

The amendment affects Texas Education Code, §56.355.

§23.36. *Repayment of Education Loans.*

Eligible education loans shall be repaid under the following conditions:

(1) the annual repayment(s) shall be in one disbursement made payable to the holder(s) of the loan(s) or co-payable to the teacher and the holder(s) of the loan(s);

(2) the Commissioner of Higher Education or his or her designee shall determine the maximum annual repayment amount in each fiscal year, taking into consideration the amount of available funding and the number of eligible applicants; and

(3) the teacher shall not receive loan repayment assistance for more than five years.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Texas Higher Education Coordinating Board

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For further information, please call: (512) 427-6104



TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.285

The Comptroller of Public Accounts proposes amendments to §3.285, concerning resale certificate; sales for resale. The section is being amended to reflect the changes made to Tax Code, §151.006 ("Sale for Resale") by House Bill 3319, 80th Legislature, 2007; Senate Bill 1, 82nd Legislature, First Called Session, 2011; Senate Bill 755, 84th Legislature, 2015; and Senate Bill 1396, 84th Legislature, 2015, which added new Tax Code, Chapter 163, relating to sales and use taxation of aircraft. Additional changes are made to incorporate guidance regarding sales for resale provided by the Texas Supreme Court in *Combs v. Health Care Services Corp.*, 401 S.W.3d 623 (Tex. 2013); to memorialize longstanding comptroller policies that are not addressed in the existing section; and to make various other revisions to improve the clarity of the section.

Subsection (a) is amended to define several additional terms which are used but not defined in the current section.

Paragraph (1) is added to define the term "equipment." The definition is based upon the definition of the term provided in §3.300 of this title (relating to Manufacturing; Custom Manufacturing; Fabricating; Processing).

Paragraph (2) is added to define the term "federal government." The definition is consistent with the definition of that term provided in §3.322 of this title (relating to Exempt Organizations).

Paragraph (3) is added to define the term "integral part," which appears in current §3.285 but is not defined therein. The proposed definition is consistent with existing comptroller policy as expressed in Comptroller's Decisions, including Comptroller's Decision Nos. 28,441 (1992) and 36,743 (1998), and the existing service-related sections of this title, including §3.330 (concerning Data Processing Services) and §3.354 (concerning Debt Collection Services).

Paragraph (4) is added to define the term "internet hosting service" as defined in §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules).

Paragraph (5) is added to define the term "machinery" as defined in §3.300 of this title.

Former paragraph (1), defining the term "Mexico," is renumbered as paragraph (6). Former paragraph (2), defining the term "Sale for resale," is deleted. A revised definition of the term incorporating recent legislative changes is provided in subsection (b).

Paragraph (7) is added to define the term "purchaser" to conform with Tax Code, §151.054(b) (Gross Receipts Presumed Subject to Tax) and §151.104(b) (Sale for Storage, Use, or Consumption Presumed), both of which require the purchaser to be "in the business of selling, leasing, or renting taxable items."

Paragraph (8) is added to define the term "seller" as defined in §3.286 of this title.

Paragraph (9) restates the Tax Code's definition of the term "taxable item." See Tax Code, §151.010 (Taxable Item).

Paragraph (10) is added to define the term "tax-free inventory." This definition is based upon Tax Code, §151.011(e) ("Use" and "Storage"), which establishes that the keeping or retaining of tangible personal property "for sale in the regular course of business" does not constitute a taxable use of that tangible personal property, as well as longstanding comptroller policy established in decisions such as Comptroller's Decision Nos. 31,088 (1995) and 32,194 (1998).

Former paragraph (3), defining the term "United States," is renumbered as paragraph (11).

New subsection (b) is added to define the term "sale for resale." Subsequent subsections are relettered accordingly. Paragraph (1)(A) implements Tax Code, §151.006(a)(1). The language is derived from subsection (a)(2)(A) and (D) of the current section. Additional language is added to require that the purchaser acquire the taxable item for the purpose of selling it "with or as a taxable item." This phrase was added to Tax Code, §151.006(a)(1) by Senate Bill 1, 82nd Legislature, First Called Session, 2011. This legislative change affirms the comptroller's longstanding policy that a sale for resale may only be made to a purchaser engaged in the business of selling, leasing, or renting taxable items who intends to resell the tangible personal property or taxable service acquired with or as a taxable item--a transaction that is subject to sales and use tax as provided in Tax Code, Chapter 151. Additional language incorporates the limitation set out in Tax Code, §151.058(a) (Property Used to Provide Taxable Services and Sales Price of Taxable Services) and Tax Code, §151.302(c) (Sales for Resale).

Subsection (b)(1)(B) addresses the purchase of tangible personal property for the sole purpose of leasing or renting the tangible personal property to another person. This subsection follows the language of current subsection (a)(2)(B) and Tax Code, §151.006(a)(2). A reference is added to §3.294 of this title (relating to Rental and Lease of Tangible Personal Property).

Subsection (b)(1)(C) implements Tax Code, §151.006(a)(3) and restates subsection (a)(2)(C) of the current section with non-substantive changes.

Subsection (b)(1)(D) implements Tax Code, §151.006(a)(4) and restates subsection (a)(2)(E) of the current section with non-substantive changes.

Subsection (b)(1)(E) restates Tax Code, §151.006(a)(5), which was added to the Tax Code by Senate Bill 1, 82nd Legislature, First Called Session, 2011.

Subsection (b)(1)(F) implements House Bill 3319, 80th Legislature, 2007, which added Tax Code, §151.006(b), revising the definition of a sale for resale to include the sale of a wireless voice communication device to be transferred as an integral part of a taxable service if payment for the service is a condition for receiving the wireless voice communication device.

Subsection (b)(1)(G) implements Senate Bill 755, 84th Legislature, 2015, effective June 10, 2015, which added Tax Code, §151.006(d) to modify the definition of "sale for resale" to include the sale of a computer program to a provider of Internet hosting services who sells a license to use the program to an unrelated user of Internet hosting services, provided that the reseller does not retain a right to use the program under that license.

Subsection (b)(2) states the regular course of business requirement of Tax Code, §§151.054(b), 151.104(b), 151.151, 151.152, and 151.154.

Subsection (b)(3) adds new language which incorporates the limitation set out in Tax Code, §151.302(c) that wrapping, packing, and packaging supplies cannot be purchased for resale.

Subsection (b)(4) provides that an item sold to a purchaser for use in performing a service that is not taxed under Tax Code, Chapter 151, is not a sale for resale, except in certain specified circumstances. This provision implements Senate Bill 1, 82nd Legislature, First Called Session, 2011, which enacted Tax Code, §151.006(a)(5) and (c). This provision restates the language in Tax Code, §151.006(c) without change.

Subsection (b)(5) memorializes longstanding comptroller policy that the sale of tangible personal property to a purchaser who acquires the tangible personal property for the purpose of reselling or transferring the tangible personal property outside of the United States or Mexico does not fall within the definition of a sale for resale. See, for example, Comptroller's Decision No. 29,343 (1993), which states, "Sales of goods destined for another country must qualify for exemption under §151.307 rather than §151.302." The paragraph refers purchasers buying taxable items for sale outside of the United States and Mexico to §3.323 of this title (relating to Imports and Exports).

Subsection (b)(6) states the care, custody, and control requirement of Tax Code, §151.302(b) and explains that the care, custody, and control of tangible personal property is transferred to the purchaser of the service when the purchaser has primary possession of the tangible personal property. This provision implements *Sharp v. Clearview Cable TV, Inc.*, 960 S.W.2d 424 (Tex. App.--Austin 1998, pet. denied).

Subparagraph (A) explains when a purchaser has primary possession of tangible personal property. Subparagraph (B) explains that a purchaser may also have primary possession if the purchaser or the purchaser's designee has physical possession of the tangible personal property and completely consumes it. Subparagraph (C) addresses when a purchaser has primary possession of a computer program. The standard established in this subparagraph is based upon §151.006(d), which addresses purchases of software by providers of Internet hosting services.

Subsection (b)(7) adds new language which incorporates the limitation set out in Tax Code, §151.058(a), which states that a taxable service provider is the consumer of the machinery and equipment used to perform the taxable service. As the consumer of the machinery and equipment, the service provider cannot purchase the machinery and equipment tax-free as a sale for resale, unless the service provider transfers primary possession of the machinery and equipment to a customer. Subsection (b)(7) further provides that a taxable service provider is not using the machinery and equipment in performing the service if the person has transferred primary possession of the machinery or equipment to the purchaser of the service.

Finally, subsection (b)(8) refers taxpayers to §3.280 of this title (relating to Aircraft) for information relating to the "sale for resale" of aircraft to reflect the changes resulting from new Tax Code, Chapter 163, relating to sales and use taxation of aircraft, enacted by Senate Bill 1396, 84th Legislature, 2015.

Subsection (c), formerly subsection (b), is retitled from "Acceptance of resale certificate" to "Issuance and acceptance of resale certificates" because the subsection includes information related to a purchaser's issuance of a resale certificate as well as a seller's acceptance of a certificate. New paragraph (2) addresses when a purchaser may issue a resale certificate instead of paying sales or use tax on the purchase of a taxable item. Paragraph (2)(A) memorializes current comptroller policy that a purchaser must hold a Texas sales and use tax permit to issue a resale certificate. Refer to Comptroller's Decision No. 18,660 (1986). This requirement is consistent with the requirement that a sale for resale be made to a purchaser engaged in the business of selling taxable items. Paragraph (2)(A) also restates the information currently found in subsection (b)(3) and adds language to memorialize the comptroller's longstanding policy that a sale for resale includes the sale of tangible personal property for the purpose of maintaining the tangible personal property in a tax-free inventory. This is based on Tax Code, §151.011(e) ("Use" and "Storage") and Comptroller's Decision Nos. 31,088 (1995) and 32,194 (1998).

New paragraph (2)(B) adds language providing that a purchaser may not issue a resale certificate for items that the purchaser knows, at the time of purchase, will be used or consumed by the purchaser. This provision, stated differently, is found in current subsection (f), relating to the improper use of a resale certificate.

The remainder of the information currently provided in subsection (b)(1) of the current section is reorganized under new subsection (c)(3)(A). Current subsection (b)(2) is deleted and new subsection (c)(3)(B) is proposed to explain the good faith safe harbor in greater detail. This subparagraph memorializes longstanding comptroller policy regarding the elements required for such good faith acceptance. See STAR Accession No. 9105L1110D06 (May 20, 1991) and Comptroller's Decision Nos. 35,834 (1997), 48,258 (2009), and 105,608 (2012). This subparagraph also revises the statement in the current section that, in order to accept a resale certificate in good faith, a

seller must lack actual knowledge that the sale is not a sale for resale and must take responsibility to notice the type business generally engaged in by the purchaser as shown on the resale certificate. For clarity and readability, these requirements are now described as follows: "the seller does not know, and does not have reason to know, that the sale is not a sale for resale." See Comptroller's Decision No. 48,258 (2009) ("The Comptroller has construed her rule to require 'no reason or basis for the seller to suspect that the certificate is invalid.' It reflects the 'should have known' concept.").

Current subsection (b)(3) is deleted, as the information contained in that subsection is now provided in subsection (c)(2)(A). Current subsection (b)(4) is relettered as subsection (c)(3)(C) and the title to referenced §3.286 is deleted.

New subsection (c)(3)(D) is added to alert sellers of the related record-keeping requirements by cross-referencing §3.281 of this title (relating to Records Required; Information Required) and providing that resale certificates are subject to the record-keeping requirements set out in that section.

Current subsection (c), relating to blanket resale certificates, is renumbered as subsection (c)(4). The subsection is also amended to delete the word "only," so that the section now reads, "a purchaser who purchases items for resale." This amendment is made to reflect current comptroller practice.

New subsection (c)(5) memorializes prior comptroller guidance, not reflected in the current section, that a broker or dealer who only buys and sells raw commodities, such as natural gas, raw cotton bales, or raw aluminum, in bulk is not required to hold a sales tax permit and is not required to issue a resale certificate when making such purchases. A broker or dealer may issue a resale certificate, if requested by the seller, even if the broker or dealer does not hold a tax permit. See, for example, STAR Accession Nos. 8909L0957A03 (September 29, 1989), 9608300L (August 15, 1996), and 200710196L (October 18, 2007).

Subsection (d), which addresses resale certificates issued by retailers outside Texas, is amended to add paragraphs (4) - (6) and to make minor revisions that are intended to make the subsection easier to read, not to change the meaning of the subsection. New paragraph (4) is added to advise taxpayers that retailers not located inside the United States or Mexico may issue resale certificates to purchase items for resale outside Texas but within the United States or Mexico. This provision is consistent with the definition of sale for resale set out in Tax Code, §151.006 and subsection (b) of this section. New paragraph (5) provides a cross-reference to §3.286 of this title to assist resellers located outside of Texas in obtaining information about their obligations under Texas law. New paragraph (6) memorializes existing comptroller policy that a purchaser may not issue a resale certificate to purchase items for resale outside the United States or Mexico. Such sales do not fall within the definition of a sale for resale provided in subsection (b). Purchasers are directed to §3.323 of this title. Other minor changes to the wording of subsection (d) are made for readability and are not intended to change the meaning of the subsection.

Subsection (e) is amended by changing the heading from "Improper use of items purchased for resale" to "Taxable use of items purchased for resale; items removed from tax-free inventory." The information currently provided in this subsection is reorganized, additional headings are added, and the words "tangible personal property" and "tangible personal property or a taxable service" have been replaced, when appropriate, with the

defined term "taxable item." Information regarding property used outside the state is moved to new paragraph (4). Paragraphs (2) through (4) of the current subsection are relettered as paragraph (1)(A), (B), and (C). Paragraphs (5) and (6) are renumbered accordingly. Other minor changes to the wording are intended to make the subsection easier to read, and are not intended to alter the meaning of the subsection.

New subsection (e)(4) addresses items that are used outside of Texas. New subsection (e)(5) memorializes comptroller policy, which is not reflected in the current section, that tax is not due on tangible personal property that is totally destroyed or permanently disposed of in a manner other than for use or sale in the normal course of business. See Comptroller's Decision No. 28,901 (1993) and STAR Accession No. 9606L1417A08 (June 10, 1996).

Subsection (f), concerning the improper use of a resale certificate, is amended by adding "criminal offenses" to the heading and replacing language relating to the specific criminal penalties with a reference to §3.305 of this title (relating to Criminal Offenses and Penalties).

Subsection (g), concerning the content of a resale certificate, is amended to delete the use of the term "permanent" in connection with a permit number issued by the comptroller, as the term is no longer used. Subsection (g)(2) is further amended to delete a reference to 11 digit Texas tax permit numbers beginning with the number 2, as such numbers no longer exist.

Subsection (h), concerning the proper form of a resale certificate, is amended to reflect that the comptroller will no longer adopt by reference the Texas Sales and Use Tax Resale Certificate or a Border States Uniform Sale for Resale Certificate; to update instructions for taxpayers to obtain a copy of a Texas resale certificate; and to advise taxpayers that a seller may accept the Uniform Sales and Use Tax Certificate-Multijurisdiction as a resale certificate, but may not accept the Streamlined Sales and Use Tax Agreement Certificate of Exemption.

Tom Currah, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by conforming the rule to current statutes and agency policy. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposals 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 amendments are proposed under Tax Code, §111.002 (Comptroller's Rules, Compliance, Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendments implement Tax Code, §§151.006, ("Sale for Resale"), 151.010 (Taxable Item), 151.011 ("Use" and "Storage"), 151.025 (Records Required to be Kept), 151.054 (Gross

Receipts Presumed Subject to Tax), 151.058 (Property Used to Provide Taxable Services and Sales Price of Taxable Services), 151.104 (Sale for Storage, Use, or Consumption Presumed), 151.151 (Resale Certificate), 151.152 (Resale Certificate: Form), 151.154 (Resale Certificate: Liability of Purchaser), and 151.302 (Sales for Resale).

§3.285. Resale Certificate; Sales for Resale [(Tax Code, §§151.006, 151.054, 151.151, 151.152, 151.153, 151.154, 151.302, 151.707)].

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

(1) Equipment--Any apparatus, device, or simple machine used to perform a service.

(2) Federal government--The government of the United States of America and its unincorporated agencies and instrumentalities, including all parts of the executive, legislative, and judicial branches and all independent boards, commissions, and agencies of the United States government unless otherwise designated in this section.

(3) Integral part--An essential element without which the whole would not be complete. One taxable item is an integral part of a second item if the taxable item is necessary, as opposed to desirable, for the completion of the second item, and if the second item could not be provided as a whole without the taxable item.

(4) 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).

(5) Machinery--All power-operated machines.

(6) ~~[(4)]~~ Mexico--Within the geographical limits of the United Mexican States.

~~[(2) Sale for resale--A sale of:]~~

~~[(A) tangible personal property to a purchaser who acquires the property for the purpose of reselling it in the United States or Mexico in the normal course of business either in the form or condition in which it is purchased, or as an attachment to, or as an integral part of other tangible personal property;]~~

~~[(B) tangible personal property to a purchaser who acquires the property for the sole purpose of leasing or renting it in the United States or Mexico to another person, but not if incidental to the leasing or renting of real estate;]~~

~~[(C) tangible personal property to a purchaser who acquires the property for the purpose of transferring care, custody, and control of the property to a customer in the United States or Mexico as an integral part of a taxable service;]~~

~~[(D) a taxable service to a purchaser who obtains the service for the purpose of reselling it in the United States or Mexico in the normal course of business as an integral part of a taxable service; or]~~

~~[(E) a taxable service performed on tangible personal property that is held for sale by the purchaser of the taxable service.]~~

(7) Purchaser--A person who is in the business of selling, leasing, or renting taxable items.

(8) 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. Specific types of sellers, such as direct sales organizations, pawnbrokers, and auctioneers, are further defined in §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules).

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

(10) Tax-free inventory--A stock of tangible personal property purchased tax-free for resale, whether from out-of-state or by issuing a properly completed resale certificate, by a purchaser who, at the time of purchase:

(A) holds a valid Texas sales and use tax permit;

(B) makes sales of taxable items in the regular course of business; and

(C) does not know whether the tangible personal property will be resold in the normal course of business or used in the performance of a service.

(11) ~~[(3)]~~ United States--Within the geographical limits of the United States of America or within the territories and possessions of the United States of America.

(b) Sale for resale.

(1) Except as provided in paragraphs (3) - (6) of this subsection, each of the following is a sale for resale:

(A) the sale of a taxable item to a purchaser who acquires the taxable item for the purpose of reselling it with or as a taxable item in the United States or Mexico in the normal course of business:

(i) in the form or condition in which it is acquired;

or
(ii) as an attachment to or as an integral part of another taxable item;

(B) the sale of tangible personal property to a purchaser who acquires the property for the sole purpose of leasing or renting it in the United States or Mexico in the normal course of business to another person, but not if incidental to the leasing or renting of real estate, as described in §3.294(k) of this title (relating to Rental and Lease of Tangible Personal Property);

(C) the sale of tangible personal property to a purchaser who acquires the property for the purpose of transferring the property to a customer in the United States or Mexico as an integral part of a taxable service;

(D) the sale of a taxable service performed on tangible personal property that the purchaser of the service holds for sale, lease, or rental;

(E) the sale of tangible personal property to a purchaser who acquires the tangible personal property for the purpose of transferring it as an integral part of performing a contract, or a subcontract of a contract, with the federal government only if the purchaser:

(i) allocates and bills to the contract the cost of the tangible personal property as a direct or indirect cost; and

(ii) transfers title to the tangible personal property to the federal government under the contract or subcontract and applicable federal acquisition regulations;

(F) the sale of a wireless voice communication device, such as a cellular telephone, to a purchaser who acquires the device for the purpose of transferring the device as an integral part of a taxable telecommunication service when the purchase of the service is a condition for receiving the device, regardless of whether there is a separate charge for the device or whether the purchaser is the provider of the taxable service. See §3.344 of this title (relating to Telecommunications Services) for information about telecommunication services); and

(G) the sale of a computer program to a provider of Internet hosting services who acquires the computer program from an unrelated vendor for the purpose of selling the right to use the computer program to an unrelated user of the provider's Internet hosting services in the normal course of business and in the form or condition in which the provider acquired the computer program, without regard to whether the provider transfers care, custody, and control of the computer program to the unrelated user. The performance by the provider of routine maintenance of the computer program that is recommended or required by the unrelated vendor of the computer program does not affect the application of this subsection. For purposes of this subsection, the purchase of the computer program by the provider qualifies as a sale for resale only if:

(i) the provider offers the unrelated user a selection of computer programs that are available to the public for purchase directly from an unrelated vendor;

(ii) the provider executes a written contract with the unrelated user that specifies the name of the computer program sold to the unrelated user and includes a charge to the unrelated user for computing hardware;

(iii) the unrelated user purchases the right to use the computer program from the provider through the acquisition of a license; and

(iv) the provider does not retain the right to use the computer program under that license.

(2) To qualify as a sale for resale, the taxable item must be acquired for the purpose of selling, leasing, or renting it in the regular course of business or for the purpose of transferring it as an integral part of a taxable service performed in the regular course of business.

(3) A sale for resale does not include the sale of internal or external wrapping, packing, or packaging supplies to a purchaser who acquires the supplies for use in wrapping, packing, or packaging tangible personal property, or in the performance of a service, for the purpose of furthering the sale of the tangible personal property or the service. See §3.314 of this title (relating to Wrapping, Packing, Packaging Supplies, Containers, Labels, Tags, Export Packers, and Stevedoring Materials and Supplies).

(4) A sale for resale does not include the sale of tangible personal property or a taxable service to a purchaser who acquires the property or service for the purpose of performing a service that is not taxed under this chapter, regardless of whether title transfers to the service provider's customer, unless the tangible personal property or taxable service is purchased for the purpose of reselling it to the United States in a contract, or a subcontract of a contract, with any branch of the Department of Defense, Department of Homeland Security, Department of Energy, National Aeronautics and Space Administration, Central Intelligence Agency, National Security Agency, National Oceanic and Atmospheric Administration, or National Reconnaissance Office

to the extent allocated and billed to the contract with the federal government.

(5) A sale for resale does not include the sale of a taxable item to a purchaser who acquires the taxable item for the purpose of reselling or transferring the taxable item outside the territorial limits of the United States or Mexico. Refer to §3.323 of this title (relating to Imports and Exports).

(6) Tangible personal property used to perform a taxable service is not considered resold unless the care, custody, and control of the tangible personal property is transferred to the purchaser of the service. The care, custody, and control of tangible personal property is transferred to the purchaser of the service when the purchaser has primary possession of the tangible personal property.

(A) Except as provided in subparagraphs (B) and (C) of this paragraph, to have primary possession, the purchaser or the purchaser's designee must have:

(i) physical possession of the tangible personal property off of the premises of the service provider;

(ii) a contractual duty to care for the tangible personal property. At a minimum, the contract must prohibit the purchaser from damaging the tangible personal property or impose liability if the purchaser damages the tangible personal property; and

(iii) a superior right to use the tangible personal property for a contractually specified period of time.

(B) The purchaser may have primary possession of tangible personal property if the purchaser or the purchaser's designee has physical possession of the tangible personal property and directly consumes the tangible personal property during the provision of the taxable service. Property is considered consumed if it can no longer be used for its intended purpose in the normal course of business or is not retained or reusable by the service provider.

(C) A purchaser may have primary possession of a computer program if the purchaser acquires a license to use the computer program from the service provider and the service provider does not retain the right to use the computer program under that license.

(7) A person performing services taxable under Tax Code, Chapter 151 is the consumer of machinery and equipment used by the person in performing the services. A person performing a taxable service is not using the machinery or equipment in performing the service if the person has transferred primary possession, as that term is described in paragraph (6) of this subsection, of the machinery or equipment to the purchaser of the service.

(8) Aircraft. See §3.280 of this title (relating to Aircraft) for the definition of "sale for resale" as it applies to aircraft.

(c) [(b)] Issuance and acceptance [~~Acceptance~~] of resale certificates [~~certificate~~].

(1) A sale for resale as defined in subsection (b) [(a)(2)] of this section is not taxable.

(2) Who may issue a resale certificate.

(A) In general, a purchaser who holds a Texas sales and use tax permit may issue a resale certificate instead of paying tax at the time of purchase of a taxable item that the purchaser intends to resell, lease, rent, or transfer as an integral part of a taxable service in the normal course of business. A purchaser may also issue a resale certificate instead of paying tax at the time of purchase of a taxable item that the purchaser intends to maintain in a valid tax-free inventory, if the purchaser does not know at the time of purchase whether the item

will be resold or used in the performance of a service. The purchaser must collect, report, and remit tax to the comptroller as required by §3.286 of this title when the purchaser sells, leases, or rents taxable items.

(B) A purchaser may not issue a resale certificate in lieu of paying tax on the purchase of a taxable item, including tangible personal property to maintain in a valid tax-free inventory, that the purchaser knows, at the time of purchase, will be used or consumed by the purchaser.

(3) Accepting a resale certificate.

(A) All gross receipts of a seller are subject to sales or use tax unless a properly completed resale or exemption certificate is accepted by the seller. A properly completed resale certificate contains the information required by subsection (g) of this section. See also §3.287 of this title (relating to Exemption Certificates).

(B) A seller does not owe tax on a sale, lease, or rental of a taxable item if the seller accepts a properly completed resale certificate in good faith. A resale certificate is deemed to be accepted in good faith if:

(i) the resale certificate is accepted at or before the time of the transaction;

(ii) the resale certificate is properly completed, meaning that all of the information required by subsection (g) of this section is legible; and

(iii) the seller does not know, and does not have reason to know, that the sale is not a sale for resale. It is the seller's responsibility to be familiar with Texas sales tax law as it applies to the seller's business and to take notice of the information provided by the purchaser on the resale certificate. For example, a jewelry seller should know that a resale certificate from a landscaping service is invalid because a landscaping service is not in the business of reselling jewelry.

{(2) A sale is exempt if the resale certificate is accepted in good faith and the seller lacks actual knowledge that the sale is not a sale for resale. It is the seller's responsibility to take notice of the type business generally engaged in by the purchaser as shown on the resale certificate.}

{(3) [A resale certificate may be signed by a purchaser at the time of purchase if the purchaser intends to resell, lease, or rent the taxable item or transfer it as an integral part of a taxable service in the regular course of business.]}

(C) [(4)] The seller should obtain a properly executed resale certificate at the time the taxable transaction occurs. All certificates obtained on or after the date the comptroller's auditor actually begins work on the audit at the seller's place of business or on the seller's records after the entrance conference are subject to verification. All incomplete certificates will be disallowed regardless of when they were obtained. The seller has 60 days from the date written notice is received by the seller from the comptroller in which to deliver the certificates to the comptroller. Written notice shall be given by the comptroller upon the filing of a petition for redetermination or claim for refund. For the purposes of this section, written notice given by mail is presumed to have been received by the seller within three business days from the date of deposit in the custody of the United States Postal Service. The seller may overcome the presumption by submitting proof from the United States Postal Service or by other competent evidence showing a later delivery date. Any certificates delivered to the comptroller during the 60-day period will be subject to independent verification by the comptroller before any deductions will be allowed. Certificates delivered after the 60-day period will not be accepted and the deduction will

not be granted. See §3.282 of this title (relating to Auditing Taxpayer Records) and §3.286 of this title [~~(relating to Seller's and Purchaser's Responsibilities)~~].

(D) Resale certificates are subject to the provisions of §3.281 of this title (relating to Records Required; Information Required). A seller is required to keep resale certificates for a minimum of four years from the date on which the sale is made and throughout any period in which any tax, penalty, or interest may be assessed, collected, or refunded by the comptroller or in which an administrative hearing or judicial proceeding is pending.

(4) [(e)] Blanket resale certificate. A purchaser may issue to a seller a blanket resale certificate describing the general nature of the taxable items purchased for resale [may be issued to a seller by a purchaser who purchases only items for resale]. The seller may rely on the blanket certificate until it is revoked in writing.

(5) Bulk commodities. A resale certificate is not required to be issued by a broker or dealer that buys and sells only raw commodities in bulk, such as natural gas, raw cotton bales, or raw aluminum, from producers or other commodity brokers or dealers solely for resale in the normal course of business. However, if requested by the seller, a properly completed resale certificate, absent a sales tax permit number, may be issued by the purchaser of such raw commodities even if the purchaser does not hold a sales and use tax permit.

(d) Retailers outside Texas.

(1) A seller in Texas may accept a resale certificate in lieu of tax from a [bona fide] retailer located outside Texas who purchases taxable items for resale in the United States or Mexico in a transaction that is a sale for resale, as defined in subsection (b) [(a)] of this section.

(2) The resale certificate must show the signature and address of the purchaser, the date of the sale, the state in which the purchaser intends to resell the item, the sales tax permit number or the registration number assigned to the purchaser by the state in which the purchaser is authorized to do business or a statement that the purchaser is not required to be permitted in the state in which the purchaser is authorized to do business. Mexican retailers who purchase taxable items for resale must show their Federal Taxpayers Registry (RFC) identification number for Mexico on the resale certificate and give a copy of their Mexican Registration Form to the Texas seller. An invoice describing the taxable item purchased and showing the exact street address or office address from which the taxable item will be resold must be attached to the resale certificate. The resale certificate must also state the type business engaged in by the purchaser and the type items sold in the regular course of business. A resale certificate may be accepted from the [bona fide] out-of-state retailer even if the Texas retailer ships or delivers the taxable item directly to a recipient located inside Texas.

(3) The Texas retailer is not responsible for determining whether the out-of-state retailer is required to hold a Texas sales and use tax permit or to enter a Texas permit number on the resale certificate.

(4) Foreign purchasers, other than purchasers from Mexico, who are not engaged in business in Texas and do not hold a Texas sales and use tax permit, may issue a properly completed resale certificate, as described in paragraph (2) of this subsection, in lieu of paying tax on the purchase of taxable items for sale in the normal course of business when the items are delivered or shipped to a location outside of Texas but within the United States or Mexico.

(5) An out-of-state or foreign purchaser who acquires goods or services from a Texas seller for resale in Texas should refer to §3.286 of this title for information on their responsibilities.

(6) A purchaser, whether from Texas, Mexico, or another foreign country, may not issue a resale certificate for taxable items purchased for resale outside the United States or Mexico. See subsection (b)(5) of this section. Purchasers who purchase taxable items in Texas for sale outside the United States or Mexico must comply with the requirements of §3.323 of this title to claim exemption from the Texas sales tax.

(e) Taxable [~~Improper~~] use of items purchased for resale; items removed from tax-free inventory.

(1) Divergent use; paying tax on fair market rental value. When a taxable item [~~tangible personal property~~] is removed from a valid tax-free inventory for use in Texas, Texas sales tax is due. [~~Texas sales tax is not due on tangible personal property removed from a valid tax-free inventory for use outside the state.~~] When a taxable item [~~tangible personal property or a taxable service~~] purchased under a resale certificate is used for any purpose other than retention, demonstration, or display while holding it for sale, lease, or rental, or for transfer as an integral part of a taxable service, the purchaser is liable for sales tax based on the value of the taxable item [~~tangible personal property or taxable service~~] for the period of time used.

(A) [(2)] The value of tangible personal property is the fair market rental value of the tangible personal property. The fair market rental value is the amount that a purchaser would pay on the open market to rent or lease the tangible personal property for use. If tangible personal property has no fair market rental value, sales tax is due based upon the original purchase price.

(B) [(3)] The value of a taxable service is the fair market value of the taxable service. The fair market value is the amount that a purchaser would pay on the open market to obtain that taxable service. If a taxable service has no fair market value, sales tax is due based upon the original purchase price.

(C) [(4)] At any time the person using a taxable item [~~tangible personal property or a taxable service~~] may stop paying tax on the value of the taxable item [~~tangible personal property or the value of a taxable service~~] and instead pay sales tax on the original purchase price. When the person elects to pay sales tax on the original purchase price, credit will not be allowed for taxes previously paid based on value.

(2) [(5)] Donation of taxable item. A purchaser who gives a valid resale certificate instead of paying tax on the purchase of a taxable item [~~for tangible personal property or a taxable service~~] is not liable for sales tax on the taxable item when [~~tangible personal property or a taxable service~~] donated to an organization exempt under Tax Code, §151.309 (Governmental Entities), or §151.310(a)(1) and (2) (Religious, Educational, And Public Service Organizations), provided the purchaser did [~~does~~] not make a taxable use of the donated taxable item prior to its donation [~~tangible personal property or the donated taxable service~~].

(3) [(6)] Use of taxable item as a trade-in. A purchaser who gives a valid resale certificate instead of paying tax on [~~for~~] the purchase of a taxable item is liable for sales tax if the purchaser uses the taxable item as a trade-in on the purchase of another taxable item. Tax must be paid on the original purchase price of the taxable item used as a trade-in.

(4) Use of taxable item outside Texas. Texas sales or use tax is not due on a taxable item removed from a valid tax-free inventory for use by the purchaser outside the state.

(5) Lost or destroyed inventory. Texas sales or use tax is not due on tangible personal property purchased under a valid resale certificate that is totally destroyed or permanently disposed of by the

purchaser in a manner other than for use or sale in the normal course of business. For example, documented theft, casualty damage or loss, or disposal in a landfill. This does not apply to consumable items that are completely used up or destroyed by the purchaser in the course of performing a service in Texas.

(f) Improper use of a resale certificate; criminal offenses.

(1) A person may not issue a resale certificate at the time of purchase for a taxable item if the person knows the item is being purchased for a specific taxable use.

(2) Any person who intentionally or knowingly makes, presents, uses, or alters a resale certificate for the purpose of evading Texas sales or use tax is guilty of a criminal offense. For more information, see §3.305 of this title (relating to Criminal Offenses and Penalties).

~~[(A) If the tax evaded by the invalid certificate is less than \$20, the offense is a Class C misdemeanor.]~~

~~[(B) If the tax evaded by the invalid certificate is \$20 or more but less than \$200, the offense is a Class B misdemeanor.]~~

~~[(C) If the tax evaded by the invalid certificate is \$200 or more but less than \$750, the offense is a Class A misdemeanor.]~~

~~[(D) If the tax evaded by the invalid certificate is \$750 or more but less than \$20,000, the offense is a felony of the third degree.]~~

~~[(E) If the tax evaded by the invalid certificate is \$20,000 or more, the offense is a felony of the second degree.]~~

(g) Content of a resale certificate. A resale certificate must show:

(1) the name and address of the purchaser;

(2) the number from the sales tax permit held by the purchaser or a statement that an application for a permit is pending before the comptroller with the date the application for a permit was made. If the application is pending, the resale certificate is valid for only 60 days, after which time the resale certificate must be renewed to show the ~~permanent~~ permit number. If the purchaser holds a Texas sales and use tax permit, the number must consist of 11 digits that begin with a 1~~, 2,~~ or 3. Federal employer's identification (FEI) numbers or social security numbers are not acceptable evidence of resale. See also subsection (d)(2) of this section regarding registration numbers for retailers outside Texas;

(3) a description of the taxable items generally sold, leased, or rented by the purchaser in the regular course of business and a description of the taxable items to be purchased tax free by use of the certificate. The item to be purchased may be generally described on the certificate or itemized in an order or invoice attached to the certificate;

(4) the signature of the purchaser or an electronic form of the purchaser's signature authorized by the comptroller and the date; and

(5) the name and address of the seller.

(h) Form of a resale certificate. A resale certificate must be substantially either in the form of a Texas Sales and Use Tax Resale Certificate or a Border States Uniform Sale for Resale Certificate. ~~[The comptroller adopts both certificates by reference.]~~ Copies of both certificates are available at comptroller.texas.gov ~~[for inspection at the office of the Texas Register]~~ or may be obtained ~~[from the Comptroller of Public Accounts, Tax Policy Division, 111 W. 6th Street, Austin, Texas 78701-2913. Copies may also be requested]~~ by calling our toll-free

number 1-800-252-5555. A seller may also accept as a resale certificate the Uniform Sales and Use Tax Certificate-Multijurisdiction promulgated by the Multistate Tax Commission and available online at <http://www.mtc.gov>. The Streamlined Sales and Use Tax Agreement Certificate of Exemption may not be accepted as a resale certificate. [In Austin, call 463-4600. (From a Telecommunication Device for the Deaf (TDD) only, call 1-800-248-4099 toll free. In Austin, the local TDD number is 463-4621-)]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 1, 2017.

TRD-201701748

Lita Gonzalez

General Counsel

Comptroller of Public Accounts

Earliest possible date of adoption: June 11, 2017

For further information, please call: (512) 475-0387



SUBCHAPTER GG. INSURANCE TAX

34 TAC §3.834

The Comptroller of Public Accounts proposes amendments to §3.834 concerning volunteer fire department assistance fund assessment. This section is being amended to implement House Bill 7, 84th Legislature, 2015. Effective for fiscal years beginning on or after September 1, 2015, the calculation of the total amount of the Volunteer Fire Department Assistance Fund Assessment is amended to take into account appropriations for contributions to the Texas Emergency Services Retirement System under Government Code, §614.104(d) (Fund). In addition, effective for the fiscal years beginning on September 1, 2015 and September 1, 2016 only, the calculation of the total amount of the Volunteer Fire Department Assistance Fund Assessment is amended to take into account appropriations to the Texas A&M Forest Service for grants to volunteer fire departments.

Subsection (a) is amended to add a definition of the term "state fiscal year." This term appears in Insurance Code, Chapter 2007 (Assessment for Rural Fire Protection), but is not defined. The subsequent paragraph is renumbered accordingly.

Subsection (b) is reformatted and revised to include additional information. The subsection is reorganized into four paragraphs. Paragraph (1) addresses the total amount of the assessment for state fiscal years beginning September 1, 2013 and September 1, 2014 only. The term "fiscal year" is replaced with the defined term "state fiscal year." Paragraph (2) addresses the total amount of the assessment for state fiscal years beginning September 1, 2015 and September 1, 2016 only. This paragraph implements Sections 24 and 57 of House Bill 7, which reduce the calculation of the Volunteer Fire Department Assistance Fund Assessment for these years based upon appropriations to the Texas Emergency Services Retirement System and the Texas A&M Forest Service. Paragraph (3) addresses the total amount of the assessment for state fiscal years beginning on or after September 1, 2017. This paragraph implements Section 24 of House Bill 7. Paragraph (4) contains information from current subsection (b) relating to data used to calculate each insurer's portion of the assessment. The existing language is amended to incorporate the specific method for determining this amount

based on the graphic that is currently attached to the rule. The graphic is no longer necessary and is deleted.

In addition, amendments are made throughout the section to include the titles of the statutes referenced.

Tom Currah, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by conforming the rule to current statutory provisions. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

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 amendment is proposed under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture) and §111.0022 (Application To Other Laws Administered By Comptroller), which provide the comptroller with authority to prescribe, adopt, and enforce rules relating to the administration and enforcement provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

This section is being amended to implement House Bill 7, 84th Legislature, 2015, Sections 24 and 57 and Insurance Code, Chapter 2007.

§3.834. *Volunteer Fire Department Assistance Fund Assessment.*

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

(1) Annual statement--A comprehensive statement, in the format promulgated by the National Association of Insurance Commissioners (NAIC), of an insurer's financial condition, business operations, and activities, required to be filed with state insurance departments and the NAIC.

(2) Insurer--An insurance entity that is authorized to engage in business in this state, including a stock company, mutual, farm mutual, county mutual, Lloyd's plan, or reciprocal or interinsurance exchange, as of the assessment date.

(3) Net direct premium--The total gross direct premium written by an insurer, as reported to the Texas Department of Insurance and reflected on the insurer's NAIC Annual Statement State Page Exhibit for:

- (A) policies of:
- (i) homeowner's insurance;
 - (ii) fire insurance;
 - (iii) farm and ranch owner's insurance;
 - (iv) private passenger automobile physical damage insurance; and
 - (v) commercial automobile physical damage insurance; and