

§ 1101. Definitions. (a) When used in this article the term "person" includes an individual, partnership, limited liability company, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee, and any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of the foregoing.

(b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(1) Purchase at retail. A purchase by any person for any purpose other than those set forth in clauses (A) and (B) of subparagraph (i) of paragraph (4) of this subdivision.

(2) Purchaser. A person who purchases property or to whom are rendered services, the receipts from which are taxable under this article, including a mobile telecommunications customer.

(3) Receipt. (i) The amount of the sale price of any property and the charge for any service taxable under this article, including gas and gas service and electricity and electric service of whatever nature, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts and also including any charges by the vendor to the purchaser for shipping or delivery, and, with respect to gas and gas service and electricity and electric service, any charges by the vendor for transportation, transmission or distribution, regardless of whether such charges are separately stated in the written contract, if any, or on the bill rendered to such purchaser and regardless of whether such shipping or delivery or transportation, transmission, or distribution is provided by such vendor or a third party, but excluding any credit for tangible personal property accepted in part payment and intended for resale. For special rules governing computation of receipts, see section eleven hundred eleven of this article.

(ii) Receipt shall include consideration received by the vendor from third parties if:

(A) The vendor receives consideration from a third party and the consideration is directly related to a rebate, discount or similar price reduction on the sale;

(B) The vendor has an obligation to pass such consideration through to the purchaser in the form of a rebate, discount or similar price reduction;

(C) The amount of the consideration to be paid by the third party is fixed and determinable by the vendor at the time of the sale of the property or service to the purchaser; and

(D) One of the following criteria is met:

(I) the purchaser presents a coupon, certificate or other documentation to the vendor to claim a rebate, discount or similar price reduction where the coupon, certificate or documentation is authorized, distributed or granted by a third party with the understanding that the third party shall reimburse any vendor to whom the coupon, certificate or documentation is presented;

(II) the purchaser presents identification as a member of a group or organization entitled to a rebate, discount or similar price reduction; or

(III) the rebate, discount or similar price reduction is identified as a third party rebate, discount or similar price reduction on the invoice received by the purchaser or on a coupon, certificate or other documentation presented by the purchaser.

(iii) Subparagraph (ii) of this paragraph shall not apply to rebates, discounts or similar price reductions that are reimbursed by a third party on sales of motor vehicles.

(iv) For the purposes of subclause (II) of clause (D) of subparagraph (ii) of this paragraph, "identification as a member of a group or organization entitled to a rebate, discount or similar price reduction" shall not include the presentation of a customer loyalty or related rewards program card.

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by that person in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to

tax. Notwithstanding the preceding provisions of this subparagraph, a sale of any tangible personal property to a contractor, subcontractor or repairman for use or consumption in erecting structures or buildings, or building on, or otherwise adding to, altering, improving, maintaining, servicing or repairing real property, property or land, as the terms real property, property or land are defined in the real property tax law, is deemed to be a retail sale regardless of whether the tangible personal property is to be resold as such before it is so used or consumed, except that a sale of a new mobile home to a contractor, subcontractor or repairman who, in such capacity, installs such property is not a retail sale. Notwithstanding the preceding provisions of this subparagraph, the purchase of a truck, trailer or tractor-trailer combination for rental or lease to an authorized carrier, as described in paragraph twenty-two of subdivision (a) of section eleven hundred fifteen, shall be deemed a retail sale.

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, no motor fuel or diesel motor fuel shall be sold or used in this state without payment, and inclusion in the sales price of such motor fuel, of the tax on motor fuel required to be prepaid pursuant to the provisions of section eleven hundred two of this article except where a provision of this article relating to motor fuel or diesel motor fuel specifically provides otherwise and except in the case of a sale or use subject to tax under section eleven hundred five or eleven hundred ten, respectively, of this article. Provided, however, except for such requirement of prepayment of tax required by section eleven hundred two of this article, the provisions of this subparagraph shall not otherwise modify the meaning of the term "retail sale" as used in this article. For purposes of this subparagraph and sections eleven hundred two, eleven hundred eleven, eleven hundred twenty, eleven hundred thirty-two, eleven hundred thirty-four, eleven hundred thirty-five, eleven hundred thirty-six, eleven hundred forty-two, eleven hundred forty-five and eighteen hundred seventeen of this chapter, the following terms shall have the following meanings:

(A) "Petroleum products" means diesel motor fuel as defined in subdivision fourteen of section two hundred eighty-two of this chapter, other than kerosene or propane used for residential purposes, or motor fuel as defined in subdivision two of section two hundred eighty-two of

this chapter. The phrase "used for residential purposes" shall have the same meaning as it has for purposes of section eleven hundred five-A of this article.

(B) The term "distributor" shall have the same meaning as it has for purposes of article twelve-A of this chapter, excluding persons who are not required pursuant to section two hundred eighty-two-a to pay the tax imposed thereby.

(C) The term "motor fuel" means motor fuel as defined in subdivision two of section two hundred eighty-two of this chapter.

(D) The terms "filling station", "terminal" and "owner" shall have the same meaning as they have for the purposes of article twelve-A of this chapter.

(E) The term "diesel motor fuel" means diesel motor fuel as defined in subdivision fourteen of section two hundred eighty-two of this chapter.

(F) The terms "highway diesel motor fuel" and "non-highway diesel motor fuel" shall have the same meaning as they have for purposes of article twelve-A of this chapter.

(iii) Notwithstanding the provisions of subparagraph (i) of this paragraph, no cigarettes shall be sold or used in this state without payment, and inclusion in the sales price of such cigarettes, of the tax on cigarettes required to be prepaid pursuant to the provisions of section eleven hundred three of this article except where a provision of this article relating to cigarettes specifically provides otherwise and except in the case of a sale or use subject to tax under section eleven hundred five or eleven hundred ten, respectively, of this article. Provided, however, except for such requirement of prepayment of tax required by section eleven hundred three of this article, the provisions of this subparagraph shall not otherwise modify the meaning of the term "retail sale" as used in this article. For purposes of this subparagraph and sections eleven hundred three, eleven hundred eleven, eleven hundred fifteen, eleven hundred sixteen, eleven hundred twenty-one, eleven hundred thirty-two, eleven hundred thirty-four, eleven hundred thirty-five, eleven hundred thirty-six, eleven hundred thirty-eight, eleven hundred forty-two and eleven hundred forty-five of this article and eighteen hundred seventeen of this chapter, the terms "cigarette," "agent" and "package" shall have the same meaning that they have for purposes of article twenty of this chapter.

(iv) (A) The term retail sale does not include:

(I) The transfer of tangible personal property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consolidation effected under the law of New York or any other jurisdiction.

(II) The distribution of property by a corporation to its stockholders as a liquidating dividend.

(III) The distribution of property by a partnership to its partners in whole or partial liquidation.

(IV) The transfer of property to a corporation upon its organization in consideration for the issuance of its stock.

(V) The contribution of property to a partnership in consideration for a partnership interest therein.

(B) For an exception applicable to this subparagraph, see subdivision (q) of section eleven hundred eleven of this article.

(v) Notwithstanding the provisions of subparagraph (i) of this paragraph, the following sales of tangible personal property shall be deemed to be retail sales: (A) a sale to a single member limited liability company or a subsidiary for resale to its member or owner, where such single member limited liability company or subsidiary is disregarded as an entity separate from its owner for federal income tax purposes (without reference to any special rules related to the imposition of certain federal taxes), including but not limited to certain employment and excise taxes; (B) a sale to a partnership for resale to one or more of its partners; or (C) a sale to a trustee of a trust for resale to one or more beneficiaries of such trust.

(5) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor.

(6) Tangible personal property. Corporeal personal property of any nature. However, except for purposes of the tax imposed by subdivision (b) of section eleven hundred five of this article, such term shall not include gas, electricity, refrigeration and steam. Such term shall also

include pre-written computer software, whether sold as part of a package, as a separate component, or otherwise, and regardless of the medium by means of which such software is conveyed to a purchaser. Such term shall also include newspapers and periodicals where the vendor ships or delivers the entire edition or issue of the newspaper or periodical, with or without the advertising included in the paper edition or issue, but not including anything, other than advertising, not in such paper edition or issue, to the purchaser by means of telephony or telegraphy or other electronic media, but only where the amount of the sale price to such purchaser of such newspaper or magazine or the subscription price, in the case of a subscription to a newspaper or periodical, including any charge by such vendor for shipping or delivery to the purchaser, is separately stated to such purchaser. However, such term shall not include a modular home that is permanently affixed to real property, provided that, if a modular home is to be removed from the realty, whether as a whole or disassembled, it and its component parts shall be tangible personal property whether it is to be sold as a whole or as pieces.

(7) Use. The exercise of any right or power over tangible personal property or over any of the services which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine. Without limiting the foregoing, use also shall include the distribution of only tangible personal property, such as promotional materials, or of any such service subject to tax under such section eleven hundred ten or pursuant to the authority of such article twenty-nine.

(8) Vendor. (i) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within

the state of tangible personal property or services, the use of which is taxed by this article;

(C) A person who solicits business either:

(I) by employees, independent contractors, agents or other representatives; or

(II) by distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the state which satisfies the nexus requirement of the United States constitution;

and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article;

(D) A person who makes sales of tangible personal property or services, the use of which is taxed by this article, and who regularly or systematically delivers such property or services in this state by means other than the United States mail or common carrier;

(E) A person who regularly or systematically solicits business in this state by the distribution, without regard to the location from which such distribution originated, of catalogs, advertising flyers or letters, or by any other means of solicitation of business, to persons in this state and by reason thereof makes sales to persons within the state of tangible personal property, the use of which is taxed by this article, if such solicitation satisfies the nexus requirement of the United States constitution;

(F) A person making sales of tangible personal property, the use of which is taxed by this article, where such person retains an ownership interest in such property and where such property is brought into this state by the person to whom such property is sold and the person to whom such property is sold becomes or is a resident or uses such property in any manner in carrying on in this state any employment, trade, business or profession;

(G) Any other person making sales to persons within the state of tangible personal property or services, the use of which is taxed by this article, who may be authorized by the commissioner of taxation and finance to collect such tax by part IV of this article;

(H) The state of New York, any of its agencies, instrumentalities,

public corporations (including a public corporation created pursuant to agreement or compact with another state or Canada) or political subdivisions when such entity sells services or property of a kind ordinarily sold by private persons; and

(I) A seller of tangible personal property or services, the use of which is taxed by this article if either (I) an affiliated person that is a vendor as otherwise defined in this paragraph uses in the state trademarks, service marks, or trade names that are the same as those the seller uses; or (II) an affiliated person engages in activities in the state that inure to the benefit of the seller, in its development or maintenance of a market for its goods or services in the state, to the extent that those activities of the affiliate are sufficient to satisfy the nexus requirement of the United States constitution. For purposes of this clause, "affiliated person" has the same meaning as in clause (B) of subparagraph (v) of this paragraph. Nothing in this clause shall be construed to narrow the scope of any other provision in this paragraph. Notwithstanding the provisions of this clause, the activities in the state of an affiliated person in providing accounting or legal services or advice to a seller, or in directing the activities of a seller, including, but not limited to, making decisions about (a) strategic planning, (b) marketing, (c) inventory, (d) staffing, (e) distribution, or (f) cash management, will not result in making the seller a vendor under this paragraph.

(ii) (A) In addition, when in the opinion of the commissioner it is necessary for the efficient administration of this article to treat any salesman, representative, peddler or canvasser as the agent of the vendor, distributor, supervisor or employer under whom he operates or from whom he obtains tangible personal property sold by him, or for whom he solicits business, the commissioner may, in his discretion, treat such agent as the vendor jointly responsible with his principal, distributor, supervisor or employer for the collection and payment over of the tax. An unaffiliated person providing fulfillment services to a purchaser shall not be treated as a vendor by the commissioner under this paragraph with respect to such activity. For purposes of this clause, persons are affiliated persons with respect to each other where one of such persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest

of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons which are affiliated persons with respect to each other.

(B) A person shall be deemed a vendor of the services enumerated in paragraph nine of subdivision (c) of section eleven hundred five of this article, liable for all the obligations of a vendor, including the collection, reporting and remittance of the tax imposed under this article and possessing all the rights of a vendor including the right to an exclusion or a credit or refund of tax as provided in subdivision (e) of section eleven hundred thirty-two of this article, with respect to such services which are provided by a vendor thereof and are subject to taxation under this article, where such person, its affiliate or agent bills, on behalf of such vendor, either (I) as part of, or as a schedule to, the statement of such person to its purchasers or (II) separately (without regard to whether or not such person has customers of its own), such enumerated services provided by such vendor. For the purpose of this paragraph, "affiliate" means an entity which directly, indirectly or constructively controls a vendor of such enumerated services or is controlled by such vendor or is under the control of, along with such vendor, a common parent. Provided, however, the provisions of this clause shall not in any way be construed to otherwise limit or remove the obligations and liabilities of any person with respect to the tax imposed by this article.

(iii) For purposes of clause (D) of subparagraph (i) of this paragraph, a person shall be presumed to be regularly or systematically delivering property or services in this state if the cumulative total number of occasions such person or his agent came into the state to deliver property or services exceeded twelve during the preceding four quarterly periods ending on the last day of February, May, August and November, unless such person can demonstrate, to the satisfaction of the commissioner, that he cannot reasonably be expected to come into the state for such purposes on more than twelve occasions during the next succeeding four quarterly periods ending on the last day of February, May, August and November.

(iv) For purposes of clause (E) of subparagraph (i) of this paragraph, a person shall be presumed to be regularly or systematically soliciting business in this state if, for the immediately preceding four quarterly

periods ending on the last day of February, May, August and November, the cumulative total of such person's gross receipts from sales of property delivered in this state exceeds five hundred thousand dollars and such person made more than one hundred sales of property delivered in this state, unless such person can demonstrate, to the satisfaction of the commissioner, that he cannot reasonably be expected to have gross receipts in excess of five hundred thousand dollars or more than one hundred sales of property delivered in this state for the next succeeding four quarterly periods ending on the last day of February, May, August and November.

(v) Notwithstanding any other provision of law, the term vendor shall not include:

(A) a person who is not otherwise a vendor who purchases fulfillment services carried on in New York by a person other than an affiliated person; or

(B) a person who is not otherwise a vendor who owns tangible personal property located on the premises of an unaffiliated person performing fulfillment services for such person.

For purposes of this subparagraph, persons are affiliated persons with respect to each other where one of such persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons which are affiliated persons with respect to each other.

(vi) For purposes of subclause (I) of clause (C) of subparagraph (i) of this paragraph, a person making sales of tangible personal property or services taxable under this article ("seller") shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars

during the preceding four quarterly periods ending on the last day of February, May, August, and November. This presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution during the four quarterly periods in question. Nothing in this subparagraph shall be construed to narrow the scope of the terms independent contractor or other representative for purposes of subclause (I) of clause (C) of subparagraph (i) of this paragraph.

(9) Capital improvement. (i) An addition or alteration to real property which:

(A) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and

(B) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and

(C) Is intended to become a permanent installation.

(ii) A mobile home shall not constitute an addition or capital improvement to real property, property or land, regardless of the nature of its installation.

(iii) Notwithstanding the provisions of subparagraph (i) of this paragraph: (A) Floor covering, such as carpet, carpet padding, linoleum and vinyl roll flooring, carpet tile, linoleum tile and vinyl tile, installed as the initial finished floor covering in new construction or a new addition to or total reconstruction of existing construction shall constitute an addition or capital improvement to real property, property or land; and

(B) Floor covering, such as carpet, carpet padding, linoleum and vinyl roll flooring, carpet tile, linoleum tile and vinyl tile, installed other than as described in clause (A) of this subparagraph shall not constitute an addition or capital improvement to real property, property or land.

(10) Mobile home. (i) A structure which is:

(A) A type of manufactured housing; and

(B) Not self-propelled; and

(C) Transportable in one or more sections:

(I) that may be folded, collapsed or telescoped when being towed and

expanded later to provide additional cubic capacity, or

(II) that may be separately towable and designed to be joined into one integral structure capable of being again separated into the sections for repeated towing; and

(D) Built on a permanent chassis, comprised of frame and wheels, that is to be connected to utilities; and

(E) Designed to be used as a permanent dwelling, with or without permanent foundation; and

(F) Used for residential or commercial purposes.

(ii) The term "mobile home" shall also include structures commonly called "double wides".

(iii) The term "mobile home" shall not include:

(A) Structures designed and constructed primarily for temporary living quarters, recreations, camping or travel; or

(B) Furniture, fixtures, furnishings, appliances, attachments or similar tangible personal property not incorporated as component parts of a mobile home at the time of manufacture.

(11) New mobile home. A mobile home which is sold for the first time at retail including all components incorporated into such mobile home at the time of manufacture and remaining unchanged at the time of the first retail sale thereof.

(12) Promotional materials. Any advertising literature, other related tangible personal property (whether or not personalized by the recipient's name or other information uniquely related to such person) and envelopes used exclusively to deliver the same. Such other related tangible personal property includes, but is not limited to, free gifts, complimentary maps or other items given to travel club members, applications, order forms and return envelopes with respect to such advertising literature, annual reports, prospectuses, promotional displays and Cheshire labels but does not include invoices, statements and the like. Promotional materials shall also include paper or ink furnished to a printer for use in providing the services of producing, printing or imprinting promotional materials or in producing, printing or imprinting promotional materials, where such paper and ink become a physical component part of the promotional materials and such printer sells such services or such promotional materials to the person who furnished the paper and ink to such printer.

(13) Telephone answering service. A service that consists of taking messages by telephone and transmitting such messages to the purchaser of the service or at the purchaser's direction, but not including such service if it is merely an incidental element of a different or other service purchased by the customer.

(14) Pre-written computer software. Computer software (including pre-written upgrades thereof) which is not software designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more pre-written computer software programs or pre-written portions thereof does not cause the combination to be other than pre-written computer software. Pre-written software also includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than such purchaser. Where a person modifies or enhances computer software of which such person is not the author or creator, such person shall be deemed to be the author or creator only of such person's modifications or enhancements. Pre-written software or a pre-written portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains pre-written software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such modification or enhancement, such modification or enhancement shall not constitute pre-written computer software.

(15) Clothing and footwear. (i) Clothing and footwear to be worn by human beings, but not including costumes or rented formal wear, and (ii) fabric, thread, yarn, buttons, snaps, hooks, zippers and like items which are used or consumed to make or repair such clothing (other than such costumes or rented formal wear) and which become a physical component part of such clothing, but not including such items made from pearls, precious or semi-precious stones, jewels or metals, or imitations thereof.

(16) Commercial vessel. A vessel used primarily (i) to transport persons or property, for hire, (ii) by the purchaser of the vessel to transport such person's tangible personal property in the conduct of such person's business, or (iii) for both such purposes.

(17) Commercial aircraft. Aircraft used primarily (i) to transport

persons or property, for hire, (ii) by the purchaser of the aircraft to transport such person's tangible personal property in the conduct of such person's business, or (iii) for both such purposes. Transporting persons for hire does not include transporting agents, employees, officers, members, partners, managers or directors of affiliated persons. Persons are affiliated persons with respect to each other where one of the persons has an ownership interest of more than five percent, whether direct or indirect, in the other, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of the persons by another person or by a group of other persons that are affiliated persons with respect to each other. For an exception to the exclusions from the definition of "retail sale" applicable to aircraft, see subdivision (q) of section eleven hundred eleven of this article.

18. Fulfillment services. Any of the following services performed by an entity on its premises on behalf of a purchaser:

- (i) the acceptance of orders electronically or by mail, telephone, telefax or internet;
- (ii) responses to consumer correspondence and inquiries electronically or by mail, telephone, telefax or internet;
- (iii) billing and collection activities; or
- (iv) the shipment of orders from an inventory of products offered for sale by the purchaser.

(19) Farming. The term "farming" includes agriculture, floriculture, horticulture, aquaculture and silviculture; stock, dairy, poultry, fruit, fur bearing animal, graping, truck and tree farming; ranching; operating nurseries, greenhouses, vineyard trellises or other similar structures used primarily for the raising of agricultural, horticultural, vinicultural, viticultural, floricultural or silvicultural commodities; operating orchards; raising, growing and harvesting crops, livestock and livestock products, as defined in subdivision two of section three hundred one of the agriculture and markets law; and raising, growing and harvesting woodland products, including, but not limited to, timber, logs, lumber, pulpwood, posts and firewood.

(20) Commercial horse boarding operation. "Commercial horse boarding operation" shall have the same meaning that such term has in subdivision

thirteen of section three hundred one of the agriculture and markets law.

(22) (A) "Prepaid telephone calling service" means the right to exclusively purchase telecommunication services, that must be paid for in advance and enable the origination of one or more intrastate, interstate or international telephone calls using an access number (such as a toll free network access number) and/or authorization code, whether manually or electronically dialed, for which payment to a vendor must be made in advance, whether or not that right is represented by the transfer by the vendor to the purchaser of an item of tangible personal property. Such term, except with respect to the tax imposed by section one hundred eighty-six-e of article nine of this chapter, includes a prepaid mobile calling service. In no event shall a credit card constitute a prepaid telephone calling service. If the sale or recharge of a prepaid telephone calling service does not take place at the vendor's place of business, it shall be conclusively determined to take place at the purchaser's shipping address or, if there is no item shipped, at the purchaser's billing address or the location associated with the purchaser's mobile telephone number, or, if the vendor does not have the address or the location associated with the customer's mobile telephone number, at such address, as approved by the commissioner, that reasonably reflects the customer's location at the time of the sale or recharge.

(B) "Prepaid mobile calling service" means the right to use a commercial mobile radio service, whether or not sold with other property or services, that must be paid for in advance and is sold for use over a specified period of time or in predetermined units or dollars that decline with use in a known amount, whether or not that right is represented by or includes the transfer to the purchaser of an item of tangible personal property.

(23) Qualified empire zone enterprise. The term "qualified empire zone enterprise" shall have the same meaning that such term has in section fourteen of this chapter for purposes of this article and article twenty-nine of this chapter.

(24) "Mobile telecommunications service" shall mean commercial mobile radio service. "Mobile telecommunications service" does not include prepaid telephone calling service or air-ground radio telephone service

as defined in section 22.99 of title 47 of the code of federal regulations as in effect on June first, nineteen hundred ninety-nine.

(25) "Commercial mobile radio service" and "mobile service" shall have the same meanings as in section 20.3 of title 47 of the code of federal regulations in effect on June first, nineteen hundred ninety-nine, to wit:

(i) "Commercial mobile radio service." A mobile service that is: (A)(I) provided for profit, i.e., with the intent of receiving compensation or monetary gain; (II) an interconnected service; and (III) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (B) the functional equivalent of such a mobile service described in clause (A) of this subparagraph.

(ii) "Mobile service." A radio communications service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes: (A) both one-way and two-way radio communications services; (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation; and (C) any service for which a license is required in a personal communications service under part 24 of title 47 of the code of federal regulations in effect on June first, nineteen hundred ninety-nine.

(26) "Place of primary use" shall mean the street address representative of where a mobile telecommunications customer's use of the mobile telecommunications service primarily occurs, and must be: (i) the residential street address or the primary business street address of the mobile telecommunications customer and (ii) within the licensed service area of the home service provider.

(27)(i) "Mobile telecommunications customer" shall mean either (A) a person or entity that contracts with a home service provider for mobile telecommunications services; or (B) if the end user of mobile telecommunications services is not the contracting party, the end user of the mobile telecommunications service, but this clause (B) applies only for the purpose of determining the place of primary use. "Mobile

telecommunications customer" does not include either (A) a reseller of mobile telecommunications service; or (B) a serving carrier under an arrangement to serve a mobile telecommunications customer outside the home service provider's licensed service area.

(ii) "Home service provider" shall mean a facilities-based carrier or reseller as defined in subparagraph (iv) of this paragraph, with which the mobile telecommunications customer contracts for the provision of mobile telecommunications service.

(iii) "Licensed service area" shall mean the geographic area in which a home service provider is authorized by law or contract to provide mobile telecommunications service to a mobile telecommunications customer.

(iv) "Reseller" shall mean a provider who purchases telecommunications service from another telecommunications service provider and then resells, uses as a component part of, or integrates the purchased services into a mobile telecommunications service. "Reseller" does not include a serving carrier with which a home service provider arranges for the services to its mobile telecommunications customers outside the home service provider's licensed service area.

(v) "Serving carrier" shall mean a facilities-based carrier providing mobile telecommunications service to a mobile telecommunications customer outside the home service provider's or reseller's licensed service area.

(28) "Taxing jurisdiction" shall mean any of the several states, the District of Columbia, or any territory or possession of the United States, any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other political subdivision within the territorial limits of the United States with the authority to impose a tax, charge, or fee.

* (29) "E85" shall have the same meaning as in subdivision twenty-two of section two hundred eighty-two of this chapter.

* NB Repealed September 1, 2031

* (30) "B20" shall have the same meaning as in subdivision twenty-three of section two hundred eighty-two of this chapter.

* NB Repealed September 1, 2031

* (31) "CNG" shall have the same meaning as in subdivision twenty-four of section two hundred eighty-two of this chapter.

* NB Repealed September 1, 2031

* (32) "Hydrogen" shall have the same meaning as in subdivision twenty-five of section two hundred eighty-two of this chapter.

* NB Repealed September 1, 2031

(33) Modular home. A one- to three-family residential structure constructed at the building site from modular home modules, where the modules are connected and such structure is finished using building materials or other tangible personal property at the building site, such modular home conforms to the building and other codes applicable to one- to three-family site-built homes in the jurisdiction where such building site is located, and such finished modular home constitutes a capital improvement. "Modular home" shall not include (i) a structure or portion of a structure built on-site, whether built by the modular home installer or another person, using building materials delivered to the site, even if some of such materials were manufactured, produced, or assembled off-site, such as, by way of example and not by way of limitation, concrete blocks, windows, door units, wall or roof panels, trusses and dormers; (ii) a shed, gazebo, any unattached garage or the like (even if made or built by a manufacturer of modular home modules); or (iii) a mobile home.

(34) Transportation service. The service of transporting, carrying or conveying a person or persons by livery service; whether to a single destination or to multiple destinations; and whether the compensation paid by or on behalf of the passenger is based on mileage, trip, time consumed or any other basis. A service that begins and ends in this state is deemed intra-state even if it passes outside this state during a portion of the trip. However, transportation service does not include transportation of persons in connection with funerals. Transportation service includes transporting, carrying, or conveying property of the person being transported, whether owned by or in the care of such person. Notwithstanding the foregoing, transportation service shall not include a TNC prearranged trip, as that term is defined in article forty-four-B of the vehicle and traffic law, that is subject to tax under article twenty-nine-B of this chapter. In addition to what is included in the definition of "receipt" in paragraph three of this subdivision, receipts from the sale of transportation service subject to tax include any handling, carrying, baggage, booking service,

administrative, mark-up, additional, or other charge, of any nature, made in conjunction with the transportation service. Livery service means service provided by limousine, black car or other motor vehicle, with a driver, but excluding (i) a taxicab, (ii) a bus, and (iii), in a city of one million or more in this state, an affiliated livery vehicle, and excluding any scheduled public service. Limousine means any vehicle with a seating capacity of up to fourteen persons, excluding the driver, and any vehicle with a seating capacity of between fifteen and twenty persons, excluding the driver, that has only two axles and four tires. "Bus" means any motor vehicle with a seating capacity of at least fifteen persons, excluding the driver, that does not otherwise qualify as a limousine. Black car means a for-hire vehicle dispatched from a central facility. "Affiliated livery vehicle" means a for-hire motor vehicle with a seating capacity of up to six persons, including the driver, other than a black car or luxury limousine, that is authorized and licensed by the taxi and limousine commission of a city of one million or more to be dispatched by a base station located in such a city and regulated by such taxi and limousine commission; and the charges for service provided by an affiliated livery vehicle are on the basis of flat rate, time, mileage, or zones and not on a garage to garage basis.

(35) Modular home modules. The component sections that will be installed on-site to construct a modular home, each of which sections is (i) engineered and manufactured in a factory, (ii) shipped or delivered to the building site on a truck or other vehicle, (iii) installed at the site, on a permanent foundation, to become part of the modular home and (iv) not by itself suitable for occupancy. Every group of modules that will be installed in this state as a modular home, or, if a modular home is to be built from a single module, that single module, shall, prior to shipment from the place where it is made, bear the insignia of approval issued by the department of state pursuant to the authority of article eighteen of the executive law and regulations thereunder; and the department of state shall cooperate with the commissioner and furnish such information as the commissioner requests to carry out this article and its purposes. A modular home module shall include tangible personal property shipped or delivered with the module from the factory by the manufacturer at the same time the module is shipped or delivered, such

as exterior siding, roof shingles, roof vent pipes, interior trim pieces, paint, and interior doors, and supplies required and used to install them, but only if that property (i) was engineered or designed to be an integral component part of the module, (ii) matches, or is essential to the functioning of, the module, (iii) was not installed in the module at the time the module was made only because it would be damaged during, or interfere with, shipping or delivery of the module to the building site, (iv) will be permanently installed in the module at the building site by the manufacturer or by the purchaser of the module or by the contractor of either of them, (v) is listed in full on the contract, bill of sale, invoice or other memorandum of price given to the purchaser or buyer, or in an addendum thereto, true copies of which the manufacturer shall retain as part of the records required to be kept by this article and make available on request, and (vi) is included in the sale price of the module, without any additional charge. A modular home module shall not include (i) furniture, fixtures, furnishings, appliances, attachments or similar tangible personal property not incorporated as component parts of the module at the time of its manufacture or (ii) building materials or other tangible personal property used to connect the modules or finish the modular home at the building site.

(36) New modular home module. A modular home module sold for the first time at retail.

(37) Electronic news service. (i) A service delivered, furnished or provided to or accessed by the purchaser electronically or digitally that meets all of the following conditions:

(A) The service's predominant purpose is the presentation of news content, which it prominently features;

(B) The service's news content (I) includes general news that is accessible without use of a search function; (II) is newly published or updated at least daily unless the service specifies some other interval, provided, however, that the news content must be newly updated or published within a twenty-four hour period that precedes or immediately follows a time when the non-news content is newly published or updated; and (III) is predominantly purchased from contracted wire services or written or produced by the employees or engaged independent contractors of the person providing the service, including, but not limited to,

employees or engaged independent contractors of any affiliate of such person;

(C) The service is available to the public;

(D) The service holds itself out as a "news service," "newspaper," "magazine," "periodical," "journal," "post," or words of similar import and does not hold itself out as something other than one of such terms or a term of similar import.

(E) The service has continuity as to its title and the general nature of its content over time;

(F) The service is not, in whole or in substantial part, a listing, catalog, database, or compilation;

(G) The only search function the service offers without a separately-stated, reasonable charge is a search of the service's or of any of its affiliates' present or past news content. Provided, a service that satisfies all the clauses of this subparagraph except this clause may still qualify as an electronic news service for purposes of this paragraph if the provider of the service can show that the non-news content available through the search function is merely an incidental part of the service, including, for example, by showing that the cost to the person providing the service of any non-news content available through the search function is less than the cost to that person of providing the news content available through the service. Provided, further, that a purchaser's access to the service's search function for which there is a separately-stated, reasonable charge to the purchaser shall be treated separately and is not relevant as to whether this clause is satisfied.

(ii) The following definitions apply to subparagraph (i) of this paragraph and subdivision (gg) of section eleven hundred fifteen of this article:

(A) "News content" means the articles, photographs, and video and audio material concerning general news or specialized news and does not include listings, advertisements, catalogs, compilations, databases, or the like.

(B) "Non-news content" means any information other than news content.

(C) "Article" means a prose composition, including commentaries, reviews, editorials, op-eds, letters to the editor, and reader comments on articles. The term does not include listings, advertisements,

catalogs, compilations, databases, or the like.

(D) "General news" means matters of general interest and reports of current events.

(E) "Specialized news" means matters of a specialized interest, such as legal, mercantile, financial, theatrical, entertainment news, political, religious, or sporting matters.

(F) "Cap amount" means three hundred percent of the annualized average daily newsstand price of the three newspapers with the largest total paid national daily circulation. The commissioner shall determine the cap amount annually and shall cause it to be published on the department's website and give other appropriate general notice thereof. The commissioner shall determine and publish the cap amount annually by April first based on prices charged during the first week of January of that year, which cap amount shall apply for the succeeding twelve-month period commencing June first and ending May thirty-first. The calculation and publication of the cap amount under this clause shall not be included within paragraph (a) of subdivision two of section one hundred two of the state administrative procedure act relating to the definition of a rule.

(G) "Affiliate" means, with respect to any person, any other person that, directly or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such person, and the term "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such person, whether through ownership of voting securities, by contract or otherwise.

(38) Electronic periodical. (i) A publication delivered, furnished or provided to or accessed by the purchaser electronically or digitally that meets all of the following conditions:

(A) The publication's predominant purpose is the presentation of news content, which it prominently features;

(B) The publication is published at stated intervals, at least as frequently as four times a year but no more frequently than weekly, and is not updated between issues. However, the incidental provision of additional news content between issues will not prevent the requirement in this clause from being satisfied. In determining whether the news

content added between issues is incidental, among the factors the commissioner is to consider is the amount of the news content added between issues relative to the news content in preceding issues and the frequency of the provision of additional news content between issues. Provided that the display of reader comments or letters to the editor between issues does not affect whether this clause is satisfied.

(C) The publication's news content is purchased from contracted wire services or written or produced by multiple employees or engaged independent contractors of the person providing the publication, including, but not limited to, employees or engaged independent contractors of any affiliate of such person;

(D) The publication is available to the public;

(E) The publication holds itself out as a "magazine," "periodical" or words of similar import and does not hold itself out as something other than a "magazine," "periodical," or words of similar import;

(F) The publication has continuity as to its title and the general nature of its content over time;

(G) The publication is not, in whole or in substantial part, a listing, catalog, database, or compilation; and

(H) The only search function the publication offers without a separately-stated, reasonable charge is a search of the publication's or of an affiliate's present or past news content. However: (I) the publication's provision of access, at no additional charge, to a search engine that, apart from the service, is otherwise available to the public for free is not relevant as to whether this clause is satisfied; and (II) the publication's provision of access to a search function for which there is a separately-stated, reasonable charge to the purchaser shall be treated separately and is not relevant as to whether this clause is satisfied.

(ii) For purposes of subparagraph (i) of this paragraph and the exemption provided for electronic periodicals in subdivision (gg) of section eleven hundred fifteen of this article, "articles" has the same meaning as in subparagraph (ii) of paragraph thirty-seven of subdivision (b) of this section and "news content" means articles, photographs, and video and audio material devoted to literature, the sciences, the arts, news, an industry, profession, sport or other field of endeavor, and does not include listings, advertisements, catalogs, compilations,

databases, or the like.

(c) When used in this article for the purposes of the tax imposed under subdivision (e) of section eleven hundred five of this article, the following terms shall mean:

(1) Hotel. A building or portion of it which is regularly used and kept open as such for the lodging of guests. The term "hotel" includes an apartment hotel, a motel, boarding house or club, whether or not meals are served.

(2) Occupancy. The use or possession, or the right to the use or possession, of any room in a hotel or short term rental unit. "Right to the use or possession" includes the rights of a room remarketer as described in paragraph eight of this subdivision.

(3) Occupant. A person who, for a consideration, uses, possesses, or has the right to use or possess, any room in a hotel or short term rental unit under any lease, concession, permit, right of access, license to use or other agreement, or otherwise. "Right to use or possess" includes the rights of a room remarketer as described in paragraph eight of this subdivision.

(4) Operator. Any person operating a hotel or short term rental unit. Such term shall include a room remarketer and such room remarketer shall be deemed to operate a hotel, or portion thereof, with respect to which such person has the rights of a room remarketer.

(5) Permanent resident. Any occupant of any room or rooms in a hotel or short term rental unit for at least ninety consecutive days shall be considered a permanent resident with regard to the period of such occupancy.

(6) Rent. The consideration received for occupancy, including any service or other charge or amount required to be paid as a condition for occupancy, valued in money, whether received in money or otherwise and whether received or collected by the booking service, operator or a room remarketer or another person on behalf of any of them.

(7) Room. Any room or rooms of any kind in any part or portion of a hotel or short term rental unit, which is available for or let out for any purpose other than a place of assembly.

(8) Room remarketer. A person who reserves, arranges for, conveys, or furnishes occupancy, whether directly or indirectly, to an occupant for rent in a hotel for an amount determined by the room remarketer,

directly or indirectly, whether pursuant to a written or other agreement. Such person's ability or authority to reserve, arrange for, convey, or furnish occupancy, directly or indirectly, and to determine rent therefor, shall be the "rights of a room remarketer". A room remarketer is not a permanent resident with respect to a room for which such person has the rights of a room remarketer.

(9) Short term rental unit. A building or portion of it that is used for the lodging of guests. The term "short term rental unit" includes a house, an apartment, a condominium, a cooperative unit, a cabin, a cottage, a bungalow, or a similar furnished living unit, or one or more rooms therein, where sleeping accommodations are provided for the lodging of paying occupants, the typical occupants are transients or travelers, and the relationship between the operator and occupant is not that of a landlord and tenant, provided that, in a city with a population of a million or more, the term "short term rental unit" shall also include any building or portion of a building that is a short-term rental, as such term is defined in section 26-3101 of chapter thirty-one of title twenty-six of the administrative code of the city of New York. It is not necessary that meals are served. A building or portion of a building may qualify as a short term rental unit whether or not amenities, including but not limited to daily housekeeping services, concierge services, or linen services, are provided.

(10) (i) Booking service. A person who, pursuant to an agreement with an operator or operators, facilitates the occupancy of a short term rental unit for such operator or operators. A person "facilitates the occupancy of a short term rental unit" for purposes of this paragraph when the person meets both of the following conditions: (A) such person provides the forum in which, or by means of which, the sale of the occupancy takes place or the offer of such sale is accepted, including a shop, store, or booth, an internet website, mobile device application, catalog, or similar forum; and (B) such person or an affiliate of such person collects the rent paid by a customer to an operator for the occupancy of a short term rental unit, or contracts with a third party to collect such rent.

(ii) For the purposes of this article, the term "booking service" shall not include a "room remarketer" as defined in paragraph eight of this subdivision. For purposes of this paragraph, persons are affiliated

if one person has an ownership interest of more than five percent, whether direct or indirect, in another, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons that are affiliated persons with respect to each other.

(d) When used in this article for purposes of the tax imposed under subdivision (f) of section eleven hundred five, the following terms shall mean:

(1) Active annual member. A member who is not a life member but who enjoys full club privileges as distinguished from the privileges enjoyed by a person holding a nonresident membership, an associate membership, or other partial or restricted membership.

(2) Admission charge. The amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of facilities therefor.

(3) Amusement charge. Any admission charge, dues or charge of roof garden, cabaret or other similar place.

(4) Charge of a roof garden, cabaret or other similar place. Any charge made for admission, refreshment, service, or merchandise at a roof garden, cabaret or other similar place.

(5) Dramatic or musical arts admission charge. Any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance.

(6) Dues. Any dues or membership fee including any assessment, irrespective of the purpose for which made, and any charges for social or sports privileges or facilities, except charges for sports privileges or facilities offered to members' guests which would otherwise be exempt if paid directly by such guests.

(7) Initiation fee. Any payment, contribution, or loan, required as a condition precedent to membership, whether or not such payment, contribution or loan is evidenced by a certificate of interest or indebtedness or share of stock, and irrespective of the person or organization to whom paid, contributed or loaned.

(8) Lessor. Any person who is the owner, licensee or lessee of any place of amusement or roof garden, cabaret or other similar place which he leases, subleases or grants a license to use to other persons who

make amusement charges or admission charges.

(9) Patron. Any person who pays an amusement charge or who is otherwise required to pay the tax imposed under such subdivision (f) of section eleven hundred five.

(10) Place of amusement. Any place where any facilities for entertainment, amusement, or sports are provided.

(11) Recipient. Any person who collects or receives or is under a duty to collect an amusement charge.

(12) Roof garden, cabaret or other similar place. Any roof garden, cabaret or other similar place which furnishes a public performance for profit, but not including a place where merely live dramatic or musical arts performances are offered in conjunction with the serving or selling of food, refreshment or merchandise, so long as such serving or selling of food, refreshment or merchandise is merely incidental to such performances.

(13) Social or athletic club. Any club or organization of which a material purpose or activity is social or athletic.

(14) Honorary member. A membership granted in a social or athletic club without payment of dues which may provide full or partial club privileges.

(e) When used in this article for the purposes of the taxes imposed under subdivision (a) of section eleven hundred five of this article and by section eleven hundred ten of this article, the following terms shall mean:

(1) Marketplace provider. A person who, pursuant to an agreement with a marketplace seller, facilitates sales of tangible personal property by such marketplace seller or sellers. A person "facilitates a sale of tangible personal property" for purposes of this paragraph when the person meets both of the following conditions: (A) such person provides the forum in which, or by means of which, the sale takes place or the offer of sale is accepted, including a shop, store, or booth, an internet website, catalog, or similar forum; and (B) such person or an affiliate of such person collects the receipts paid by a customer to a marketplace seller for a sale of tangible personal property, or contracts with a third party to collect such receipts. For purposes of this paragraph, a "sale of tangible personal property" shall not include the rental of a passenger car as described in section eleven hundred

sixty of this chapter but shall include a lease described in subdivision (i) of section eleven hundred eleven of this article and peer-to-peer car sharing as described in section nine hundred of the general business law. For purposes of this paragraph, persons are affiliated if one person has an ownership interest of more than five percent, whether direct or indirect, in another, or where an ownership interest of more than five percent, whether direct or indirect, is held in each of such persons by another person or by a group of other persons that are affiliated persons with respect to each other. Notwithstanding anything in this paragraph, a person who is not otherwise registered pursuant to section eleven hundred thirty-four of this article is not a marketplace provider if such person has no physical presence in New York and, for the immediately preceding four quarterly periods ending on the last day of February, May, August and November, can show that the cumulative total gross receipts of sales it has made or facilitated of property delivered in this state does not exceed five hundred thousand dollars or that such person has not made or facilitated more than one hundred sales of property delivered in this state. However, such person may elect to register as a marketplace provider, and, once registered, will be subject to the provisions of this article.

(2) Marketplace seller. Any person, whether or not such person is required to obtain a certificate of authority under section eleven hundred thirty-four of this article, who has an agreement with a marketplace provider under which the marketplace provider will facilitate sales of tangible personal property by such person within the meaning of paragraph one of this subdivision.