

The Comptroller of Public Accounts proposes to amend §3.286, concerning seller's and purchaser's responsibilities, including nexus, permits, returns and reporting periods, and collection and exemption rules. In the wake of the United States Supreme Court's substantial nexus analysis in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (June 21, 2018), the proposed amendment restores the permit and collection requirements of the Tax Code that were unconstitutional prior to the *Wayfair* decision and establishes a safe harbor for remote sellers. The proposed amendment also updates other provisions of the section and renames the section.

To streamline the title of this section, the comptroller proposes to replace "Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules" with "Seller's and Purchaser's Responsibilities." Throughout the section, the comptroller proposes to add or amend the titles to statutory references, rules, and forms. The comptroller does not intend to make substantive changes through these additions of and amendments to the statutory references, rules, and forms.

Current §3.286 omits "all [statutory] definitions of 'engaged in business' except those definitions requiring a 'physical presence' in Texas. This was done in response to a United States Supreme Court Case, *Quill v. North Dakota*, 112 S. Ct. 1094 (1992)." 21 Tex. Reg. 11,800 (Dec. 6, 1996). However, in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (June 21, 2018), the United States Supreme Court concluded that "the physical presence rule of *Quill* is unsound and incorrect." The Court further stated that "substantial nexus" "is established when a taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Wayfair*, 138 S. Ct. at 2099 (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)). The Court also reiterated that "States may not impose undue burdens on interstate commerce."

In response to the *Wayfair* opinion, the comptroller now proposes to amend the definition of "engaged in business" in subsection (a)(4) to reinsert the omitted "engaged in business" activities

described in Tax Code, §151.107 (Retailer Engaged in Business in This State). Omitted Tax Code, §151.107(a)(4) describes the systematic solicitation of sales through various types of communication systems, and omitted Tax Code, §151.107(a)(5) describes the solicitation of orders by mail or other media. These statutory provisions are proposed for incorporation into subsections (a)(4)(I) and (J). The comptroller proposes to reletter the subsequent subparagraphs of subsection (a)(4) and to conform cross-references to the new and renumbered subparagraphs.

The comptroller also proposes to revise subsection (a)(4)(G) of the definition of "engaged in business" to more closely track the wording of Tax Code, §151.107. And the comptroller proposes to add subsection (a)(4)(M) to track the wording of Tax Code, §151.107(b).

The comptroller proposes to delete the phrase "in this state" from the definition of seller in subsection (a)(10) to more closely track the definition of seller in Tax Code, §151.008.

In subsection (a)(10)(C), the comptroller proposes to replace the term "storagemen" with the term "warehouses" to make the definition gender neutral.

To conform to current agency practice, the comptroller proposes to amend subsection (b)(1) to require a seller engaged in business in the state to obtain a single permit for its out-of-state places of business in addition to a permit for each place of business operated in this state.

In further response to the *Wayfair* opinion, the comptroller has reexamined the provision for out-of-state sellers in subsection (b)(2). Current subsection (b)(2) refers to each "out-of-state seller who has nexus," and current subsection (a)(8) defines "nexus" as "[s]ufficient contact with or activity within the state, as determined by state and federal law." These nexus statements provides little meaningful guidance to taxpayers. Therefore, the comptroller proposes to delete them and

replace them with a safe harbor for remote sellers. References to "nexus" would also be removed from subsections (a)(4)(L) and (d)(6).

In devising a safe harbor, the comptroller has considered whether the statutory "engaged in business" activities constitute substantial nexus based on availment of the substantial privilege of carrying on business in Texas; whether the statutory "engaged in business" activities might constitute an undue burden on interstate commerce; the safe harbor thresholds established to date by other states that are implementing the *Wayfair* opinion; and the extent to which the failure to enforce the obligations associated with the statutory "engaged in business" activities might thwart the use tax statute purpose of leveling the playing field between in-state and out-of-state vendors.

After weighing these considerations, the comptroller is proposing a safe harbor in new subsection (b)(2) for remote sellers – sellers whose activities in the state are limited to the activities described in Tax Code, §151.107(a)(4) and (5) (proposed subsection (a)(4)(I) and (J) in this section). The comptroller will not impose the statutory permit and collection responsibilities on remote sellers whose Texas sales are below the safe harbor amount. The comptroller intends the safe harbor amount to simplify tax administration for both the agency and taxpayers by eliminating the need to litigate on a case-by-case basis whether the statutory collection obligation is unduly burdensome.

The safe harbor amount uses historical sales, as was the case with the tax legislation in *Wayfair*. Because the safe harbor uses historical sales, it is conceivable that taxpayers with similar current sales below the safe harbor amount will have different collection obligations. The comptroller has determined that there are rational, legitimate reasons for this treatment. Among other reasons, a seller with historically higher sales has enjoyed a greater benefit from the Texas market. Also, the courts have upheld the use of historical data in other similar contexts, specifically the Texas franchise tax, which bases the current privilege of doing business on prior year activity in the State.

See Rylander v. Palais Royal, Inc., 81 S.W.3d 909, 915 (Tex. App. - Austin 2002, pet. denied); *Rylander v. 3 Beall Brothers 3, Inc.*, 2 S.W.3d 562 (Tex. App. - Austin 1999, pet. denied).

Subsection (b)(2)(F) gives permitted remote sellers the option to terminate their collection obligations if their Texas sales decline below the specified amount. However, a remote seller must notify the comptroller in order to terminate its collection obligation.

In subsection (b)(2)(H), the comptroller proposes to postpone the permitting and collection requirements for remote sellers until October 1, 2019, to provide additional time for remote sellers to prepare for their collection and reporting obligations.

The comptroller proposes new subsection (b)(3), which allows a permitted seller to withdraw from the state if the seller no longer intends to make sales of taxable items in the state. Subsequent paragraphs are renumbered.

The comptroller proposes to amend subsection (g)(6) to codify current agency policy regarding filing and remittance requirements of state agencies.

The comptroller proposes to adopt these amendments without retroactive effect. §151.022 (Retroactive Effect of Rules). This section will be effective January 1, 2019.

Public Benefit/Cost; Fiscal Implications for state or local government, small businesses, and individuals.

Comments on the proposal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the Texas Register.

The comptroller proposes this amendment under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to amend rules to reflect changes in the constitution or laws of the United States and judicial interpretations thereof.

This amendment implements Tax Code, §151.107(a)(4), (a)(5), and (b) (Retailer Engaged in Business in the State) and *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (June 21, 2018).

<rule>

§3.286. Seller's and Purchaser's Responsibilities[, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules].

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Consignment sale--The sale, lease, or rental of tangible personal property by a seller who, under an agreement with another person, is entrusted with possession of tangible personal property with respect to which the other person has title or another ownership interest, and is authorized to sell, lease, or rent the tangible personal property without additional action by the person having title to or another ownership interest in the tangible personal property.

(2) Direct sales organization--A person that typically sells taxable items directly to purchasers through independent salespersons and not in or through a place of business. The term "independent salespersons" includes, but is not limited to, distributors, representatives, and consultants. Items are typically sold person-to-person through in-home product demonstrations, parties, catalogs, and

one-on-one selling. The term includes, but is not limited to, direct marketing and multilevel marketing organizations.

(3) Disaster- or emergency-related work--Repairing, renovating, installing, building, rendering services, or performing other business activities relating to the repair or replacement of equipment and property, including buildings, offices, structures, lines, poles, and pipes, that:

(A) is owned or used by or for:

(i) a telecommunications provider or cable operator;

(ii) communications networks;

(iii) electric generation;

(iv) electric transmissions and distribution systems;

(v) natural gas and natural gas liquids gathering, processing, and storage, transmission and distribution systems; or

(vi) water pipelines and related support facilities, equipment, and property that serve multiple persons; and

(B) is damaged, impaired, or destroyed by a declared state disaster or emergency.

(4) Engaged in business--Except as provided in subparagraphs (L) and (M) of this paragraph, a[A] seller is engaged in business in this state if the seller:

(A) maintains, occupies, or uses in this state, permanently or temporarily, directly or indirectly, or through an agent by whatever name called, a kiosk, office, distribution center, sales or sample room or place, warehouse or storage place, or any other physical location where business is conducted;

(B) has any representative, agent, salesperson, canvasser, or solicitor who operates under the authority of the seller to conduct business in this state, including selling, delivering, or taking orders for taxable items;

(C) promotes a flea market, arts and crafts show, trade day, festival, or other event in this state that involves sales of taxable items;

(D) uses independent salespersons, who may include, but are not limited to, distributors, representatives, or consultants, in this state to make direct sales of taxable items;

(E) derives receipts from the sale, lease, or rental of tangible personal property that is located in this state or owns or uses tangible personal property that is located in this state, including a computer server or software to solicit orders for taxable items, unless the seller uses the server or software as a purchaser of an Internet hosting service;

(F) allows a franchisee or licensee to operate under its trade name in this state if the franchisee or licensee is required to collect sales or use tax in this state;

(G) otherwise conducts business in this state[through employees, agents, or independent contractors];

(H) is formed, organized, or incorporated under the laws of this state and the seller's internal affairs are governed by the laws of this state, notwithstanding the fact that the seller may not be otherwise engaged in business in this state pursuant to this section; [or]

(I) engages in regular or systematic solicitation of sales of taxable items in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio, or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting sales of taxable items;

(J) solicits orders for taxable items by mail or through other media including the Internet or other media that may be developed in the future; or

(K)[(I)] holds a substantial ownership interest in, or is owned in whole or substantial part by, another person who:

(i) maintains a distribution center, warehouse, or similar location in this state and delivers property sold by the seller to purchasers in this state;

(ii) maintains a location in this state from which business is conducted, sells the same or substantially similar lines of products as the seller, and sells such products under a business name that is the same or substantially similar to the business name of the seller; or

(iii) maintains a location in this state from which business is conducted if the person with the location in this state uses its facilities or employees:

(I) to advertise, promote, or facilitate sales by the seller to purchasers; or

(II) to otherwise perform any activity on behalf of the seller that is intended to establish or maintain a marketplace for the seller in this state, including receiving or exchanging returned merchandise.

(iv) For purposes of this subparagraph only, "ownership" includes direct ownership, common ownership, or indirect ownership through a parent entity, subsidiary, or affiliate, and "substantial," with respect to ownership, constitutes an interest, whether direct or indirect, of at least 50% of:

(I) the total combined voting power of all classes of stock of a corporation;

(II) the beneficial ownership interest in the voting stock of the corporation;

(III) the current beneficial interest in the corpus or income of a trust;

(IV) the total membership interest of a limited liability company;

(V) the beneficial ownership interest in the membership interest of a limited liability company; or

(VI) the profits or capital interest of any other entity, including, but not limited to, a partnership, joint venture, or association.

(L)[(J)] Effective June 16, 2015, a seller is not engaged in business in this state if the seller is an out-of-state business entity whose physical presence in this state is solely from the entity's performance of disaster- or emergency-related work during a disaster response period. An out-of-state business entity that remains in this state after a disaster response period has ended is engaged in business in this state if the entity conducts any of the activities described in subparagraphs (A) – (K)[(I)] of this paragraph.

(i) For purposes of this subparagraph only, an "affiliate" is a member of a combined group as that term is described by Tax Code, §171.1014 (Combined Reporting; Affiliated Group Engaged in Unitary Business).

(ii) For purposes of this subparagraph only, a "disaster response period" is:

(I) the period that:

(-a-) begins on the 10th day before the date of the earliest event establishing a declared state of disaster or emergency by the issuance of an executive order or proclamation by the governor or a declaration of the president of the United States; and

(-b-) ends on the earlier of the 120th day after the start date or the 60th day after the ending date of the disaster or emergency period established by the executive order or proclamation or declaration, or on a later date as determined by an executive order or proclamation by the governor; or

(II) the period that, with respect to an out-of-state business entity:

(-a-) begins on the date that the out-of-state business entity enters this state in good faith under a mutual assistance agreement and in anticipation of a state of disaster or emergency, regardless of whether a state of disaster or emergency is actually declared; and

(-b-) ends on the earlier of the date that the work is concluded or the seventh day after the out-of-state business entity enters this state.

(iii) For purposes of this subparagraph only, a "mutual assistance agreement" is an agreement to which one or more business entities are parties and under which a public utility, municipally owned utility, or joint agency owning, operating, or owning and operating critical infrastructure used for electric generation, transmission, or distribution in this state may request that an out-of-state business entity perform work in this state in anticipation of a state of disaster or emergency.

(iv) For purposes of this subparagraph only, an "out-of-state business entity" is a foreign entity that:

(I) enters this state at the request of, or is an affiliate of, an in-state business entity and performs work in Texas under a mutual assistance agreement; or

(II) enters this state at the request of an in-state business entity, under a mutual assistance agreement, or is an affiliate of an in-state business entity and enters this state at the request of an in-state business entity, the state of Texas, or a political subdivision of this state to perform disaster- or emergency-related work in this state during the disaster response period, and:

(-a-) except with respect to the performance of disaster- or emergency-related work, has no physical presence in this state and is not authorized to transact business in this state immediately before a disaster response period; and

(-b-) is not registered with the secretary of state to transact business in this state, does not file a tax report with this state, or a political subdivision of this state, and is not engaged in business[does not have a nexus] with this state for the purpose of taxation during the tax year immediately preceding the disaster response period.

(M) A broadcaster, printer, outdoor advertising firm, advertising distributor, or publisher that broadcasts, publishes, displays, or distributes paid commercial advertising in this state that is intended to be disseminated primarily to consumers located in this state and is only secondarily disseminated to bordering jurisdictions, including advertising appearing exclusively in a Texas edition or section of a national publication, is considered for purposes of this subsection to be the agent of the person placing the advertisement and is not considered to be engaged in business in this state as a result of those acts.

(5) Internet hosting service--The provision to an unrelated user of access over the Internet to computer services using property that is owned or leased and managed by the service provider and on which the unrelated user may store or process the user's own data or use software that is owned, licensed, or leased by the unrelated user or service provider. The term does not include telecommunications services as defined in §3.344 of this title (relating to Telecommunications Services).

(6) Itinerant vendor--A seller who does not operate a place of business in this state and who travels to various locations in this state to solicit sales.

(7) Kiosk--A small, stand-alone area or structure that:

(A) is used solely to display merchandise or to submit orders for taxable items from a data entry device, or both;

(B) is located entirely within a location that is a place of business of another seller, such as a department store or shopping mall; and

(C) at which taxable items are not available for immediate delivery to a purchaser.

(8) Nexus--Sufficient contact with or activity within this state, as determined by state and federal law, to require a person to collect and remit sales and use tax. A person does not have nexus in this state if the person has no connection with this state except the possession of a certificate of authority to do business in this state issued by the Texas Secretary of State.]

(8)(9) Permit holder--A person to whom the comptroller has issued a sales and use tax permit. The term includes permitted sellers as well as permitted purchasers, but does not include a person who does not hold a Texas sales and use tax permit or whose sales and use tax permit is suspended, pursuant to subsection (l) of this section, or cancelled, pursuant to subsection (n) of this section, or a person who has not received a sales and use tax permit due to an unsigned or incomplete application.

(9)(10) Place of business--This term has the meaning given in §3.334 of this title (relating to Local Sales and Use Taxes).

(10)(11) Seller--Every retailer, wholesaler, distributor, manufacturer, or any other person who sells, leases, rents, or transfers ownership of tangible personal property or performs taxable services [in this state]for consideration. Seller is further defined as follows:

(A) A promoter of a flea market, trade day, or other event that involves the sales of taxable items is a seller responsible for the collection and remittance of the sales tax that dealers, salespersons, or individuals collect at such events, unless those persons hold active sales and use tax permits that the comptroller has issued.

(B) A direct sales organization that is engaged in business in this state is a seller responsible for the collection and remittance of the sales and use tax collected by the organization's independent salespersons.

(C) Pawnbrokers, warehouses[storagemen], mechanics, artisans, or others who sell property to enforce a lien are sellers responsible for the collection and remittance of sales and use tax on the sale of such tangible personal property.

(D) A person engaged in business in this state who sells, leases, or rents tangible personal property owned by another person by means of a consignment sale is a seller responsible for the collection and remittance of the sales tax on the consignment sale.

(E) An auctioneer who owns tangible personal property or to whom tangible personal property has been consigned is a seller responsible for the collection and remittance of the sales and use tax on tangible personal property sold at auction. For more information, auctioneers should refer to §3.311 of this title (relating to Auctioneers, Brokers, and Factors).

(11)[(12)] Taxable item--Tangible personal property and taxable services. Except as otherwise provided in Tax Code, Chapter 151, the sale or use of a taxable item in electronic form instead of on physical media does not alter the item's tax status.

(A) Tangible personal property means property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner, including a computer program as defined in §3.308 of this title (relating to Computers--Hardware, Computer Programs[Software], Services, and Sales) and a telephone prepaid calling card, as defined in §3.344 of this title.

(B) Taxable services are those identified in Tax Code, §151.0101 (Taxable Services).

(b) Who must have a sales and use tax permit.

(1) Sellers. Except as provided in paragraph (2) of this subsection, each[Each] seller who is engaged in business in this state, including itinerant vendors, persons who own or operate a kiosk, and sellers operating temporarily in this state, must apply to the comptroller and obtain a sales and use tax permit for each place of business operated in this state and a single permit for its out-of-state places of business.

(2) Safe harbor for remote sellers.

(A) Remote seller defined. For purposes of this paragraph, a remote seller is a seller engaged in business in this state whose only activity in the state is described in subsection (a)(4)(I) or (J) of this section.

(B) Safe harbor. The comptroller will not enforce the permit requirement of this subsection or the collection obligation of subsection (d) of this section on a remote seller whose total revenue in the preceding twelve calendar months is less than \$500,000. If a remote seller's total revenue exceeds that amount, the remote seller shall obtain a permit and begin collecting as provided in subparagraph (E) of this paragraph and shall continue to collect unless it terminates its collection responsibility under subparagraph (F) of this paragraph.

(C) Total revenue defined. For purposes of this paragraph, total revenue means the gross revenue from the sale of tangible personal property and services for storage, use, or other consumption in this state recognized under the accounting method used by the seller, and includes separately stated handling, transportation, installation, and other similar fees collected by the seller in connection with the sale.

(D) Consolidation of total revenue. The comptroller may consolidate the total revenue of sellers engaged in conduct that circumvents the safe harbor amount in subparagraph (B) of this paragraph.

(E) When to obtain a permit and begin collecting. No later than the first day of the fourth month after the month in which a remote seller exceeds the safe harbor amount in subparagraph (B) of this paragraph, the remote seller shall obtain a permit and begin collecting sales and use taxes. For example, if during the period of July 1, 2018, through June 30, 2019, a remote seller's total revenue exceeds the safe harbor amount in subparagraph (B) of this paragraph, the remote seller shall obtain a permit by October 1, 2019, and begin collecting sales and use taxes no later than October 1, 2019.

(F) Terminating collection responsibility. A remote seller that is required to be permitted may terminate its collection obligation under this paragraph after twelve consecutive months in which the remote seller's total revenue for the preceding twelve calendar months is below the safe harbor amount in subparagraph (B) of this paragraph. In order to terminate its collection obligation, a remote seller must submit a form prescribed by the comptroller. Thereafter, the remote seller shall resume collection on the first day of the month following any twelve calendar months in which the remote seller's total revenue exceeds the safe harbor amount in subparagraph (B) of this paragraph.

(G) Records retention required. A remote seller that terminates its collection obligation shall comply with the record retention requirement of §3.281 of this title (relating to Records Required; Information Required) and §3.282 of this title (relating to Auditing Taxpayer Records). The remote seller must maintain sufficient documentation to verify the date on which the remote seller terminated its collection obligation under paragraph (F) of this paragraph or ceases to engage in business in this state.

(H) Transition rule. Remote sellers will be subject to the permit requirement of this subsection and the collection obligation of subsection (d) of this section beginning on October 1, 2019. The initial twelve calendar months for determining a remote seller's total revenue will be July 1, 2018, through June 30, 2019. If a remote seller's total revenue during that period exceeds the safe harbor amount in subparagraph (B) of this paragraph, the seller shall obtain a permit by October 1, 2019, and begin collecting sales and use taxes no later than October 1, 2019.

[(2) Out-of-state sellers. Each out-of-state seller who has nexus with this state and is engaged in business in this state must apply to the comptroller and obtain a sales and use tax permit. An out-of-state seller is responsible for the collection and remittance of sales and use tax on all sales of taxable items made in this state until the seller ceases to have nexus with this state. An out-of-state seller ceases to have nexus with this state when the seller no longer has, and no longer intends to engage in activities that would create, nexus with this state. For example, an out-of-state seller who enters the state each year to participate in an annual trade show does not cease to have nexus with this state between one trade show and the next. An out-of-state seller who discontinues the product line that it marketed and sold in this state, and who does not anticipate entering the state to solicit new business, has ceased to have nexus with this state. An out-of-state seller is required to maintain, for at least four years after the out-of-state seller ceases to have nexus with this state, all records required by subsection (j) of this section, including sufficient documentation to verify the date on which the out-of-state seller ceased to have nexus with this state. For more information regarding reporting periods, refer to subsection (g) of this section.]

(3) A seller that no longer has, and no longer intends to engage in business and make sales of taxable items in the state shall submit a form prescribed by the comptroller to terminate its permit and must obtain a new permit before it commences sales of taxable items in the state thereafter. The seller must maintain sufficient documentation to verify the date on which the seller ceases to engage in business in this state.

(4)[(3)] Direct sales organizations. Independent salespersons of direct sales organizations are not required to hold sales and use tax permits to sell taxable items for direct sales organizations. Direct sales organizations engaged in business in this state are sellers responsible for holding sales and use tax permits and for the collection and remittance of sales and use tax on all sales of taxable items by their independent salespersons. See subsection (d)(3) of this section for more information about the collection and remittance of sales and use tax by direct sales organizations.

(5)[(4)] Non-permitted purchasers. Persons who are not required to have a sales and use tax permit or who do not have a direct payment permit are still responsible for paying to the comptroller sales or use tax due on purchases of taxable items from sellers who do not collect and remit tax. See subsection (g)(9) of this section for return and payment information and §3.346 of this title (relating to Use Tax).

(6)[(5)] Non-permitted sellers. Failure to obtain a sales and use tax permit does not relieve a seller required by this section or other applicable law to have a sales and use tax permit from the obligation to properly collect and remit sales and use taxes. Sellers whose sales and use tax permits are suspended, pursuant to subsection (l) of this section, or cancelled, pursuant to subsection (n) of this section, and sellers who have not received sales and use tax permits due to unsigned or incomplete applications, are still responsible for properly collecting and remitting sales and use taxes. See subsection (g) of this section for return and payment information.

(c) Obtaining a sales and use tax permit.

(1) A seller must complete an application that the comptroller furnishes and must return that application to the comptroller, together with bond or other security that may be required by §3.327 of this title (relating to Taxpayer's Bond or Other Security). A seller who files an electronic

application furnished by the comptroller is deemed to have signed the application and is not required to print and mail a signed application to the comptroller. A separate sales and use tax permit under the same taxpayer account number is issued to the applicant for each place of business. Sales and use tax permits are issued without charge.

(2) Each seller must apply for a sales and use tax permit. An individual or sole proprietor must be at least 18 years of age unless the comptroller allows an exception from the age requirement. The sales and use tax permit cannot be transferred from one seller to another. The sales and use tax permit is valid only for the seller to whom it was issued and for the transaction of business only at the address that is shown on the sales and use tax permit. If a seller operates two or more types of business at the same location, then only one sales and use tax permit is required.

(3) The sales and use tax permit must be conspicuously displayed at the place of business for which it is issued. A permit holder that has traveling sales persons who operate from a central office needs only one sales and use tax permit, which must be displayed at that office.

(4) All sales and use tax permits of the seller will have the same taxpayer account number; however, each place of business will have a different outlet number. The outlet numbers assigned may not necessarily correspond to the number of business locations operated by the seller.

(d) Collecting sales and use tax due.

(1) Bracket system.

(A) Each seller must collect sales or use tax on each separate retail sale in accordance with the statutory bracket system in Tax Code, §151.053 (Sales Tax Brackets). The practice of rounding off the amount of sales or use tax that is due on the sale of a taxable item is prohibited. Copies of

the bracket system should be displayed in each place of business so both the seller and the purchaser may easily use them.

(B) The sales and use tax applies to each total sale, not to each item of each sale. For example, if two items are purchased at the same time and each item is sold for \$.07, then the seller must collect the tax on the total sum of \$.14. Sales and use tax must be reported and remitted to the comptroller as provided by Tax Code, §151.410 (Method of Reporting Sales Tax; General Rule). When sales and use tax is collected properly under the bracket system, the seller is not required to remit any amount that is collected in excess of the sales and use tax due. Conversely, when the sales and use tax collected under the bracket system is less than the sales and use tax due on the seller's total receipts, the seller is required to remit sales and use tax on the total receipts even though the seller did not collect sales and use tax from the purchasers.

(2) Sales and use tax due is debt of the purchaser; document requirements.

(A) The sales and use tax due is a debt of the purchaser to the seller until collected. Unpaid sales or use tax is recoverable by the seller in the same manner as the original sales price of the taxable item itself, if unpaid, would be recoverable. The comptroller may proceed against either the seller or purchaser, or against both, until all applicable tax, penalty, and interest due has been paid.

(B) The amount of sales and use tax due must be separately stated on the bill, contract, or invoice to the purchaser or there must be a written statement to the purchaser that the stated price includes sales or use tax. Contracts, bills, or invoices that merely state that "all taxes" are included are not specific enough to relieve either party to the transaction of its sales and use tax responsibilities. The total amount that is shown on such documents is presumed to be the taxable item's sales price, without sales and use tax included. The seller or purchaser may overcome the presumption by using the seller's records to show that sales or use tax was included in the sales price. Sellers located

outside of Texas must identify the tax as Texas sales or use tax on their bill, contract, or invoice to the purchaser. If the out-of-state seller does not identify the tax as Texas sales or use tax at the time of the transaction, the seller is presumed not to have collected Texas sales or use tax. Either the seller or the purchaser may overcome the presumption by submitting evidence that clearly demonstrates that the Texas sales or use tax was remitted to the comptroller.

(3) Direct sales organizations. A direct sales organization is responsible for the collection and remittance of the sales and use tax on all sales of taxable items in this state by the independent salespersons who sell the organization's product or service as explained in this paragraph. See subsection (b)(4)[(3)] of this section for information about sales and use tax permits required to be held by direct sales organizations.

(A) If an independent salesperson purchases a taxable item from a direct sales organization after taking the purchaser's order, then the direct sales organization must collect from the independent salesperson, and remit to the comptroller, the sales and use tax on the actual sales price for which the independent salesperson sold the taxable item to the purchaser.

(B) If an independent salesperson purchases a taxable item from a direct sales organization before the purchaser's order is taken, then the direct sales organization must collect from the independent salesperson, and remit to the comptroller, the sales and use tax based on the organization's suggested retail sales price of the taxable item.

(C) Taxable items that are sold to an independent salesperson for the salesperson's use are taxed based on the actual sales price for which the item was sold to the salesperson at the tax rate in effect for the salesperson's location.

(D) Incentives, including rewards, gifts, and prizes.

(i) Direct sales organizations owe sales and use tax on the cost of all taxable items used as incentives that are transferred to a recipient in this state, including purchasers, independent salespersons, and persons who host a direct sales event.

(ii) Direct sales organizations must collect sales or use tax on the total amount of consideration received in exchange for taxable items, including items purchased with hostess points or similar forms of compensation paid to a person for hosting a direct sales event and items that are earned by the host based on the volume of purchases. The redemption of reward points in exchange for taxable items is subject to sales tax under Tax Code, §151.005(2) ("Sale" or "Purchase"). See also §3.283 of this title (relating to Bartering Clubs and Exchanges).

(4) Printers. A printer is a seller of printed materials and is required to collect sales and use tax on sales of those materials in this state. A printer who is engaged in business in this state, however, is not required to collect the sales and use tax if:

(A) the printed materials are produced by a web offset or rotogravure printing process;

(B) the printer delivers those materials to a fulfillment house or to the United States Postal Service for distribution to third parties who are located both inside and outside of this state; and

(C) the purchaser issues a properly completed exemption certificate that contains the statement that the printed materials are for multistate use and the purchaser agrees to pay to this state all the sales and use taxes that are or may become due to the state on the taxable items that are purchased under the exemption certificate. See subsection (g)(4) of this section for additional reporting requirements.

(5) Fundraisers by exempt entities. Regardless of the contractual terms between a for-profit entity and a non-profit exempt entity relating to the sale of taxable items, other than amusement services, as part of any fundraiser, the for-profit entity will be considered the seller of the items under Tax Code, §151.024 (Persons Who May be Regarded as Retailers), must be a permit holder, and is responsible for the proper collection and remittance of any sales or use tax due. The exempt entity and its representatives will be considered as representatives of the for-profit entity. The for-profit entity may advertise in a sales catalog or state on each invoice that sales and use tax is included, as provided under paragraph (2) of this subsection, or may require that the sales and use tax be calculated and collected by its representatives based on the sales price of each taxable item. Fundraisers conducted by exempt entities in this manner do not qualify as a tax-free sale day. For more information on exempt entities and tax-free sales days, see §3.322 of this title (relating to Exempt Organizations). For more information on amusement services, see §3.298 of this title (relating to Amusement Services).

(6) Local sales and use tax. A seller who is required to be permitted in this state[has nexus with this state and is engaged in business in this state] is required to properly collect and remit local sales and use tax even if no sales and use tax permit is required at the location where taxable items are sold. For more information on the proper collection of local taxes, see §3.334 of this title.

(e) Sales and use tax returns and remitting tax due.

(1) Forms prescribed by the comptroller. Sales and use tax returns must be filed on forms that the comptroller prescribes. The fact that a person does not receive or obtain the correct forms from the comptroller does not relieve a person of the responsibility to file a sales and use tax return and to remit the required sales and use tax.

(2) Signatures. Sales and use tax returns must be signed by the person who is required to file the sales and use tax return or by the person's duly authorized agent, but need not be verified by oath.

(3) Permit holders.

(A) Each permit holder is required to file a sales and use tax return for each reporting period, even if the permit holder has no sales or use tax to report for the reporting period.

(B) Each permit holder must remit sales and use tax on all receipts from sales or purchases of nonexempt taxable items, less any applicable discounts as provided by subsection (h) of this section.

(C) Each permit holder shall file a single sales and use tax return together with the tax payment for all businesses that operate under the same taxpayer number. The sales and use tax return for each reporting period must reflect the total sales, taxable sales, and taxable purchases for each outlet.

(D) Consolidated reporting by affiliated entities is not allowed. Each legal entity engaged in business in this state is responsible for filing a separate sales and use tax return.

(4) Electronic returns and remittances. Certain persons must file returns and transfer payments electronically as provided by Tax Code, §111.0625 (Electronic Transfer of Certain Payments) and §111.0626 (Electronic Filing of Certain Reports). For more information, see §3.9 of this title (relating to Electronic Filing of Returns and Reports; Electronic Transfer of Certain Payments by Certain Taxpayers).

(f) Due dates.

(1) General rule. Sales and use tax returns and remittances are due no later than the 20th day of the month following each reporting period end date unless otherwise provided by this section. Sales and use tax returns and remittances that are due on Saturdays, Sundays, or legal holidays may be submitted on the next business day.

(A) Sales and use tax returns submitted by mail must be postmarked on or before the due date to be considered timely.

(B) Sales and use tax returns filed electronically must be completed and submitted by 11:59 p.m., central time, on the due date to be considered timely.

(2) Due dates for payments made using an electronic funds transfer method approved by the comptroller are provided at §3.9(c) of this title.

(3) Extensions for persons located in an area designated in a state of disaster or state of emergency declaration. The comptroller may grant an extension of not more than 90 days to make or file a sales and use tax return or pay sales and use tax that is due by a person located in an area designated in an executive order or proclamation issued by the governor declaring a state of disaster or state of emergency, or an area that the president of the United States declares a major disaster or emergency, if the comptroller finds the person to be a victim of the disaster or emergency. The person owing the sales and use tax may file a written request for an extension at any time before the expiration of 90 days after the original due date. If an extension is granted, interest on the unpaid tax does not begin to accrue until the day after the day on which the extension expires, and penalties are assessed and determined as though the last day of the extension were the original due date.

(g) Reporting periods.

(1) Quarterly filers. Permit holders who have less than \$1,500 in state sales and use tax per quarter to report may file sales and use tax returns quarterly. The quarterly reporting periods end on March 31, June 30, September 30, and December 31.

(2) Yearly filers. Permit holders who have less than \$1,000 in state sales and use tax to report during a calendar year may file yearly sales and use tax returns upon authorization from the comptroller.

(A) Authorization to file sales and use tax returns on a yearly basis is conditioned upon the correct and timely filing of prior returns.

(B) Authorization to file sales and use tax returns on a yearly basis will be denied if a permit holder's liability exceeded \$1,000 in the prior calendar year.

(C) A permit holder who files on a yearly basis without authorization is liable for applicable penalty and interest on any previously unreported quarter.

(D) Authority to file on a yearly basis is automatically revoked if a permit holder's state sales and use tax liability is greater than \$1,000 during a calendar year. The permit holder must file a sales and use tax return for that month or quarter, depending on the amount, in which the sales and use tax payment or liability is greater than \$1,000. On that return, the permit holder must report all sales and use taxes that are collected and all accrued liability for the year, and must file monthly or quarterly, as appropriate, thereafter for as long as the yearly sales and use tax liability is greater than \$1,000.

(E) Once each year, the comptroller reviews all accounts to confirm yearly filing status and to authorize permit holders who meet the filing requirements to file yearly sales and use tax returns.

(F) Yearly filers must report on a calendar year basis. The sales and use tax return and payment are due on or before January 20 of the next calendar year.

(3) Monthly filers. Permit holders who have \$1,500 or more in state sales and use tax per quarter to report must file monthly sales and use tax returns except for permit holders who prepay the sales and use tax as provided in subsection (h) of this section.

(4) Printers. A printer who is not required to collect sales and use tax on the sale of printed materials because the transaction meets the requirements of subsection (d)(4) of this section must file a quarterly special use tax report, Form 01-157, Texas Special Use Tax Report for Printers, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form, with the comptroller on or before the last day of the month following the quarter. The report must contain the name and address of each purchaser with the sales price and date of each sale. The printer is still required to file sales and use tax returns to report and remit sales and use taxes that the printer collected from purchasers on transactions that do not meet the requirements of subsection (d)(4) of this section.

(5) Local sales and use tax. Each permit holder who is required to collect, report, and remit a city, county, special purpose district, or metropolitan transit authority/city transit department sales and use tax must report the amount subject to local sales and use tax on the state sales and use tax return described in subsection (e) of this section.

(6) State agencies. Sales and use taxes must be deposited with the comptroller within the time period specified by law for deposit of state funds. State agencies may file sales and use tax returns

through electronic reporting methods provided by the comptroller, which allocates total sales and use tax deposits by state and local taxing authority. State agencies that deposit sales and use taxes according to Accounting Policy Statement Number 8 are not required to file a separate sales and use tax return, but must manually allocate total sales and use tax deposits by state and local taxing authority and deposit those amounts in accordance with the policy. Paragraphs (1) - (3) of this subsection do not apply to agencies following Accounting Policy Statement Number 8, as a fully completed deposit request voucher is deemed to be the sales and use tax return filed by these agencies.[State agencies that deposit sales and use taxes directly with the comptroller's office according to Accounting Policy Statement Number 8 are not required to file a separate sales and use tax return. A fully completed deposit request voucher is deemed to be the sales and use tax return filed by these agencies. Paragraphs (1) - (3) of this subsection do not apply to these state agencies. Sales and use taxes must be deposited with the comptroller's office within the time period otherwise specified by law for deposit of state funds.]

(7) Refunds on exports. Sellers who refund sales tax on exports based on customs broker certifications should refer to §3.360 of this title (relating to Customs Brokers).

(8) Direct payment permit holders. Yearly and quarterly filing requirements, as discussed in this subsection, and prepayment discounts and discounts for timely filing, as discussed in subsection (h) of this section, do not apply to holders of direct payment permits. See §3.288 of this title (relating to Direct Payment Procedures and Qualifications).

(9) Non-permitted purchasers. A person who does not hold a sales and use tax permit or a direct payment permit must pay sales or use tax that is due on purchases of taxable items when the sales

or use tax is not collected by the seller. The sales or use tax is to be remitted on comptroller Form 01-156, Texas[Occasional Sales and] Use Tax Return, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form.

(A) A non-permitted purchaser who owes less than \$1000 in sales and use tax on all purchases made during a calendar year on which sales and use tax was not collected by the seller must file the return on or before the 20th of January following the year in which the purchases were made.

(B) A non-permitted purchaser who owes \$1000 or more in sales and use tax on all purchases made during a calendar year on which sales and use tax was not collected by the seller must file a return and remit sales and use taxes due on or before the 20th of the month following the month when the \$1000 threshold is reached and thereafter file monthly returns and make sales and use tax payments on all purchases on which sales and use tax is due.

(h) Discounts; prepayments; penalties and interest relating to filing sales and use tax returns.

(1) Discounts. Unless otherwise provided by this section, each permit holder may claim a discount for timely filing a sales and use tax return and paying the taxes due as reimbursement for the expense of collecting and remitting the sales and use tax. The discount is equal to 0.5% of the amount of sales and use tax due and may be claimed on the return for each reporting period and is computed on the amount timely reported and paid with that return.

(2) Prepayments. Prepayments may be made by permit holders who file monthly or quarterly sales and use tax returns. The amount of the prepayment must be a reasonable estimate of the state and local sales and use tax liability for the entire reporting period. "Reasonable estimate" means at least 90% of the total amount due or an amount equal to the actual net tax liability due and paid for the same reporting period of the immediately preceding year.

(A) A permit holder who makes a timely prepayment based upon a reasonable estimate of sales and use tax liability may retain an additional discount of 1.25% of the amount due.

(B) The monthly prepayment is due on or before the 15th day of the month for which the prepayment is made.

(C) The quarterly prepayment is due on or before the 15th day of the second month of the quarter for which the sales and use tax is due.

(D) A permit holder who makes a timely prepayment must file a sales and use tax return showing the actual liability and remit any amount due in excess of the prepayment on or before the 20th day of the month that follows the quarter or month for which a prepayment was made. If there is an additional amount due, the permit holder may retain the 0.5% reimbursement on the additional amount due, provided that both the sales and use tax return and the additional amount due are timely filed. If the prepayment exceeded the actual liability, the permit holder will be mailed an overpayment notice or refund warrant.

(E) Remittances that are less than a reasonable estimate, as described by this paragraph, are not regarded as prepayments and the 1.25% discount will not be allowed. If the permit holder owes more than \$1,500 in a calendar quarter, the permit holder is regarded as a monthly filer. All monthly sales and use tax returns that are not filed because of the invalid prepayment are subject to late filing penalty and interest.

(3) Penalties and interest.

(A) If a person does not file a sales and use tax return together with payment on or before the due date, the person forfeits all discounts and incurs a mandatory 5.0% penalty. After the first 30 days delinquency, an additional mandatory penalty of 5.0% is assessed against the person, and after the first 60 days delinquency, interest begins to accrue at the prime rate, as published in the Wall Street Journal on the first business day of each calendar year, plus 1.0%. For taxes that are due on or before December 31, 1999, interest is assessed at the rate of 12% annually.

(B) A person who fails to timely file a sales and use tax return when due shall pay an additional penalty of \$50. The penalty is due regardless of whether the person subsequently files the sales and use tax return or whether no taxes are due for the reporting period.

(i) Reports of alcoholic beverage sales to retailers. Each brewer, manufacturer, wholesaler, winery, distributor, or package store local distributor shall electronically file a report of alcoholic beverage sales to retailers, as that term is defined in §3.9(e)(2) of this title, as provided in that section.

(j) Records required for comptroller inspection. See §3.281 of this title[(relating to Records Required; Information Required)] and §3.282 of this title[(relating to Auditing Taxpayer Records)].

(k) Resale and exemption certificates. See §3.285 of this title (relating to Resale Certificate; Sales for Resale) and §3.287 of this title (relating to Exemption Certificates).

(l) Suspension of sales and use tax permit.

(1) If a permit holder fails to comply with any provision of Tax Code, Title 2, or with the rules issued by the comptroller under those statutes, the comptroller may suspend the permit holder's sales and use tax permit or permits.

(2) Before a permit holder's sales and use tax permit is suspended, the permit holder is entitled to a hearing before the comptroller to show cause why the permit should not be suspended. The comptroller shall give the permit holder at least 20 days notice. The notice will include a statement of the matters asserted and procedures to be followed. See §1.5(d) of this title (relating to Initiation of a Hearing)], which shall be in accordance with the requirements of §1.14 of this title (relating to Notice of Setting for Certain Cigarette, Cigar, and Tobacco Tax Cases)].

(3) After a sales and use tax permit has been suspended, a new permit will not be issued to the same person until the person has posted sufficient security and satisfied the comptroller that the person will comply with both the provisions of the law and the comptroller's rules and regulations.

(m) Refusal to issue sales and use tax permit. The comptroller is required by Tax Code, §111.0046 (Permit or License), to refuse to issue any sales and use tax permit to a person who:

(1) is not permitted or licensed as required by law for a different tax or activity administered by the comptroller; or

(2) is currently delinquent in the payment of any tax or fee collected by the comptroller.

(n) Cancellation of sales and use tax permits with no reported business activity.

(1) Permit cancellation due to abandonment. Any holder of a sales and use tax permit who reported no business activity in the previous calendar year is deemed to have abandoned the sales and use tax permit, and the comptroller may cancel the sales and use tax permit. "No business activity" means zero total sales, zero taxable sales, and zero taxable purchases.

(2) Re-application. If a sales and use tax permit is cancelled, the person may reapply and obtain a new sales and use tax permit upon request, provided the issuance is not prohibited by subsection (m) of this section, or by Tax Code, §111.0046.

(o) Liability related to acquisition of a business or assets of a business. Tax Code, §111.020 (Tax Collection on Termination of Business) and §111.024 (Liability in Fraudulent Transfers), provides that the comptroller may impose a tax liability on a person who acquires a business or the assets of a business. See §3.7 of this title (relating to Successor Liability; and Fraudulent Transfers): Liability Incurred by Purchase [or Acquisition]of a Business).

(p) Criminal penalties. Tax Code, Chapter 151, imposes criminal penalties for certain prohibited activities or for failure to comply with certain provisions under the law. See §3.305 of this title (relating to Criminal Offenses and Penalties).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on

WILLIAM HAMNER
General Counsel
Comptroller of Public Accounts