

2 J. "marketplace seller" means a seller that makes  
3 retail sales through any physical or electronic marketplaces  
4 operated by a marketplace facilitator or directly resulting from a  
5 referral by a referrer, regardless of whether the seller is  
6 registered with the department:

7 K. "person" means:

8 (1) an individual, estate, trust, receiver,  
9 cooperative association, club, corporation, company, firm,  
10 partnership, limited liability company, limited liability  
11 partnership, joint venture, syndicate or other entity, including  
12 any gas, water or electric utility owned or operated by a county,  
13 municipality or other political subdivision of the state; or

14 (2) a national, federal, state, Indian or other  
15 governmental unit or subdivision, or an agency, department or  
16 instrumentality of any of the foregoing;

17 L. "platform" means an electronic or physical medium,  
18 including a web site or catalog, operated by a referrer:

19 [~~J.~~] M. "property" means real property, tangible  
20 personal property, licenses other than the licenses of copyrights,  
21 trademarks or patents and franchises. Tangible personal property  
22 includes electricity and manufactured homes;

23 N. "referral" means the transfer by a referrer of a  
24 potential customer to a marketplace seller who advertises or lists  
25 products for sale on the referrer's platform:

1           0. "referrer" means a person, other than a person  
2 engaging in the business of printing or publishing a newspaper  
3 who:

4                   (1) contracts or otherwise agrees with a seller to  
5 list or advertise for sale one or more items in any medium,  
6 including a web site or catalog;

7                   (2) receives a commission, fee, or other  
8 consideration from the seller for the listing or advertisement;

9                   (3) transfers, via telephone, internet link, or  
10 other means, a purchaser to a seller or an affiliated person to  
11 complete the sale; and

12                   (4) does not collect receipts from the purchasers  
13 for the transaction;

14                   (5) but "referrer" does not include a person that:

15                           (i) provides internet advertising services;

16 and

17                           (ii) does not provide either the marketplace  
18 seller's shipping terms or advertise whether a marketplace seller  
19 charges gross receipts or compensating tax.

20           P. "remote seller" means a person selling tangible  
21 personal property, products transferred electronically or services  
22 for delivery into New Mexico, who does not have a physical  
23 presence in the state;

24           ~~[K.]~~ Q. "research and development services" means an  
25 activity engaged in for other persons for consideration, for one

1 or more of the following purposes:

2 (1) advancing basic knowledge in a recognized  
3 field of natural science;

4 (2) advancing technology in a field of technical  
5 endeavor;

6 (3) developing a new or improved product, process  
7 or system with new or improved function, performance, reliability  
8 or quality, whether or not the new or improved product, process or  
9 system is offered for sale, lease or other transfer;

10 (4) developing new uses or applications for an  
11 existing product, process or system, whether or not the new use or  
12 application is offered as the rationale for purchase, lease or  
13 other transfer of the product, process or system;

14 (5) developing analytical or survey activities  
15 incorporating technology review, application, trade-off study,  
16 modeling, simulation, conceptual design or similar activities,  
17 whether or not offered for sale, lease or other transfer; or

18 (6) designing and developing prototypes or  
19 integrating systems incorporating the advances, developments or  
20 improvements included in Paragraphs (1) through (5) of this  
21 subsection;

22 ~~[L.]~~ R. "retail sale" means any sale, lease or rental  
23 for any purpose other than for resale, sublease or subrent;

24 S. "secretary" means the secretary of taxation and  
25 revenue or the secretary's delegate;

1           ~~[M-]~~ T. "service" means all activities engaged in for  
2 other persons for a consideration, which activities involve  
3 predominantly the performance of a service as distinguished from  
4 selling or leasing property. "Service" includes activities  
5 performed by a person for its members or shareholders. In  
6 determining what is a service, the intended use, principal  
7 objective or ultimate objective of the contracting parties shall  
8 not be controlling. "Service" includes construction activities  
9 and all tangible personal property that will become an ingredient  
10 or component part of a construction project. That tangible  
11 personal property retains its character as tangible personal  
12 property until it is installed as an ingredient or component part  
13 of a construction project in New Mexico. Sales of tangible  
14 personal property that will become an ingredient or component part  
15 of a construction project to persons engaged in the construction  
16 business are sales of tangible personal property; and

17           ~~[N-]~~ U. "use" or "using" includes use, consumption or  
18 storage other than storage for subsequent sale in the ordinary  
19 course of business or for use solely outside this state."

20           **SECTION 3.** A new Section 7-9-4.4 NMSA 1978 is enacted to  
21 read:

22           "7-9-4.4 [NEW MATERIAL] CERTAIN REMOTE SELLERS ENGAGING IN  
23 BUSINESS. -- Remote sellers are engaging in business and are subject  
24 to the provisions of the Gross Receipts and Compensating Tax Act  
25 as if the seller had a physical presence in the state, provided

1 the remote seller meets either of the following criteria in the  
2 previous calendar year or the current calendar year:

3 A. The seller's gross revenue from the sale of tangible  
4 personal property, any product transferred electronically, or  
5 services delivered into New Mexico exceeds one hundred thousand  
6 dollars; or

7 B. The seller sold tangible personal property, any  
8 product transferred electronically, or services for delivery into  
9 New Mexico in two hundred or more separate transactions.”

10 **SECTION 4.** A new Section 7-9-5.1 NMSA 1978 is enacted to  
11 read:

12 “7-9-5.1. [NEW MATERIAL] SOURCING RULES FOR GROSS  
13 RECEIPTS. --

14 A. The following rules apply in sourcing gross  
15 receipts.

16 (1) Gross receipts from transactions, other than  
17 those described in Paragraphs (2) through (5) of this subsection,  
18 are sourced to the seller's place of business.

19 (2) With respect to gross receipts from retail  
20 sales of personal property or services:

21 (a) When the property is received by the  
22 purchaser or the service performed at the seller's place of  
23 business, receipts are sourced to the seller's place of business.

24 (b) When the property is not received by the  
25 purchaser or the service performed at the seller's place of

1 business, receipts are sourced to the location where receipt by  
2 the purchaser or the purchaser's donee of the property occurs or  
3 where the service is performed, when known to the seller.

4 (c) When neither Subparagraphs (a) or (b) of  
5 this paragraph applies, receipts are sourced to the location  
6 indicated by the purchaser's address available from seller's  
7 business records if no other address is available, when use of the  
8 address does not constitute bad faith.

9 (d) When Subparagraphs (a) through (c) of  
10 this paragraph do not apply, receipts are sourced to the location  
11 indicated by the purchaser's address obtained during the sale,  
12 including an address indicated by the purchaser's payment  
13 instrument, when use of the address does not constitute bad faith.

14 (e) When Subparagraphs (a) through (d) of  
15 this paragraph do not apply, receipts are sourced to the location  
16 indicated by the address from which the property was shipped, a  
17 digital good or computer software delivered electronically was  
18 first available for transmission by the seller or from which the  
19 service was performed (disregarding for these purposes any  
20 location that merely provided the digital transfer of the product  
21 sold).

22 (3) For lease or rental of tangible personal  
23 property other than that described in Paragraphs (4) and (5) of  
24 this subsection:

25 (a) For leases or rentals requiring

1 recurring periodic payments, the gross receipts from the first  
2 periodic payment are sourced in the same manner as Subparagraph  
3 (a) of Paragraph (2) of this subsection. Subsequent payments are  
4 sourced to the primary property location of the lessee or renter  
5 as indicated by the lessor's books and records. The primary  
6 property location shall be as indicated by an address for the  
7 property provided by the lessee that is available to the lessor  
8 from its records maintained in the ordinary course of business,  
9 when use of this address does not constitute bad faith. The  
10 property location shall not be altered by intermittent use at  
11 different locations, such as use of business property that  
12 accompanies employees on business trips and service calls.

13 (b) For leases or rentals not requiring  
14 periodic payments, receipts are sourced to the primary property  
15 location of the lessee or renter as indicated by the lessor's  
16 books and records.

17 (4) For lease or rental of motor vehicles,  
18 trailers, semi-trailers or aircraft other than transportation  
19 equipment:

20 (a) For leases or rentals requiring  
21 recurring periodic payments, the gross receipts from each periodic  
22 payment is sourced to the primary property location. The primary  
23 property location shall be as indicated by an address for the  
24 property provided by the lessee that is available to the lessor  
25 from its records maintained in the ordinary course of business,

1 when use of this address does not constitute bad faith. This  
2 location shall not be altered by intermittent use at different  
3 locations

4 (b) For leases or rentals not requiring  
5 periodic payments, receipts are sourced to the primary property  
6 location of the lessee or renter as indicated by the lessor's  
7 books and records.

8 (5) For leases or rentals of transportation  
9 equipment, the gross receipts shall be sourced the same as a  
10 retail sale in accordance with the provisions of Subparagraph (a)  
11 of Paragraph (1) of this subsection.

12 B. As used in this section, "transportation equipment"  
13 means any of the following:

14 (1) Locomotives and railcars that are utilized for  
15 the carriage of persons or property in interstate commerce;

16 (2) Trucks and truck-tractors with a Gross Vehicle  
17 Weight Rating (GVWR) of 10,001 pounds or greater, trailers, semi-  
18 trailers or passenger buses that are registered through the  
19 International Registration Plan and operated under authority of a  
20 carrier authorized and certificated by the U.S. Department of  
21 Transportation or another federal authority to engage in the  
22 carriage of persons or property in interstate commerce.

23 (3) Aircraft that are operated by air carriers  
24 authorized and certificated by the U.S. Department of  
25 Transportation or another federal or a foreign authority to engage

1 in the carriage of persons or property in interstate or foreign  
2 commerce.

3 (4) Containers designed for use on and component  
4 parts attached or secured on the items set forth in paragraphs (1)  
5 through (4) of this subsection.”

6 **SECTION 5.** A new Section 7-9-5.2 NMSA 1978 is enacted to  
7 read:

8 “7-9-5.2. [NEW MATERIAL] MARKETPLACE FACILITATORS TO REPORT  
9 GROSS RECEIPTS AND PAY TAX FOR CERTAIN MARKETPLACE SELLERS. --

10 A. Except as provided otherwise in this section,  
11 marketplace facilitators shall report to the department each month  
12 the gross receipts of each marketplace seller selling into New  
13 Mexico through the marketplace facilitator's platform and remit  
14 the appropriate tax. Reporting of the gross receipts and payment  
15 of the appropriate tax relieves the marketplace seller of  
16 responsibility to report and pay with respect to the transactions  
17 taking place through the marketplace facilitator's platform.

18 B. If a marketplace seller is registered with the  
19 department to report gross receipts, the marketplace seller must  
20 notify the marketplace seller of the fact of the seller's  
21 registration with the department and either:

22 (1) that the marketplace seller will report all  
23 gross receipts on transactions made by the seller through the  
24 marketplace facilitator's platform into New Mexico and pay  
25 appropriate tax, in which case upon receipt of the notification

1 the marketplace seller is relieved of any obligation to report and  
2 pay with respect to transaction of the marketplace seller; or

3 (2) that the marketplace seller will enter into  
4 an agreement with the marketplace facilitator under which the  
5 facilitator will continue to report the seller's gross receipts  
6 and pay appropriate tax and that the marketplace seller will  
7 report gross receipts on any transactions into New Mexico not  
8 conducted through the facilitator's platform and pay appropriate  
9 tax on such transactions.

10 C. All marketplace sellers with a physical presence in  
11 New Mexico are required to register with the department for  
12 reporting of gross receipts."

13 **SECTION 6.** A new Section 7-9-5.3 NMSA 1978 is enacted to  
14 read:

15 "7-9-5.3. [NEW MATERIAL] REFERRERS REPORTING REGARDING  
16 MARKETPLACE SELLERS. -- Referrers are not required to report gross  
17 receipts with respect to marketplace sellers or to pay appropriate  
18 tax with respect to such gross receipts, other than their own  
19 gross receipts or taxes. The department, however, may require  
20 referrers to provide the department with such information  
21 regarding the identity of marketplace sellers selling into New  
22 Mexico as the department may specify."

23 **SECTION 7. LIMITATION OF LIABILITY--NO RETROACTIVITY.** -- The  
24 provisions of this act do not apply to marketplace facilitators or  
25 referrers with regard to any transaction occurring before the

1 effective date of this act and do not affect the terms of any  
2 agreement covering such transactions entered into prior to the  
3 effective date of this act by the department and a marketplace  
4 facilitator or referrer.

5 **SECTION 8. REPEAL.** --Section 7-9-7.1 NMSA 1978 (being Laws  
6 1993, Chapter 45, Section 1, as amended) is repealed.

7 **SECTION 8. EFFECTIVE DATE.** --The effective date of the  
8 provisions of this act is January 1, 2020.