

**Additional Information on How Sellers May Rebut the New Presumption
Applicable to the Definition of Sales Tax Vendor as Described in
TSB-M-08(3)S**

This memorandum provides additional guidance relating to rebutting the presumption that a seller is a vendor required to be registered for sales tax purposes and collect state and local sales taxes pursuant to Chapter 57 of the Laws of 2008.

TSB-M-08(3)S, *New Presumption Applicable to Definition of Sales Tax Vendor*, states that the Tax Department will deem the presumption rebutted where the seller is able to establish that the only activity of its resident representatives in New York State on behalf of the seller is placing a link on the resident representatives' Web sites to the seller's Web site. In addition, none of the resident representatives may engage in any solicitation activity in the state targeted at potential New York State customers on behalf of the seller.

The inclusion of language in a contract or agreement between a seller and a resident representative that prohibits solicitation by the resident representative is not sufficient, by itself, to rebut the presumption that the seller is a vendor. In order to rebut the presumption, the seller must be able to demonstrate both that the prohibition has been established and that the resident representative has complied with it. Thus, for example, a seller may rebut the presumption by meeting both of the following conditions:

Contract condition - The contract or agreement between the seller and the resident representative provides that the resident representative is prohibited from engaging in any solicitation activities in New York State that refer potential customers to the seller including, but not limited to: distributing flyers, coupons, newsletters and other printed promotional materials, or electronic equivalents; verbal solicitation (e.g., in-person referrals); initiating telephone calls; and sending e-mails. In addition, if the resident representative is an organization such as a club or a non-profit group, the contract or agreement must provide that the organization will maintain on its Web site information alerting its members to the prohibition against each of the solicitation activities described above; and

Proof of compliance condition - Each resident representative must submit to the seller, on an annual basis, a signed certification stating that the resident representative has not engaged in any prohibited solicitation activities in New York State, as described above, at any time during the previous year. In addition, if the resident representative is an organization, the annual certification must also include a statement from the resident organization certifying that its Web site includes information directed at its members alerting them to the prohibition against the solicitation activities described above. Furthermore, the certification must contain a statement alerting the representative that the certification and any information submitted with it is subject to verification and audit by the Tax Department.

With regard to the proof of compliance condition:

- The resident representatives may submit the annual certification to the seller in paper form or electronically. The certification must be signed (either manually or electronically) by the resident representative. If the resident representative is an organization, the certification must be signed by a person who has the authority to execute binding contracts on behalf of the organization. The certification must also show the name and address of the resident representative, and, if the resident representative is an organization, the name and address of the person signing the certification.
- A seller will be considered to have satisfied this condition if it receives the completed certifications from its resident representatives and the seller accepts the certifications in good faith (that is, the seller does not know or have reason to know that any of the certifications are false or fraudulent).
- The seller must retain copies of the certifications that are signed by and received from resident representatives, in either hard-copy or electronic format, as part of the seller's record keeping requirements. In addition, the seller must make the copies available to the department upon request.
- In weighing the significance of a seller's reliance on certifications from fewer than all its New York resident representatives, the Tax Department will apply the standards for constitutional nexus set forth in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *Orvis Co. v. Tax Appeals Tribunal*, 86 N.Y. 2d 165, 178 (1995).
- There is no specific form required for this certification process. The seller may choose the form of the certification as long as it contains the information prescribed above. The Tax Department plans to issue a form in the near future that sellers may use to obtain the certification.

If the seller meets the two conditions described above, it rebuts the presumption. Accordingly, the seller need not register and collect tax unless the Department subsequently determines that any of the resident representatives are actually engaging in solicitation activities in New York State or that the seller is a vendor for some other reason (e.g., the seller has employees in the State).

NOTE: A TSB-M is an informational statement of changes to the law, regulations, or Department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in Department policies could affect the validity of the information presented in a TSB-M.