TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 1. CENTRAL ADMINISTRATION

SUBCHAPTER C. ADMINISTRATION

34 TAC §1.200

The Comptroller of Public Accounts proposes new §1.200, concerning state employee family leave pool. The new section will be located in Chapter 1, new Subchapter C, Administration.

The new section implements House Bill 2063, 87th Legislature, R.S., 2021, which enacted Government Code, §§661.021 - 661.028 (State Employee Family Leave Pool).

Proposed §1.200 creates a process for the Comptroller's State Employee Family Leave Pool. Subsection (a) outlines the establishment and purpose, which is to provide eligible employees more flexibility in bonding with and caring for children during a child's first year following birth, adoption, or foster placement, and caring for a seriously ill family member or the employee, including pandemic-related illnesses or complications caused by a pandemic. Subsection (b) outlines guidelines for the program, provides for designation of a pool administrator, describes the responsibilities of the pool administrator, and provides that the operation of the family leave pool shall be consistent with Government Code, Chapter 661, Subchapter A-1.

Brad Reynolds, Chief Revenue Estimator, has determined that during the first five years that the proposed new rule is in effect, the rule: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rule's applicability; and will not positively or adversely affect this state's economy.

Mr. Reynolds also has determined that the proposed new rule would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed new rule would benefit the public by implementing the rule regarding state employee family leave pool. There would be no significant anticipated economic cost to the public. The proposed new rule would have no fiscal impact on small businesses or rural communities.

Comments on the proposal may be submitted to Yadira Gibson, Senior Legal Counsel to Human Resources, Texas Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711 or to the email address: Yadi.Gibson@cpa.texas.gov. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

This new section is proposed under Government Code, §661.022(c), which requires the governing body of each state agency to adopt rules and prescribe procedures relating to the operation of the state employee family leave pool.

The new section implements Government Code, §§661.021 - 661.028 (State Employee Family Leave Pool)

§1.200.State Employee Family Leave Pool.

(a) Establishment and Purpose. In accordance with Government Code, Chapter 661, Subchapter A-1 (State Employee Family Leave Pool), the comptroller establishes the Employee Family Leave Pool program to provide eligible employees more flexibility in bonding with and caring for children during a child's first year following birth, adoption, or foster placement, and caring for a seriously ill family member or the employee, including pandemic-related illnesses or complications caused by a pandemic.

(b) Guidelines.

(1) Under the Employee Family Leave Pool, an agency employee may voluntarily transfer sick leave or vacation leave earned by the employee to the family leave pool, and employees may apply for leave time under the family leave pool.

(2) The comptroller or deputy comptroller shall designate a pool administrator.

(3) The pool administrator will develop procedures and forms as necessary for the administration of the family leave pool.

(4) Operation of the family leave pool shall be consistent with Government Code, Chapter 661, Subchapter A-1.

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 September 12, 2022.

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Victoria North

General Counsel for Fiscal and Agency Affairs

Comptroller of Public Accounts

Earliest possible date of adoption: October 23, 2022

For further information, please call: (512) 475-2220

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.334

The Comptroller of Public Accounts proposes amendments to §3.334, concerning local sales and use taxes.

Background.

The comptroller's local sales and use tax rulemaking process began in 2018, when several issues arose regarding local sales and use tax. The United States Supreme Court issued a decision in South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (June 21, 2018), which appeared to expand the states' authority to impose use tax collection obligations on remote sellers. In addition, as the comptroller began to receive inquiries regarding the legitimacy of various local tax revenue-sharing schemes, it became apparent that the comptroller's existing rule was inadequate to explain the comptroller's interpretation of the local sales and use tax consummation statutes.

Before proposing the rule amendments, the comptroller consulted with various organizations, including the Texas Municipal League, the City of Round Rock, the City of Coppell, and the City of Carrollton. The comptroller was aware that cities had conflicting concerns. Some were concerned that other cities were siphoning off sales tax revenue under various revenue-sharing schemes with vendors, while other cities were concerned that their revenue-sharing agreements with vendors would be in jeopardy. Again, it became clear that the comptroller's existing rule did not provide adequate guidance to resolve these concerns.

The comptroller published a notice of proposed rulemaking in the January 3, 2020, issue of the *Texas Register.* After the publication of the notice of proposed rulemaking, the comptroller extended the 30-day public comment period to 90 days. In addition, the comptroller held a public hearing on February 4, 2020. The comptroller scrutinized the comments, made some changes, and rejected others. The comptroller published the final rule in the May 22, 2020, issue of the *Texas Register.*

The Cities of Round Rock, Coppell, DeSoto, Humble, and Carrollton then challenged the validity of the 2020 rule amendments. The litigation has been consolidated in Cause No. D-1-GN-21-003198, City of Coppell, Texas, et al. v. Glenn Hegar, in the 201st District Court of Travis County Texas.

The district court found that the comptroller failed to substantially comply with one or more of the procedural requirements for the notice of proposed rule (Government Code, §2001.024) when the comptroller adopted §3.334(b)(5). The court remanded §3.334(b)(5) to give the comptroller the opportunity to either revise or readopt it through established procedure. Accordingly, the comptroller is proposing to revise §3.334(b)(5) and other portions of the rule, with an explanation that augments the explanation in the notice of proposed rulemaking published in the January 3, 2020, issue of the *Texas Register* (45 TexReg 98) and the order adopting amendments to §3.334 published in the May 22, 2020, issue of the *Texas Register* (45 TexReg 3499).

Proposed amendments

The comptroller proposes to amend subsection (a)(9) to make the language more consistent with Tax Code, §321.203(c-1):

(9) Fulfill--To complete an order by transferring possession of a taxable item to a purchaser, or to ship or deliver a taxable item to a location designated by the purchaser. The term does not include receiving or tracking an order, determining shipping costs, managing inventory, or other activities that do not involve the transfer, shipment, or delivery of a taxable item to the purchaser or to a location designated by the purchaser.

The comptroller proposes to amend the definition of "place of business of the seller" in subsection (a)(16):

(16) Place of business of the seller - general definition--A place of business of the seller must be an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items from persons other than employees, independent contractors, and natural persons affiliated with the seller. An "established outlet, office, or location" requires staffing by one or more sales personnel. The term does not include a computer server, Internet protocol address, domain name, website, or software application. The "purpose" element of the definition may be established by proof that sales personnel of the seller received three or more orders for taxable items at the facility during the calendar year. ...

The definition of "place of business of the seller" comes into play in determining where a local sale or use is consummated. The consummation standards are not all "origin-based." Possible outcomes include consummation at the place of business where the order was received, consummation at the place of business from which the order was shipped or delivered, consummation at the location to which the item is shipped or delivered, and consummation at the first point in the state where the item is stored, used, or consumed. Tax Code, §321.203 and §321.205. The location of the consummation can be affected by whether an order is received at a "place of business of the seller" in Texas, and whether the seller ships or delivers the item from a "place of business of the seller" in Texas.

The consummation standards for municipal sales and use taxes are in Tax Code, §321.203 for sales tax and Tax Code, §321.205 for use tax. Other local sales and use tax statutes have similar standards. See, Tax Code, Chapter 322 (special purpose taxing authority sales and use tax) and Chapter 323 (county sales and use tax).

The rule uses "place of business of the seller," while the statute uses "place of business of the retailer." See Tax Code, §321.002(3)(A). The terms "seller" and "retailer" are synonymous for sales and use tax purposes. Tax Code, §151.008. The current rule and the proposed rule use "place of business of the seller" rather than "place of business of the retailer" to avoid potential confusion over the term "retailer." The term "retailer" is statutorily defined to include both retailers and wholesalers, as those terms are commonly used. Tax Code, §151.008.

The statute defines "place of business of the retailer" with 82 words:

"Place of business of the retailer" means an established outlet, office, or location operated by the retailer or the retailer's agent or employee for the purpose of receiving orders for taxable items and includes any location at which three or more orders are received by the retailer during a calendar year. A warehouse, storage yard, or manufacturing plant is not a "place of business of the retailer" unless at least three orders are received by the retailer during the calendar year at the warehouse, storage yard, or manufacturing plant.

The definition is narrower than the ordinary meaning of the phrase. The definition includes the concept of receiving orders for taxable items, which could exclude locations ordinarily considered to be places of business, such as executive offices. Additionally, a location is not a "place of business" simply because it receives orders. If that were the case, the legislature could have defined the phrase with those very words, which can be counted on one hand.

Against this backdrop, the comptroller proposes to amend the definition of "place of business of the seller" in subsection (a)(16).

The first sentence of the proposed definition states: "A place of business of the seller must be an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items from persons other than employees, independent contractors, and natural persons affiliated with the seller." This definition tracks the statutory definition, but adds a qualifier from the existing rule definition, which would allow a facility to make in-house courtesy sales without becoming a place of business.

In the *City of Webster* litigation, the court of appeals stated: "we do not determine whether a place of business must be 'an established outlet, office, or location operated by the retailer or the retailer's agent or employee,' *see id.,* as appellees do not raise this issue." *Combs v. City of Webster,* 311 S.W.3d 85, 96 at n. 7 (Tex. App.-Austin 2009, pet. Denied). The first sentence of the proposed definition is worded in the imperative to clearly answer that unanswered question. The comptroller interprets the statute to mean that a place of business of the seller must be an established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items.

The second sentence states: "An 'established outlet, office, or location' requires staffing by one or more sales personnel." This requirement is based on several rules of statutory construction. Every word of a statute, including each word in the phrase "established outlet, office, or location," should have meaning. *Amarillo v. Martin,* 971 426, 430 (Tex. 1998). If the word "location" is given its broadest application, it would subsume the words "outlet" and "office," rendering them meaningless. Therefore, the rule of "ejusdem generis" should apply, in which general words are not to be construed in their widest meaning, but are limited to persons or things of the same kind or class as those expressly mentioned. *Stanford v. Butler,* 181 S.W.2d 269 (Tex. 1944). Thus, a "location" should be a facility that is similar to an "outlet" or "office."

The term "outlet" implies the presence of sales personnel, particularly in the sales tax context. Each retail store is considered to be an "outlet" for reporting sales tax.

In the abstract, there could be many types of "offices." But in the context of "receiving orders," the term implies a sales office.

Thus, to provide something of a bright-line test for buyers, sellers, and auditors to follow, the rule provides that an "established outlet, office, or location" requires staffing by one or more sales personnel. *See, Perry Homes v. Strayhorn,* 108 S.W.3d 444, 448 (Tex. App.- Austin 2003, no pet.) (example of bright line rule); *DuPont Photomasks, Inc. v. Strayhorn,* 219 S.W.3d 414, 422 (Tex. App.-Austin 2006, pet. Denied) (example of bright line rule).

This interpretation of the statute is confirmed by legislative history. The Texas Legislature added the definition of "place of business of the retailer" in 1979. 66th Legislature, R.S., Ch. 624, Art. 1, §3 (SB 582). During that session of the legislature, a House Study Group analysis stated that the "bill is necessary to protect the state from possible consequences of the pending court suits." The analysis specifically referenced "Dunigan Tool and Supply v. Bullock" as one of those suits. The analysis is available at the Legislative Reference Library website at https://lrl.texas.gov/scanned/hroBillAnalyses/66-0/SB582.pdf.

In the *Dunigan* litigation, retail stores took orders that were fulfilled from a warehouse. The comptroller wanted to source the local tax to the retail stores, but the district court and the court of appeals sourced the local tax to the warehouse, declaring the warehouse to be a place of business. *Bullock v. Dunigan Tool & Supply Co.,* 588 S.W.2d 633 (Tex. Civ. App.- Austin, Sept. 6, 1979, writ ref'd n.r.e.).

The 1979 House Study Group bill analysis states that the bill was intended to protect the state from the consequences of the *Dunnigan* litigation. Thus, the legislative intent was that a fulfillment warehouse without sales personnel would not be a "place of business."

The legislative intent was further confirmed by the subsequent October 2, 1980, Interim Report of the House Ways and Means Committee, which was produced by the City of Coppell during the litigation. The committee was considering whether to allow the recently adopted statutory definition of "place of business" to expire. The committee described the consequence: "The location of sale would no longer be tied to permitted outlets, salesmen's locations, or sales offices." Interim Report at 20. These words confirm the comptroller's current interpretation that the definition of a "place of business" requires staffing by one or more sales personnel: "location" was intended to mean "salesmen's locations" and "office" was intended to mean "sales office."

In the subsequent legislative session, the legislature did not allow the "place of business" definition to expire, and instead, made it permanent. 67th Legislature, R.S., Ch. 838 §1 (H.B. 1838). The 1979 definition and its legislative history remain in place today. And, the comptroller's interpretation of "place of business," which tracks the legislative history, is a longstanding one. In 1985, the comptroller adopted the proposal for decision in Comptroller's Decision No. 15,654 (1985), which stated:

But it seems to the administrative law judge that the legislature was amending the law if not entirely in reaction to the then-pending case of *Bullock v. Dunigan Tool & Supply Co.,* 588 S.W.2d 633 (Tex. Civ. App.-Texarkana, writ ref'd n.r.e.), at least partly in reaction to that case. And if that be so, then the legislature did not want warehousing and storage facilities (many of which are outside city limits) to be the places where sales were consummated for local sales tax purposes unless orders were actually received there by personnel working there, but wanted the office location out of which the salesman operated to be the place where the sales were consummated.

The City of Coppell and others have advanced a contrary explanation regarding fulfillment warehouses that has superficial appeal: a warehouse cannot fulfill an order unless the warehouse has "received" the order, and therefore a fulfillment warehouse is inherently a "place of business." In the abstract, this argument may seem like a reasonable interpretation of the word "received." But not in context. When the words of the rather lengthy statutory definition are considered, and when the legislative history is considered, the legislature intended the opposite - a fulfillment warehouse is not automatically a "place of business" simply because orders have to be forwarded to the warehouse for fulfillment.

The third sentence in the proposed definition of "place of business" states: "The term does not include a computer server, Internet protocol address, domain name, website, or software application." This sentence is consistent with the concept that a "place of business" requires the presence of personnel to receive the order. Even a broad, every-day usage of the term "place of business" does not include computer servers, Internet protocol addresses, and automated telephone ordering systems. Many sellers house their computer servers at a co-location facility or rent computer server space at a managed hosting site. An ordinary person would not consider the physical locations of these computer servers to be places of business of the seller. Similarly, an ordinary person would not perceive an Internet protocol address, a domain name, or a website as an "established outlet, office, or location" so as to constitute a place of business in ordinary usage. And, in this statutory context, which is narrower than ordinary usage, the comptroller has concluded that the legislature could not have intended that the receipt of an order by an automated mechanical device would make the device an "established outlet, office or location operated by the retailer."

The treatment of computer servers, while new to the rule in 2020, is not new to the comptroller. Comptroller Letter Ruling (STAR Accession No.) 200510723L (2005) stated:

The location of the server does not create a "place of business" for purposes of local Tax Collection.

And Comptroller Letter Ruling (STAR Accession No.) 200605592L (2006) similarly stated:

The location of the server does not create a "place of business" for purposes of local tax collection.

And Comptroller Letter Ruling (STAR Accession No.) 201906015L (2019) similarly stated:

COMPANY operates **********'s online marketplace (Website) and various apps used by Texas customers to make online orders. ... Orders placed on the Website or through COMPANY's apps and processed and routed by servers are not received at a place of business.

The fourth sentence of the proposed definition of "place of business of the seller" states: "The 'purpose' element of the definition may be established by proof that sales personnel of the seller received three or more orders for taxable items at the facility during the calendar year." The sentence conforms the rule to the statute, as explained in *Combs v. City of Webster,* 311 S.W.3d 85, 96 (Tex. App.-Austin 2009, pet. denied). In that opinion, the court stated that the statutory "phrase 'and includes' can reasonably be interpreted to indicate that the 'for the purpose of' phrase and the 'three or more orders' phrase are alternate methods of satisfying the statutory definition."

Finally, in addition to being the most reasonable interpretation of the statute, the proposed definition of "place of business of the seller" is a practical interpretation that will facilitate uniformity and ease of administration for taxpayers and auditors. Website orders can be received at multiple physical addresses - any locations that have Internet access. A website order is sent to an Internet protocol ("IP") address. An IP address is not a permanent physical address. It is a series of numbers assigned to a device, such as a computer server. Websites may use dynamic IP addresses that are assigned by the network upon connection and that change over time. The public IP address of a website may simply be routing orders to different, private IP addresses. Load balancers may change the IP addresses that communicate with customers. Conversely, multiple web sites may be hosted at a single IP address.

The computer server receiving an order may belong to the seller or it may belong to a third party. The computer server may be situated on the seller's premises, it may be situated at a co-location facility operated by a third party, or it may be situated at a web hosting facility operated by a third party. The computer server may be one of multiple servers that serve the same website from different physical addresses as part of a cloud distribution network. The computer server may route the order to multiple other servers for load balancing purposes. Conversely, a single computer server may serve multiple websites. Also, the seller may or may not know the physical address of the server receiving the order. The physical locations of computer servers that receive website orders are often random, variable, and uncertain. The best way to treat computer servers consistently and coherently is to uniformly recognize that they are not "established" places of business of the seller.

In conclusion, regarding the proposed definition of "place of business of the seller," the comptroller is under no illusions that the definition will eliminate all ambiguities. In many instances, the determination of whether or not particular facilities have "sales personnel" will have to be made on a case-by-case basis. But the rule makes clear that mere hardware installations, or other facilities that do not use any personnel, are not "places of business of the seller." To that extent, the rule will help taxpayers understand how the comptroller interprets and intends to apply the statute.

The comptroller proposes to amend subsection (b)(1)(A) regarding distribution centers, manufacturing plants, storage yards, warehouses, or similar facilities to add the sentence: "The forwarding of previously received orders to the facility for fulfilment does not make the facility a place of business."

Subsection (b)(1)(A) is an application of the definition of "place of business of the seller" in subsection (a)(16). The explanation of subsection (a)(16) is also applicable to subsection (b)(1)(A).

The comptroller proposes to amend subsections (b)(4) and (b)(5) for stylistic reasons and to more clearly state the comptroller's application of the definition of place of business of the seller from subsection (a)(16):

(4) An order that is received by a salesperson who is not at a place of business of the seller when the salesperson receives the order is treated as being received at the location from which the salesperson operates. Examples include orders that a salesperson receives by mail, telephone, including Voice over Internet Protocol and cellular phone calls, facsimile, and email while traveling. The location from which the salesperson operates is the principal fixed location where the salesperson conducts work-related activities. The location from which a salesperson operates will be a place of business of the seller only if the location meets the definition of a "place of business of a seller" in subsection (a)(16) of this section on its own, without regard to the orders imputed to that location by this subsection.

(5) An order that is not received by a salesperson is received at a location that is not a place of business of the seller. Examples are orders received by a computer server through a shopping cart software program and orders received by an automated telephone ordering system.

The examples have been moved from the headings to separate sentences in both subsections (b)(4) and (b)(5), and labeled as examples. The new examples in subsection (b)(5) are more precise examples than the former examples of "a shopping website or shopping software application."

Subsection (b)(5) is an application of the definition of "place of business of the seller" in subsection (a)(16). The explanation of subsection (a)(16) is also applicable to subsection (b)(5).

The comptroller proposes to amend subsection (c)(2)(B)(ii) to make the language more consistent with Tax Code, §321.205(c):

(ii) Order not fulfilled in Texas. When an order is received by a seller at a location that is not a place of business of the seller in Texas, and is fulfilled from a location outside of Texas, the sale is not consummated in Texas. However, a use is considered to be consummated at the first point in this state where the item is stored, used, or consumed after the interstate transit has ceased. A taxable item delivered to a point in this state is presumed to be for storage, use, or consumption at that point until the contrary is established. Local use tax should be collected as provided in subsection (d) of this section. Except as provided in subsection (i)(3) of this section, a remote seller required to collect state use tax under §3.286(b)(2) of this title must also collect local use tax.

Sourcing of local tax

It has been alleged that the proposed rule would result in a wholesale policy change from origin sourcing to destination sourcing for website orders. However, there cannot be a wholesale policy change because the consummation statutes for website orders are not inherently origin-based in the first place. Marketplace sales made through marketplaces are consummated at destination. Tax Code, §321.203(e-1). And there are other circumstances in which website orders do not use origin sourcing. Website orders fulfilled from a place of business of the seller in Texas are consummated at the place of business where the order is fulfilled. Tax Code, §321.203(c-1). Website orders received outside of Texas and fulfilled from a location in Texas other than a place of business of the seller are consummated at destination. Tax Code, §321.203(c). Website orders that are received outside of Texas and fulfilled from outside of Texas are consummated at destination. Tax Code, §321.205(c). And, amusement services, which may be delivered over the Internet, are sourced to destination. Tax Code, §321.203(h).

Rather than being a wholesale change in sourcing, the proposed rule is an articulation of the pre-existing comptroller interpretation of "place of business of the retailer" as defined by the legislature. The definition requires the presence of sales personnel to receive orders, and if there are no sales personnel involved, such as an automated website order received by a computer server, the order is received at a location that is not a "place of business." And, that interpretation of "place of business" does not mean that every website sale is sourced to destination, since some will be sourced to the place of business of the seller where the order is fulfilled.

It has also been alleged that the proposed subsection (b)(5) will change the way that Texas retailers with one place of business in Texas will source local tax. However, in most instances, subsection (b)(5) will not change the way that Texas retailers with one place of business in Texas will source local tax.

If orders are received by Internet servers located outside the state, local tax will be sourced the same regardless of the text of subsection (b)(5). Except for the application of special rules for remote sellers in subsection (i)(3), direct payment permit purchases in subsection (j), and certain taxable items, including taxable items sold by a marketplace provider, as provided in subsection (k), the sale will be consummated at the place of business of the seller in Texas from which the order is fulfilled, or if not, the a sale will be consummated, or a use will be consummated at the location in Texas to which the item is shipped or delivered or at which the purchaser of the item takes possession as provided in subsection (d). See §3.334(c), (c)(2), (j) and (k) and Tax Code, §321.203(b), (c-1), (e), (e-1), (f), (g), (g-1), (g-2), (g-3), (h), (i), (j), (k), (n) and §321.205(c).

If orders are placed in person at the place of business of the seller in Texas, local tax will be sourced the same regardless of the text of subsection (b)(5). Except for the application of special rules for direct payment permit purchases in subsection (j), and certain taxable items, including taxable items sold by a marketplace provider, as provided in subsection (k), the sale will be consummated at the single place of business of the seller in Texas where the order was received. See §3.334(c), (c)(1)(A), (j), and (k) and Tax Code, §321.203(b), (c), (e-1), (f), (g), (g-1), (g-2), (g-3), (h), (i), (j), (k), and (n).

If orders are received by sales personnel of the retailer at the place of business of the seller in Texas, but the orders are not placed in person by the buyer, local tax will be sourced the same regardless of the text of subsection (b)(5). Except for the application of special rules for direct payment permit purchases in subsection (j), and certain taxable items as provided in subsection (k), the sale will be consummated at the single place of business of the seller in Texas where the order was received. See §3.334(c), (c)(1)(B)(i), (c)(1)(B)(ii), (j), and (k) and Tax Code, §321.203(b), (c-1), (d), (f), (g), (g-1), (g-2), (g-3), (h), (i), (j), (k), and (n).

If orders are received by sales personnel of the retailer who are not at the place of business of the seller in Texas when they receive the orders, but who operate out of the place of business of the seller in Texas, local tax will be sourced the same regardless of the text of subsection (b)(5). Except for the application of special rules for direct payment permit purchases in subsection (j), and certain taxable items as provided in subsection (k), the sale will be consummated at the single place of business of the seller in Texas out of which the sales personnel operate. See §3.334(b)(4), (c), (c)(1)(B)(i), (c)(1)(B)(ii), (j), and (k) and Tax Code, §321.203(b), (c-1), (d), (f), (g), (g-1), (g-2), (g-3), (h), (i), (j), (k), and (n).

If orders are received by sales personnel of the retailer who are not at the place of business of the seller in Texas when they receive the orders, and who do not operate out of the place of business of the seller in Texas, local tax will be sourced the same regardless of the text of subsection (b)(5). Except for the application of special rules for direct payment permit purchases in subsection (j), and certain taxable items as provided in subsection (k), the sale will be consummated at the place of business of the seller in Texas from which the order is fulfilled, or if not, the sale will be consummated, or a use will be consummated at the location in Texas to which the item is shipped or delivered or at which the purchaser of the item takes possession as provided in subsection (d). See §3.334(c), (c)(2), (j) and (k) and Tax Code, §321.203(b), (c-1), (e), (f), (g), (g-1), (g-2), (g-3), (h), (i), (j), (k), (n) and §321.205(c).

If the orders are not received by sales personnel, such as orders received by an automated shopping website operated by the retailer, but the orders are fulfilled at the single place of business of the seller in Texas, local tax will be sourced the same regardless of the text of subsection (b)(5). Except for the application of special rules for direct payment permit purchases in subsection (j) of this section, and certain taxable items as provided in subsection (k) of this section, the sale will be consummated at the single place of business of the seller in Texas from which the orders are fulfilled. See §3.334(c), (c)(2)(A), (j) and (k), and Tax Code, §321.203(b), (c-1), (f), (g), (g-1), (g-2), (g-3), (h), (i), (j), (k), and (n).

If the orders are not received by sales personnel, such as orders received by an automated shopping website operated by the retailer, and the orders are shipped or delivered or the purchaser takes possession in the same jurisdiction in which the retailer's single place of business in Texas is located, local tax will be sourced the same regardless of the text of subsection (b)(5). Except for the application of special rules for direct payment permit purchases in subsection (j) of this section, and certain taxable items as provided in subsection (k) of this section, the sale or use will be consummated in the jurisdiction where the single place of business of the seller is located. See §3.334(c), (c)(2)(A), (c)(2)(B)(i), (c)(2)(B)(ii), (j) and (k), and Tax Code, §321.203(b), (c-1), (e), (f), (g), (g-1), (g-2), (g-3), (h), (i), (j), (k), and (n) and §321.205(c).

If the orders are received by a shopping website operated by a marketplace provider, or the orders are received by any other physical medium operated by a marketplace provider such as catalogs and stores, local tax will be sourced the same regardless of the text of subsection (b)(5). Except for the application of special rules for direct payment permit purchases in subsection (j), and certain taxable items as provided in subsection (k), the sale will be consummated at the location in Texas state to which the item is shipped or delivered or at which possession is taken by the purchaser. See §3.334(k)(5), (j) and (k), and Tax Code, §321.203(e-1), (f), (g), (g-1), (g-2), (g-3), (h), (i), (j), (k), and (n).

If orders are received from purchasers with direct pay permits, local tax will be sourced the same regardless of the text of subsection (b)(5). A use will be consummated, and local use tax will be due based upon the location where the permit holder

first stores or otherwise uses the item. See §3.334(j) and Tax Code, §321.205(d).

If the purchasers issue resale exemption certificates, subsection (b)(5) will have no effect because the transactions will not be subject to local tax.

If orders are for the sale of exempt items, subsection (b)(5) will have no effect because the transactions will not be subject to local tax.

If the orders are for the sale of items to exempt entities, subsection (b)(5) will have no effect because the transactions will not be subject to local tax.

If the orders are for the sale of natural gas or electricity, local tax will be sourced the same regardless of the text of subsection (b)(5). The sale will be consummated at the point of delivery to the consumer. See §3.334(k)(8) and Tax Code, §321.203(f).

If the orders are for the sale of amusement services, local tax will be sourced the same regardless of the text of subsection (b)(5). The sale will be consummated where the performance or event occurs. See §3.334(k)(1) and Tax Code, §321.203(h).

If the orders are for the sale of cable television service, local tax, if any, will be sourced the same regardless of the text of subsection (b)(5). The sale will be consummated at the point of delivery to the consumer. See §3.334(k)(2), §3.313, and Tax Code, §321.203(j).

If the orders are for the sale of landline telecommunications service, local tax will be sourced the same regardless of the text of subsection (b)(5). The sale will be consummated at the location of the device from which the call or other transmission originates, or the billing address. See §3.334(k)(4) and Tax Code, §321.203(g-1).

If the orders are for the sale of mobile telecommunication services, local tax will be sourced the same regardless of the text of subsection (b)(5). The sale will be consummated at the primary place of use. See §3.334(k)(6) and Tax Code, §321.203(g).

If the orders are for the sale of garbage or other solid waste collection or removal, local tax will be sourced the same regardless of the text of subsection (b)(5). The sale will be consummated at location from which the waste is collected or removed. See §3.334(k)(11) and Tax Code, §321.203(k).

If the orders are for the remodeling, repair, or restoration of nonresidential real property, local tax will be sourced the same regardless of the text of subsection (b)(5). The sale will be consummated at the job site. See §3.334(k)(9) and Tax Code, §321.203(n).

In one circumstance, subsection (b)(5) of §3.334 might change the way Texas retailers with one place of business in Texas will source local sales tax. Prior to the 2020 amendment, §3.334(h)(3) provided in pertinent part (emphasis added):

(3) Consummation of sale. The following rules, taken from Tax Code, §321.203 and §323.203, apply to all sellers engaged in business in this state, regardless of whether they have a place of business in Texas or multiple places of business in the state.

(A) Order placed in person at a seller’s place of business in Texas. When a purchaser places an order for a taxable item in person at a seller’s place of business in Texas, the sale of that item is consummated at that place of business, regardless of the location where the order is fulfilled, except in the limited circumstances described in subparagraph (F) of this paragraph, concerning qualifying economic development agreements.

(B) Order received at a place of business in Texas, fulfilled at a location that is not a place of business. When an order that is placed over the telephone, through the Internet, or by any means other than in person is received by the seller at a place of business in Texas, and the seller fulfills the order at a location that is not a place of business of the seller in Texas, such as a warehouse or distribution center, the sale is consummated at the place of business at which the order for the taxable item is received.

(C) Order fulfilled at a place of business in Texas. When an order is placed in person at a location that is not a place of business of the seller in this state, such as a kiosk, or when an order is placed over the telephone, through the Internet, or by any means other than in person, and the seller fulfills the order at a location that is a place of business in Texas, the sale is consummated at the place of business where the order is fulfilled.

(D) Order fulfilled within the state at a location that is not a place of business. When an order is received by a seller at any location other than a place of business of the seller in this state, and the seller fulfills the order at a location in Texas that is not a place of business of the seller, then the sale is consummated at the location in Texas to which the order is shipped or delivered, or the location where it is transferred to the purchaser.

(E) Order received outside of the state, fulfilled outside of the state. When an order is received by a seller at a location outside of Texas, and the order is shipped or delivered into a local taxing jurisdiction from a location outside of the state, the sale is not consummated at a location in Texas. However, local use tax is due based upon the location in this state to which the item is shipped or delivered or at which possession of the item is taken by the purchaser as provided in subsection (i) of this section.

Former subsection (h)(3)(B) did not distinguish between website orders received by sales personnel, such as emails, and website orders not received by sales personnel, such as automated shopping cart orders. If a taxpayer relied solely on the rule and did not review the hearings decisions and letter rulings available on the comptroller's STAR system, a taxpayer might conclude that an automated order placed through the Internet could be received at a place of business, whereas proposed subsection (b)(5) explicitly states that orders not received by sales personnel are received at locations that are not places of business of the seller. Thus, under the former rule, if a retailer had a computer server at a single location that was a place of business of the seller in Texas; and if the retailer had no other location in Texas where the retailer received orders; and if the orders were not fulfilled at the place of business of the seller in Texas; and if the orders were not delivered to the same jurisdiction in which they were received; and if the orders were not received from purchasers with direct pay permits; and if the orders were not received from exempt purchasers; and if the purchasers did not issue resale exemption certificates; and if the orders were not for the sale exempt items, natural gas or electricity, amusement services, cable television service, landline telecommunications service, mobile telecommunication services, garbage or other solid waste collection or removal, or the remodeling, repair, or restoration of nonresidential real property; and if the orders were received by the retailer’s computer server located at its single place of business in Texas and not by a marketplace provider, then the rule might lead the taxpayer to conclude that the sale would be consummated at the retailer’s single place of business in Texas where the computer server was located. If all of these conditions were met under the 2020 version of the rule (which is carried forward in this proposed rulemaking), the sale would be consummated under subsection (c)(2)(B)(i) at the location in Texas to which the orders are shipped or delivered, or at which the purchasers take possession.

Fiscal note

Brad Reynolds, Chief Revenue Estimator, has determined the following for each year of the first five years that the rule will be in effect.

There will be no additional estimated cost to the state and to local governments expected as a result of enforcing or administering the proposed rule. The proposed amendments explain the manner in which the comptroller intends to apply the consummation statutes. The explanation should lead to greater taxpayer compliance, and less audit resources required to enforce or administer the rule.

There will be no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule amendments. Local governments do not administer the tax, and the comptroller will not be reducing the size of its audit staff as a result of the rule.

There could be loss or increase in revenue to individual local governments as a result of enforcing or administering the rule due to increased compliance with the consummation statutes. A revenue loss to one local government will often but not always be a revenue gain to others. Amounts for individual local governments cannot be estimated.

In general, due both to the number of taxing jurisdictions and lack of pertinent, detailed information regarding the specific circumstances of the myriad businesses reporting local sales and use taxes, estimation of fiscal effects of a proposed law or rule, whether of dollar amounts or merely sign of change, on an individual jurisdiction by jurisdiction basis is infeasible of execution. However, with respect to this rulemaking, it may be noted that some cities with Local Government Code, Chapter 380 agreements involving rebates of local sales and use tax revenues to certain businesses have asserted that the clarifications provided by the rule will result in changes in sourcing and reporting of local taxes by those businesses, with consequent reductions in revenue subject to the agreements, though their assessments of such have not been verified by the comptroller.

Generally, the cities have not provided the data from which they have calculated their asserted lost revenue, have not identified the vendors that would change their method of reporting, and have not identified the circumstances that would require those vendors to change their methods of reporting as a result of the rule. The significance of the assertions cannot be verified.

An exception is the City of San Marcos. During the 2020 rulemaking, the City of San Marcos filed comments claiming that the proposed rule would cause the city to lose $7-8 million in local sales tax revenue generated by a Best Buy call center, with the net effect of economic development incentive revenue loss estimated at $3.4 million, presumably because the balance of the local sales tax would have been rebated to Best Buy under a Chapter 380 agreement. Best Buy also filed comments stating that it created a subsidiary called Best Buy Texas.com LLC and sourced the local tax for all of its Internet

and telephone sales to the City of San Marcos. This would mean that if a resident of the City of Houston placed an Internet order from Houston and picked up the item at a Best Buy outlet in Houston, Best Buy would collect local sales tax for the City of San Marcos. However, it appears that the Best Buy website was actually operated by a different Best Buy affiliate, which would make it a marketplace provider as defined in Tax Code, §151.0242(a)(2). Under the marketplace statute, local tax is sourced to the location where the item is shipped or delivered or at which possession is taken by the purchaser. Thus, any loss to the City of San Marcos of local sales tax revenue from the sale to the Houston resident would be the result of compliance with the marketplace statute. And the loss of tax revenue would not be attributable to the rule. The loss resulting from compliance with the statute would occur without regard to whether the proposed rule was adopted.

The City of Round Rock identified Dell as an entity that would change its method of reporting. The comptroller does not have sufficient current information about the company or other affiliates to determine whether the company is or is not complying with the consummation statutes, former consummation rule, the consummation rule adopted in 2020, or the proposed consummation rule.

Most other cities have not identified specific taxpayers or the circumstances that would enable verification of their claims.

Nevertheless, it is conceivable that the clarifications proposed in the rule will cause some vendors to recognize their noncompliance and change their reporting methods, and that these changes could cause shifts in tax revenue between local jurisdictions.

Public benefits and costs

Brad Reynolds, Chief Revenue Estimator, has determined the following for each year of the first five years that the rule will be in effect.

The public will benefit from greater clarity regarding the consummation standards, making compliance easier.

There are no probable additional economic costs to a person required to comply with the rule. There is undoubtedly a burden associated with collecting and remitting local tax. But the burden is imposed by the statute. It is conceivable that the rule may cause some vendors to realize that they are noncompliant. If the vendors come into compliance by changing from single-location reporting to multiple-location reporting, their compliance burden may increase. And if vendors change from multiple-location reporting to single-location reporting, their compliance burden may diminish.

Government growth impact statement

Brad Reynolds, Chief Revenue Estimator, has determined the following for each year of the first five years that the rule will be in effect: The amendment: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the comptroller; will not require an increase or decrease in fees paid to the comptroller; will not create a new regulation; will not expand, limit, or repeal an existing regulation; will not increase or decrease the number of individuals subject to the rule's applicability; and will not positively or adversely affect this state's economy.

Local employment impact statement

For the first five years that the rule will be in effect, the effect on local economies and employment, if any, cannot be determined. To the extent that the proposed rule leads to greater awareness and compliance with the local tax consummation standards, some vendors may change their reporting methods, which might positively or negatively affect the tax revenue of particular local tax jurisdictions. Whether a change in local tax revenue might increase or decrease the provision of local government services to an extent that would affect local economic activity or employment would depend on discretionary actions of the governing body or the electorate of an affected jurisdiction, and cannot be determined.

Fiscal implications for small businesses and rural communities

A statement of fiscal implications for small businesses or rural communities is not required by Government Code, Chapter 2006 if the rule is proposed under Tax Code, Title 2. In this instance, the rule is proposed under both Title 2 (State Taxation) and Title 3 (Local Taxation). The comptroller has determined that the rule will not have an adverse economic effect on small businesses, micro-businesses, or rural communities.

During the 2020 rulemaking, the comptroller received comments that the proposed rule would increase compliance costs of small businesses that would have to switch from origin sourcing to destination sourcing. However, the rule does not cause that result for a small business that has all of its operations under one roof. A small business that does not sell through a marketplace and that has all of its operations at a single location, including sales and fulfillment, will be a "place of business"

under the statute, under the 2020 version of the rule, and under the proposed rule. Non-marketplace orders fulfilled from that location will continue to be consummated at that location pursuant to §3.334(c)(1) or (c)(2)(A). Sales of a small business that are through a marketplace are already subject to destination sourcing.

It is conceivable that the rule may cause some vendors, small or large, to realize that they are noncompliant. If the vendors come into compliance by changing from single-location reporting to multiple-location reporting, their compliance burden may increase. And if vendors change from multiple-location reporting to single-location reporting, their compliance burden may diminish.

And, to the extent that the vendors have been reaching the two percent ceiling on local taxes by over-collecting city sales taxes, and the vendors begin correctly reporting, unincorporated rural communities may actually benefit from increased collection of county use tax and special purpose use tax. See Tax Code, §321.205(b) and §3.334(d)(1).

Public hearing

The comptroller will hold a hearing to take public comments, on Monday, October 17, 2022, at 9:00 a.m. in Room 170 of the Stephen F. Austin Building, 1700 Congress Ave., Austin, Texas 78701. Interested persons may sign up to testify beginning at 8:30 a.m. and testimony will be heard on a first come first serve basis. All persons will have 10 minutes to present their testimony and shall also provide their testimony in writing prior to their oral testimony.

Comments

Comments on the proposal may be submitted to Jennifer Burleson, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528 or to the email address: tp.rule.comments@cpa.texas.gov. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

Statutory or other authority under which the rule is proposed to be adopted

Tax Code, §§111.002 (Comptroller's Rule; Compliance; Forfeiture); 321.306 (Comptroller's Rules); 322.203 (Comptroller's Rules); 323.306 (Comptroller's Rules) authorize the comptroller to adopt rules to implement the tax statutes.

Sections or articles of the code affected

Tax Code, §151.0595 (Single Local Tax Rate for Remote Sellers); Tax Code, Chapter 321, Subchapters A, B, C, D, and F; Tax Code, Chapter 322; Tax Code, Chapter 323.

§3.334.Local Sales and Use Taxes.

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

(1) Cable system--The system through which a cable service provider delivers cable television or bundled cable service, as those terms are defined in §3.313 of this title (relating to Cable Television Service and Bundled Cable Service).

(2) City--An incorporated city, municipality, town, or village.

(3) City sales and use tax--The tax authorized under Tax Code, §321.101(a), including the additional municipal sales and use tax authorized under Tax Code, §321.101(b), the municipal sales and use tax for street maintenance authorized under Tax Code, §327.003, the Type A Development Corporation sales and use tax authorized under Local Government Code, §504.251, the Type B Development Corporation sales and use tax authorized under Local Government Code, §505.251, a sports and community venue project sales and use tax adopted by a city under Local Government Code, §334.081, and a municipal development corporation sales and use tax adopted by a city under Local Government Code, §379A.081. The term does not include the fire control, prevention, and emergency medical services district sales and use tax authorized under Tax Code, §321.106, or the municipal crime control and prevention district sales and use tax authorized under Tax Code, §321.108.

(4) Comptroller's website--The comptroller's [~~agency's~~] website concerning local taxes located at: https://comptroller.texas.gov/taxes/sales/.

(5) County sales and use tax--The tax authorized under Tax Code, §323.101, including a sports and community venue project sales and use tax adopted by a county under Local Government Code, §334.081. The term does not include the county health services sales and use tax authorized under Tax Code, §324.021, the county landfill and criminal detention center sales and

use tax authorized under Tax Code, §325.021, or the crime control and prevention district sales and use tax authorized under Tax Code, §323.105.

(6) Drop shipment--A transaction in which an order is received by a seller at one location, but the item purchased is shipped by the seller from another location, or is shipped by the seller's third-party supplier, directly to a location designated by the purchaser.

(7) Engaged in business--This term has the meaning given in §3.286 of this title (relating to Seller's and Purchaser's Responsibilities).

(8) Extraterritorial jurisdiction-An unincorporated area that is contiguous to the corporate boundaries of a city as defined in Local Government Code, §42.021.

(9) Fulfill--To complete an order by transferring possession of a taxable item [~~directly~~] to a purchaser [~~at a Texas location~~], or to ship or deliver a taxable item to a location [in Texas] designated by the purchaser. The term does not include receiving or tracking an order, determining shipping costs, managing inventory, or other activities that do not involve the transfer, shipment, or delivery of a taxable item to the purchaser or a location designated by the purchaser.

(10) Itinerant vendor--A seller who travels to various locations for the purpose of receiving orders and making sales of taxable items and who has no place of business in this state. A person who sells items through vending machines is also an itinerant vendor. A salesperson that operates out of a place of business in this state is not an itinerant vendor.

(11) Kiosk--A small stand-alone area or structure:

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

(B) that 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.

(12) Local taxes--Sales and use taxes imposed by any local taxing jurisdiction.

(13) Local taxing jurisdiction--Any of the following:

(A) a city that imposes sales and use tax as provided under paragraph (3) of this subsection;

(B) a county that imposes sales and use tax as provided under paragraph (5) of this subsection;

(C) a special purpose district created under the Special District Local Laws Code or other provisions of Texas law that is authorized to impose sales and use tax by the Tax Code or other provisions of Texas law and as governed by the provisions of Tax Code, Chapters 321 or 323 and other provisions of Texas law; or

(D) a transit authority that imposes sales and use tax as authorized by Transportation Code, Chapters, 451, 452, 453, 457, or 460 and governed by the provisions of Tax Code, Chapter, 322.

(14) Marketplace provider--This term has the meaning given in §3.286 of this title.

(15) Order placed in person--An order placed by a purchaser with the seller while physically present at the seller's place of business regardless of how the seller subsequently enters the order.

(16) Place of business of the seller- general definition--A place of business of the seller must be an [~~An~~] established outlet, office, or location operated by a seller for the purpose of receiving orders for taxable items from persons [~~selling taxable items to those~~] other than employees, independent contractors, and natural persons affiliated with the seller. An "established outlet, office, or location" requires staffing by one or more sales personnel.[~~, where sales personnel of the seller receive three or more orders for taxable items during the calendar year.~~] The term does not include a computer server, Internet protocol address, domain name, website, or software application. The "purpose" element of the definition may be established by proof that the sales personnel of the seller receive three or more orders for taxable items at the facility during the calendar year. Additional criteria for determining when a location is a place of business of the seller are provided in subsection (b) of this section for distribution centers, manufacturing plants, storage yards, warehouses and similar facilities; kiosks; and purchasing offices. An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an

office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business, is not a place of business of the seller if the comptroller determines that the outlet, office, facility, or location functions or exists to avoid the tax legally due under Tax Code, Chapters 321, 322, and 323 or exists solely to rebate a portion of the tax imposed by those chapters to the contracting business. An outlet, office, facility, or location does not exist to avoid the tax legally due under Tax Code, Chapters 321, 322, and 323 or solely to rebate a portion of the tax imposed by those chapters if the outlet, office, facility, or location provides significant business services, beyond processing invoices, to the contracting business, including logistics management, purchasing, inventory control, or other vital business services.

(17) Purchasing office--An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business.

(18) Remote Seller--As defined in §3.286 of this title, a remote seller is a seller engaged in business in this state whose only activity in the state is:

(A) engaging 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; or

(B) soliciting orders for taxable items by mail or through other media including the Internet or other media that may be developed in the future.

(19) Seller--This term has the meaning given in §3.286 of this title and also refers to any agent or employee of the seller.

(20) Special purpose district--A local governmental entity authorized by the Texas legislature for a specific purpose, such as crime control, a local library, emergency services, county health services, or a county landfill and criminal detention center.

(21) Storage--This term has the meaning given in §3.346 of this title (relating to Use Tax).

(22) Temporary place of business of the seller--A location operated by a seller for a limited period of time for the purpose of selling and receiving orders for taxable items and where the seller has inventory available for immediate delivery to a purchaser. For example, a person who rents a booth at a weekend craft fair or art show to sell and take orders for jewelry, or a person who maintains a facility at a job site to rent tools and equipment to a contractor during the construction of real property, has established a temporary place of business. A temporary place of business of the seller includes a sale outside of a distribution center, manufacturing plant, storage yard, warehouse, or similar facility of the seller in a parking lot or similar space sharing the same physical address as the facility but not within the walls of the facility.

(23) Transit authority--A metropolitan rapid transit authority (MTA), advanced transportation district (ATD), regional or subregional transportation authority (RTA), city transit department (CTD), county transit authority (CTA), regional mobility authority (RMA) or coordinated county transportation authority created under Transportation Code, Chapters 370, 451, 452, 453, 457, or 460.

(24) Two percent cap--A reference to the general rule that, except as otherwise provided by Texas law and as explained in this section, a seller cannot collect, and a purchaser is not obligated to pay, more than 2.0% of the sales price of a taxable item in total local sales and use taxes for all local taxing jurisdictions.

(25) Use--This term has the meaning given in §3.346 of this title.

(26) Use tax--A tax imposed on the storage, use or other consumption of a taxable item in this state.

(b) Determining the place of business of a seller.

(1) Distribution centers, manufacturing plants, storage yards, warehouses, and similar facilities.

(A) A distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller for the purpose of selling taxable items where sales personnel of the seller receive three or more orders for taxable items during the calendar year from persons other than employees, independent contractors, and natural persons affiliated with the seller is a place of business of the seller. <u>The forwarding of previously received orders to the facility for fulfilment does not make the facility a place of business.</u>

(B) If a location that is a place of business of the seller, such as a sales office, is in the same building as a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the entire facility is a place of business of the seller.

(2) Kiosks. A kiosk is not a place of business of the seller for the purpose of determining where a sale is consummated for local tax purposes. A seller who owns or operates a kiosk in Texas is, however, engaged in business in this state as provided in §3.286 of this title.

(3) Purchasing offices.

(A) A purchasing office is not a place of business of the seller if the purchasing office exists solely to rebate a portion of the local sales and use tax imposed by Tax Code, Chapters 321, 322, or 323 to a business with which it contracts; or if the purchasing office functions or exists to avoid the tax legally due under Tax Code, Chapters 321, 322, or 323. A purchasing office does not exist solely to rebate a portion of the local sales and use tax or to avoid the tax legally due under Tax Code, Chapters 321, 322, or 323 if the purchasing office provides significant business services to the contracting business beyond processing invoices, including logistics management, purchasing, inventory control, or other vital business services.

(B) In making a determination under subparagraph (A) of this paragraph, as to whether a purchasing office provides significant business services to the contracting business beyond processing invoices, the comptroller will compare the total value of the other business services to the value of processing invoices. If the total value of the other business services, including logistics management, purchasing, inventory control, or other vital business services, is less than the value of the service to process invoices, then the purchasing office will be presumed not to be a place of business of the seller.

(C) If the comptroller determines that a purchasing office is not a place of business of the seller, the sale of any taxable item is deemed to be consummated at the place of business of the seller from whom the purchasing office purchased the taxable item for resale and local sales and use taxes are due according to the following rules.

(i) When taxable items are purchased from a Texas seller, local sales taxes are due based on the location of the seller's place of business where the sale is deemed to be consummated, as determined in accordance with subsection (c) of this section.

(ii) When the sale of a taxable item is deemed to be consummated at a location outside of this state, local use tax is due based on the location where the items are first stored, used or consumed by the entity that contracted with the purchasing office in accordance with subsection (d) of this section.

(4) An order that is received by a salesperson who is not at a place of business of the seller when the salesperson receives the order is treated as being received at the location from which the salesperson operates. Examples include orders that a salesperson receives [~~Orders received by sales personnel who are not at a place of business of the seller in Texas when they receive the order, including orders received~~] by mail, telephone, including Voice over Internet Protocol and cellular phone calls, facsimile, and email while traveling. The [~~This type of order is treated as being received at the~~] location from which the salesperson operates[~~, that~~] is[~~,~~] the principal fixed location where the salesperson conducts work-related activities. The location from which a salesperson operates will be a place of business of the seller only if the location meets the definition of a "place of business of a seller" in subsection (a)(16) of this section on its own, without regard to the orders imputed to that location by this paragraph. [~~Orders received prior to October 1, 2021, may also be treated as being received at the outlet, office, or location operated by the seller that serves as a base of operations or that provides administrative support to the salesperson, and these locations will be treated as places of business of the seller for purposes of subsection (c) of this section.~~]

(5) An order that is not received by a salesperson is received at a location that is not a place of business of the seller. Examples are orders received by a computer server through a shopping cart software program and orders received by an automated telephone ordering system. [~~Orders not received by sales personnel, including orders received by a shopping website or shopping software application. Effective October 1, 2021, these orders are received at locations that are not places of business of the seller.~~]

(c) Local sales tax- Consummation of sale - determining the local taxing jurisdictions to which sales tax is due. Except for the special rules applicable to remote sellers in subsection (i)(3) of this section, direct payment permit purchases in subsection (j) of this section, and certain taxable items, including taxable items sold by a marketplace provider, as provided in subsection (k) of this section, each sale of a taxable item is consummated at the location indicated by the provisions of this subsection. The following rules, taken from Tax Code, §321.203 and §323.203, apply to all sellers engaged in business in this state, regardless of whether they have no place of business in Texas, a single place of business in Texas, or multiple places of business in the state.

(1) Consummation of sale- order received at a place of business of the seller in Texas.

(A) Order placed in person. Except as provided by paragraph (3) of this subsection, when an order for a taxable item is placed in person at a seller's place of business in Texas, including at a temporary place of business of the seller in Texas, the sale of that item is consummated at that place of business of the seller, regardless of the location where the order is fulfilled.

(B) Order not placed in person.

(i) Order fulfilled at a place of business of the seller in Texas. When an order is received at a place of business of the seller in Texas and is fulfilled at a place of business of the seller in Texas, the sale is consummated at the place of business where the order is fulfilled.

(ii) Order not fulfilled at a place of business of the seller in Texas. When an order is received at a place of business of the seller in Texas and is fulfilled at a location that is not a place of business of the seller in Texas, the sale is consummated at the place of business where the order is received.

(2) Consummation of sale- order not received at a place of business of the seller in Texas.

(A) Order fulfilled at a place of business of the seller in Texas. When an order is received at a location that is not a place of business of the seller in Texas or is received outside of Texas, and is fulfilled from a place of business of the seller in Texas, the sale is consummated at the place of business where the order is fulfilled.

(B) Order not fulfilled from a place of business of the seller in Texas.

(i) Order fulfilled in Texas. When an order is received at a location that is not a place of business of the seller in Texas and is fulfilled from a location in Texas that is not a place of business of the seller, the sale is consummated at the location in Texas to which the order is shipped or delivered, or at which the purchaser of the item takes possession.

(ii) Order not fulfilled in Texas. When an order is received by a seller at a location that is not a place of business of the seller in Texas [~~outside of Texas or by a remote seller~~], and is fulfilled from a location outside of Texas, the sale is not consummated in Texas. However, a use is considered to be consummated at the first point in this state where the item is stored, used, or consumed after the interstate transit has ceased. A taxable item delivered to a point in this state is presumed to be used for storage, use, or consumption at that point until the contrary is established. Local use tax should be collected as provided in subsection (d) of this section. [~~local use tax is due based upon the location in this state to which the item is shipped or delivered or at which the purchaser of the item takes possession as provided in subsection (d) of this section.~~] Except as provided in subsection (i)(3) of this section, a remote seller required to collect state use tax under §3.286(b)(2) of this title must also collect local use tax [~~based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession~~].

(3) Exception for qualifying economic development agreements entered into before January 1, 2009, pursuant to Tax Code, §321.203(c-4) - (c-5) or §323.203(c-4) - (c-5). This paragraph is effective until September 1, 2024. If applicable, the local sales tax due on the sale of a taxable item is based on the location of the qualifying warehouse, which is a place of business of the seller, from which the item is shipped or delivered or at which the purchaser of the item takes possession.

(4) Local sales taxes are due to each local taxing jurisdiction with sales tax in effect where the sale is consummated. Local use tax may also be due if the total amount of local sales taxes due does not reach the two percent cap, and the item purchased is shipped or delivered to a location in one or more different local taxing jurisdictions, as provided in subsection (d) of this section.

(5) Multiple special purpose district taxes, multiple transit authority sales taxes, or a combination of the two may apply to a single transaction. If the sale of a taxable item is consummated at a location within the boundaries of multiple special purpose districts or transit authorities, local sales tax is owed to each of the jurisdictions in effect at that location. For example, a place of business of the seller located in the city of San Antonio is within the boundaries of both the San Antonio Advanced Transportation District and the San Antonio Metropolitan Transit Authority, and the seller is required to collect sales tax for both transit authorities. Similarly, a place of business of the seller in Flower Mound is located within the boundaries of two special purpose districts, the Flower Mound Crime Control District and the Flower Mound Fire Control District, and the seller is responsible for collecting sales tax for both special purpose districts.

(6) Itinerant vendors; vending machines.

(A) Itinerant vendors. Sales made by itinerant vendors are consummated at, and itinerant vendors must collect sales tax based upon, the location where the item is delivered or at which the purchaser of the item takes possession. Itinerant vendors do not

have any responsibility to collect use tax.

(B) Vending machines. Sales of taxable items made from a vending machine are consummated at the location of the vending machine. See §3.293 of this title (relating to Food; Food Products; Meals; Food Service) for more information about vending machine sales.

(d) Local use tax. The provisions addressing the imposition of state use tax in §3.346 of this title also apply to the imposition of local use tax. For example, consistent with §3.346(e) of this title, all taxable items that are shipped or delivered to a location in this state that is within the boundaries of a local taxing jurisdiction are presumed to have been purchased for use in that local taxing jurisdiction as well as presumed to have been purchased for use in the state.

(1) General rules.

(A) When local use taxes are due in addition to local sales taxes as provided by subsection (c) of this section, all applicable use taxes must be collected or accrued in the following order until the two percent cap is reached: city, county, special purpose district, and transit authority. If more than one special purpose district use tax is due, all such taxes are to be collected or accrued before any transit authority use tax is collected or accrued. See subparagraphs (D) and (E) of this paragraph.

(B) If a local use tax cannot be collected or accrued at its full rate without exceeding the two percent cap, the seller cannot collect it, or any portion of it, and the purchaser is not responsible for accruing it.

(C) If a seller collects a local sales tax on an item, or a purchaser accrues a local sales tax on an item, a use tax for the same type of jurisdiction is not due on the same item. For example, after a city sales tax has been collected or accrued for an item, no use tax is due to that same or a different city on that item, but use tax may be due to a county, special purpose district, or transit authority. Similarly, if one or more special purpose district sales taxes have been collected or accrued for an item, no special purpose district use tax is due on that item, and if one or more transit authority sales taxes have been collected or accrued for an item, no transit authority use tax is due on that item.

(D) Collection or accrual of use tax for multiple special purpose districts. If more than one special purpose district use tax is in effect at the location where use of an item occurs, the special purpose district taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all special purpose district taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the district with the earliest effective date would exceed the two percent cap, the tax for that district is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (C) of this paragraph, whether use tax is due for the district that next became effective.

(i) If the competing special purpose district taxes became effective on the same date, the special purpose district taxes are due in the order of the earliest date for which the election in which the district residents authorized the imposition of sales and use tax by the district was held.

(ii) If the elections to impose the local taxes were held on the same date, the special purpose district taxes are due in the order of the earliest date for which the enabling legislation under which each district was created became effective.

(E) Collection or accrual of use tax for multiple transit authorities. If more than one transit authority use tax is in effect at the location where use of an item occurs, and the two percent cap has not been met, the transit authority taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all transit authority taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the authority with the earliest effective date would exceed the two percent cap, the tax for that authority is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A)- (D) of this paragraph, whether use tax is due for the authority that next became effective.

(i) If the competing transit authorities became effective on the same date, the transit authority taxes are due in the order of the earliest date for which the election in which the authority residents authorized the imposition of sales and use tax by the authority was held.

(ii) If the elections to impose local taxes were held on the same date, the transit authority use taxes are due in the order of the earliest date for which the enabling legislation under which each authority was created became effective.

(2) General use tax rules applied to specific situations. The following fact patterns explain how local use tax is to be collected or accrued and remitted to the comptroller based on, and subject to, the general rules in paragraph (1) of this subsection.

(A) Sale consummated outside the state, item delivered from outside the state or from a location in Texas that is not operated by the seller - local use tax due. Except as provided in subsection (i)(3) of this section, if a sale is consummated outside of this state according to the provisions of subsection (c) of this section, and the item purchased is either shipped or delivered to a location in this state as designated by the purchaser from a location outside of the state, or if the order is drop shipped directly to the purchaser from a third-party supplier, local use tax is owed based upon the location in this state to which the order is shipped or delivered or at which the purchaser of the item takes possession. The seller is responsible for collecting the local use tax due on the sale. If the seller does not collect the local use taxes due on the sale, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller according to the provisions in paragraph (1) of this subsection. For example, if an order for a taxable item is received by a seller at a location outside of Texas, and the order is shipped to the purchaser from a location outside of the state, local use tax is due based upon the location to which the order is shipped or delivered or at which the purchaser of the item takes possession.

(B) Sale consummated in Texas outside a local taxing jurisdiction, item delivered into one or more local taxing jurisdictions - local use tax due. If a sale is consummated at a location in Texas that is outside of the boundaries of any local taxing jurisdiction according to the provisions of subsection (c) of this section, and the order is shipped or delivered to the purchaser at a location in this state that is within the boundaries of one or more local taxing jurisdictions, local use tax is due based on the location to which the items are shipped or delivered or at which the purchaser of the item takes possession. The seller is responsible for collecting the local use taxes due on the sale, regardless of the location of the seller in Texas. If the seller fails to collect any local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller.

(C) Sale consummated in any local taxing jurisdictions imposing less than 2.0% in total local taxes - local sales taxes and use taxes due. If a sale is consummated at a location in Texas where the total local sales tax rate imposed by the taxing jurisdictions in effect at that location does not equal 2.0% according to the provisions of subsection (c) of this section, and the item is shipped or delivered to the purchaser at a location in this state that is inside the boundaries of a different local taxing jurisdiction, additional local use tax may be due based on the location to which the order is shipped or delivered or at which the purchaser of the item takes possession, subject to the two percent cap. The seller is responsible for collecting any additional local use taxes due on the sale, regardless of the location of the seller in Texas. See subsection (i) of this section. If the seller fails to collect the additional local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller.

(i) Example one - if an order is received in person at a place of business of the seller, such that the sale is consummated at the location where the order is received as provided under subsection (c)(1)(A) of this section, and the local sales tax due on the sale does not meet the two percent cap, additional local use taxes are due based on the location to which the order is shipped or delivered or at which the purchaser of the item takes possession, subject to the provisions in paragraph (1) of this subsection.

(ii) Example two - if a seller receives an order for a taxable item at a seller's place of business in Texas, and the seller ships or delivers the item from an out-of-state location to a location in this state as designated by the purchaser, local sales tax is due based upon the location of the place of business of the seller where the order is received. If the local sales tax due on the item does not meet the two percent cap, use taxes, subject to the provisions in paragraph (1) of this subsection, are due based upon the location where the items are shipped or delivered or at which the purchaser of the item takes possession.

(e) Effect of other law.

(1) Tax Code, Title 2, Subtitles A (General Provisions) and B (Enforcement and Collection), Tax Code, Chapter 141 (Multistate Tax Compact) and Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax) apply to transactions involving local taxes. Related sections of this title and comptroller rulings shall also apply with respect to local taxes. This includes authorities such as court cases and federal law that affect whether an item is taxable or is excluded or exempt from taxation.

(2) Permits, exemption certificates, and resale certificates required by Tax Code, Chapter 151, shall also satisfy the requirements for collecting and remitting local taxes, unless otherwise indicated by this section or other sections of this title. For example, see subsection (n) of this section concerning prior contract exemptions.

(3) Any provisions in this section or other sections of this title related to a seller's responsibilities for collecting and remitting local taxes to the comptroller shall also apply to a purchaser if the seller does not collect local taxes that are due. The comptroller may proceed against the seller or purchaser for the local tax owed by either.

(f) Tax rates. Except as otherwise provided by law, no local governmental entity may adopt or increase a sales and use tax if, as a result of the adoption or increase of the tax, the combined rate of all sales and use taxes imposed by local taxing

jurisdictions having territory in the local governmental entity would exceed 2.0% at any location within the boundaries of the local governmental entity's jurisdiction. The following are the local tax rates that may be adopted.

(1) Cities. Cities may impose sales and use tax at a rate of up to 2.0%.

(2) Counties. Counties may impose sales and use tax at rates ranging from 0.5% to 1.5%.

(3) Special purpose districts. Special purpose districts may impose sales and use tax at rates ranging from 0.125% to 2.0%.

(4) Transit authorities. Transit authorities may impose sales and use tax at rates ranging from 0.25% to 1.0%.

(g) Jurisdictional boundaries, combined areas, and city tax imposed through strategic partnership agreements.

(1) Jurisdictional boundaries.

(A) City boundaries. City taxing jurisdictional boundaries cannot overlap one another and a city cannot impose a sales and use tax in an area that is already within the jurisdiction of another city.

(B) County boundaries. County tax applies to all locations within that county.

(C) Special purpose district and transit authority boundaries. Special purpose districts and transit authorities may cross or share boundaries with other local taxing jurisdictions and may encompass, in whole or in part, other local taxing jurisdictions, including cities and counties. A geographic location or address in this state may lie within the boundaries of more than one special purpose district or more than one transit authority.

(D) Extraterritorial jurisdictions. Except as otherwise provided by paragraph (3) of this subsection concerning strategic partnership agreements and subsection (l)(5) of this section concerning the City of El Paso and Fort Bliss, city sales and use tax does not apply to taxable sales that are consummated outside the boundaries of the city, including sales made in a city's extraterritorial jurisdiction. However, an extraterritorial jurisdiction may lie within the boundaries of a special purpose district, transit authority, county, or any combination of the three, and the sales and use taxes for those jurisdictions would apply to those sales.

(2) Combined areas. A combined area is an area where the boundaries of a city overlap the boundaries of one or more other local taxing jurisdictions as a result of an annexation of additional territory by the city, and where, as the result of the imposition of the city tax in the area in addition to the local taxes imposed by the existing taxing jurisdictions, the combined local tax rate would exceed 2.0%. The comptroller shall make accommodations to maintain a 2.0% rate in any combined area by distributing the 2.0% tax revenue generated in these combined areas to the local taxing jurisdictions located in the combined areas as provided in Tax Code, §321.102 or Health and Safety Code, §775.0754. Combined areas are identified on the comptroller's website. Sellers engaged in transactions on which local sales or use taxes are due in a combined area, or persons who must self-accrue and remit tax directly to the comptroller, must use the combined area local code when reporting the tax rather than the codes for the individual city, county, special purpose districts, or transit authorities that make up the combined area.

(3) City tax imposed through strategic partnership agreements.

(A) The governing bodies of a district, as defined in Local Government Code, §43.0751, and a city may enter into a limited-purpose annexation agreement known as a strategic partnership agreement. Under this agreement, the city may impose sales and use tax within all or part of the boundaries of a district. Areas within a district that are annexed for this limited purpose are treated as though they are within the boundaries of the city for purposes of city sales and use tax.

(B) Counties, transit authorities, and special purpose districts may not enter into strategic partnership agreements. Sales and use taxes imposed by those taxing jurisdictions do not apply in the limited-purpose annexed area as part of a strategic partnership agreement between a city and an authorized district. However, a county, special purpose district, or transit authority sales and use tax, or any combination of these three types of taxes, may apply at locations included in a strategic partnership agreement between a city and an authorized district if the tax is imposed in that area by the applicable jurisdiction as allowed under its own controlling authorities.

(C) Prior to September 1, 2011, the term "district" was defined in Local Government Code, §43.0751 as a municipal utility district or a water control and improvement district. The definition was amended effective September 1, 2011, to mean a conservation and reclamation district operating under Water Code, Chapter 49.

(h) Places of business of the seller and job sites crossed by local taxing jurisdiction boundaries.

(1) Places of business of the seller crossed by local taxing jurisdiction boundaries. If a place of business of the seller is crossed by one or more local taxing jurisdiction boundaries so that a portion of the place of business of the seller is located within a taxing jurisdiction and the remainder of the place of business of the seller lies outside of the taxing jurisdiction, tax is due to the local taxing jurisdictions in which the sales office is located. If there is no sales office, sales tax is due to the local taxing jurisdictions in which any cash registers are located.

(2) Job sites.

(A) Residential repair and remodeling; new construction of an improvement to realty. When a contractor is improving real property under a separated contract, and the job site is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on any separately stated charges for taxable items incorporated into the real property must be allocated to the local taxing jurisdictions based on the total square footage of the real property improvement located within each jurisdiction, including the square footage of any standalone structures that are part of the construction, repair, or remodeling project. For more information about tax due on materials used at residential and new construction job sites, refer to §3.291 of this title (relating to Contractors).

(B) Nonresidential real property repair and improvement. When taxable services are performed to repair, remodel, or restore nonresidential real property, including a pipeline, transmission line, or parking lot, that is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on the taxable services, including materials and any other charges connected to the services performed, must be allocated among the local taxing jurisdictions based upon the total mileage or square footage, as appropriate, of the repair, remodeling, or restoration project located in each jurisdiction. For more information about tax due on materials used at nonresidential real property repair and remodeling job sites, refer to §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance).

(i) Sellers' and purchasers' responsibilities for collecting or accruing local taxes.

(1) Sale consummated in Texas; seller responsible for collecting local sales taxes and applicable local use taxes. When a sale of a taxable item is consummated at a location in Texas as provided by subsection (c) of this section, the seller must collect each local sales tax in effect at the location. If the total rate of local sales tax due on the sale does not reach the two percent cap, and the seller ships or delivers the item into another local taxing jurisdiction, then the seller is required to collect additional local use taxes due, if any, based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession, regardless of the location of the seller in Texas. For more information regarding local use taxes, refer to subsection (d) of this section.

(2) Out-of-state sale; seller engaged in business in Texas. Except as provided in paragraph (3) of this subsection, when a sale is not consummated in Texas, a seller who is engaged in business in this state is required to collect and remit local use taxes due, if any, on orders of taxable items shipped or delivered at the direction of the purchaser into a local taxing jurisdiction in this state based upon the location in this state to which the item is shipped or delivered or at which the purchaser of the item takes possession as provided in subsection (d) of this section.

(3) Local use tax rate for remote sellers.

(A) A remote seller required to collect and remit one or more local use taxes in connection with a sale of a taxable item must compute the amount using:

(i) the combined tax rate of all applicable local use taxes based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession; or

(ii) at the remote seller's election, the single local use tax rate published in the *Texas Register*.

(B) A remote seller that is storing tangible personal property in Texas to be used for fulfillment at a facility of a marketplace provider that has certified that it will assume the rights and duties of a seller with respect to the tangible personal property, as provided for in §3.286 of this title, may elect the single local use tax rate under subparagraph (A)(ii) of this paragraph.

(C) Notice to the comptroller of election and revocation of election.

(i) Before using the single local use tax rate, a remote seller must notify the comptroller of its election using a form prescribed by the comptroller. A remote seller may also notify the comptroller of the election on its use tax permit application form. The remote seller must use the single local use tax rate for all of its sales of taxable items until the election is revoked as provided in clause (ii) of this subparagraph.

(ii) A remote seller may revoke its election by filing a form prescribed by the comptroller. If the comptroller receives the notice by October 1, the revocation will be effective January 1 of the following year. If the comptroller receives the notice after October 1, the revocation will be effective January 1 of the year after the following year. For example, a remote seller must notify the comptroller by October 1, 2020, for the revocation to be effective January 1, 2021. If the comptroller receives the revocation on November 1, 2020, the revocation will be effective January 1, 2022.

(D) Single local use tax rate.

(i) The single local use tax rate in effect for the period beginning October 1, 2019, and ending December 31, 2019, is 1.75%.

(ii) The single local use tax rate in effect for the period beginning January 1, 2020, and ending December 31, 2020, is 1.75%.

(E) Annual publication of single local use tax rate. Before the beginning of a calendar year, the comptroller will publish notice of the single local use tax rate in the Texas Register that will be in effect for that calendar year.

(F) Calculating the single local use tax rate. The single local use tax rate effective in a calendar year is equal to the estimated average rate of local sales and use taxes imposed in this state during the preceding state fiscal year. As soon as practicable after the end of a state fiscal year, the comptroller must determine the estimated average rate of local sales and use taxes imposed in this state during the preceding state fiscal year by:

(i) dividing the total amount of net local sales and use taxes remitted to the comptroller during the state fiscal year by the total amount of net state sales and use tax remitted to the comptroller during the state fiscal year;

(ii) multiplying the amount computed under clause (i) of this subparagraph by the rate provided in Tax Code, §151.051; and

(iii) rounding the amount computed under clause (ii) of this subparagraph to the nearest .0025.

(G) Direct refund. A purchaser may request a refund based on local use taxes paid in a calendar year for the difference between the single local use tax rate paid by the purchaser and the amount the purchaser would have paid based on the combined tax rate for all applicable local use taxes. Notwithstanding the refund requirements under §3.325(a)(1) of this title (relating to Refunds and Payments Under Protest), a non-permitted purchaser may request a refund directly from the comptroller for the tax paid in the previous calendar year, no earlier than January 1 of the following calendar year within the statute of limitation under Tax Code, 111.104 (Refunds).

(H) Marketplace providers. Notwithstanding subparagraph (A) of this paragraph, marketplace providers may not use the single local use tax rate and must compute the amount of local use tax to collect and remit using the combined tax rate of all applicable local use taxes.

(4) Purchaser responsible for accruing and remitting local taxes if seller fails to collect.

(A) If a seller does not collect the state sales tax, any applicable local sales taxes, or both, on a sale of a taxable item that is consummated in Texas, then the purchaser is responsible for filing a return and paying the tax. The local sales taxes due are based on the location in this state where the sale is consummated as provided in subsection (c) of this section.

(B) A purchaser who buys an item for use in Texas from a seller who does not collect the state use tax, any applicable local use taxes, or both, is responsible for filing a return and paying the tax. The local use taxes due are based on the location where the item is first stored, used, or consumed by the purchaser.

(C) For more information about how to report and pay use tax directly to the comptroller, see §3.286 of this title.

(5) Local tax is due on the sales price of a taxable item, as defined in Tax Code, §151.007, in the report period in which the taxable item is purchased or the period in which the taxable item is first stored, used, or otherwise consumed in a local taxing jurisdiction.

(6) A purchaser is not liable for additional local use tax if the purchaser pays local use tax using the rate elected by an eligible remote seller according to paragraph (3) of this subsection. The remote seller must be identified on the comptroller's website as electing to use the single local use tax rate. A purchaser must verify that the remote seller is listed on the comptroller's website. If the remote seller is not listed on the comptroller's website, the purchaser will be liable for additional use tax due in accordance to paragraph (4) of this subsection.

(j) Items purchased under a direct payment permit.

(1) When taxable items are purchased under a direct payment permit, local use tax is due based upon the location where the permit holder first stores the taxable items, except that if the taxable items are not stored, then local use tax is due based upon the location where the taxable items are first used or otherwise consumed by the permit holder.

(2) If, in a local taxing jurisdiction, storage facilities contain taxable items purchased under a direct payment exemption certificate and at the time of storage it is not known whether the taxable items will be used in Texas, then the taxpayer may elect to report the use tax either when the taxable items are first stored in Texas or are first removed from inventory for use in Texas, as long as use tax is reported in a consistent manner. See also §3.288(i) of this title (relating to Direct Payment Procedures and Qualifications) and §3.346(g) of this title.

(3) If local use tax is paid on stored items that are subsequently removed from Texas before they are used, the tax may be recovered in accordance with the refund and credit provisions of §3.325 of this title and §3.338 of this title (relating to Multistate Tax Credits and Allowance of Credit for Tax Paid to Suppliers).

(k) Special rules for certain taxable goods and services. Sales of the following taxable goods and services are consummated at, and local tax is due based upon, the location indicated in this subsection.

(1) Amusement services. Local tax is due based upon the location where the performance or event occurs. For more information on amusement services, refer to §3.298 of this title (relating to Amusement Services).

(2) Cable services. When a service provider uses a cable system to provide cable television or bundled cable services to customers, local tax is due as provided for in §3.313 of this title. When a service provider uses a satellite system to provide cable services to customers, no local tax is due on the service in accordance with the Telecommunications Act of 1996, §602.

(3) Florists. Local sales tax is due on all taxable items sold by a florist based upon the location where the order is received, regardless of where or by whom delivery is made. Local use tax is not due on deliveries of taxable items sold by florists. For example, if the place of business of the florist where an order is taken is not within the boundaries of any local taxing jurisdiction, no local sales tax is due on the item and no local use tax is due regardless of the location of delivery. If a Texas florist delivers an order in a local taxing jurisdiction at the instruction of an unrelated florist, and if the unrelated florist did not take the order within the boundaries of a local taxing jurisdiction, local use tax is not due on the delivery. For more information about florists' sales and use tax obligations, refer to §3.307 of this title (relating to Florists).

(4) Landline telecommunications services. Local taxes due on landline telecommunications services are based upon the location of the device from which the call or other transmission originates. If the seller cannot determine where the call or transmission originates, local taxes due are based on the address to which the service is billed. For more information, refer to §3.344 of this title (relating to Telecommunications Services).

(5) Marketplace provider sales. Local taxes are due on sales of taxable items through a marketplace provider based on the location in this state to which the item is shipped or delivered or at which the purchaser takes possession. For more information, refer to §3.286 of this title.

(6) Mobile telecommunications services. Local taxes due on mobile telecommunications services are based upon the location of the customer's place of primary use as defined in §3.344(a)(8) of this title, and local taxes are to be collected as indicated in §3.344(h) of this title.

(7) Motor vehicle parking and storage. Local taxes are due based on the location of the space or facility where the vehicle is parked. For more information, refer to §3.315 of this title (relating to Motor Vehicle Parking and Storage).

(8) Natural gas and electricity. Any local city and special purpose taxes due are based upon the location where the natural gas or electricity is delivered to the purchaser. As explained in subsection (l)(1) of this section, residential use of natural gas and electricity is exempt from all county sales and use taxes and all transit authority sales and use taxes, most special purpose district sales and use taxes, and many city sales and use taxes. A list of the cities and special purpose districts that do impose, and those that are eligible to impose, local sales and use tax on residential use of natural gas and electricity is available on the comptroller's website. For more information, also refer to §3.295 of this title (relating to Natural Gas and Electricity).

(9) Nonresidential real property repair and remodeling services. Local taxes are due on services to remodel, repair, or restore nonresidential real property based on the location of the job site where the remodeling, repair, or restoration is performed. See also subsection (h)(2)(B) of this section and §3.357 of this title.

(10) Residential real property repair and remodeling and new construction of a real property improvement performed under a separated contract. When a contractor constructs a new improvement to realty pursuant to a separated contract or improves

residential real property pursuant to a separated contract, the sale is consummated at the job site at which the contractor incorporates taxable items into the customer's real property. See also subsection (h)(2)(A) of this section and §3.291 of this title.

(11) Waste collection services. Local taxes are due on garbage or other solid waste collection or removal services based on the location at which the waste is collected or from which the waste is removed. For more information, refer to §3.356 of this title (relating to Real Property Service).

(l) Special exemptions and provisions applicable to individual jurisdictions.

(1) Residential use of natural gas and electricity.

(A) Mandatory exemptions from local sales and use tax. Residential use of natural gas and electricity is exempt from most local sales and use taxes. Counties, transit authorities, and most special purpose districts are not authorized to impose sales and use tax on the residential use of natural gas and electricity. Pursuant to Tax Code, §321.105, any city that adopted a local sales and use tax effective October 1, 1979, or later is prohibited from imposing tax on the residential use of natural gas and electricity. See §3.295 of this title.

(B) Imposition of tax allowed in certain cities. Cities that adopted local sales tax prior to October 1, 1979, may, in accordance with the provisions in Tax Code, §321.105, choose to repeal the exemption for residential use of natural gas and electricity. The comptroller's website provides a list of cities that impose tax on the residential use of natural gas and electricity, as well as a list of those cities that do not currently impose the tax, but are eligible to do so.

(C) Effective January 1, 2010, a fire control, prevention, and emergency medical services district organized under Local Government Code, Chapter 344 that imposes sales tax under Tax Code, §321.106, or a crime control and prevention district organized under Local Government Code, Chapter 363 that imposes sales tax under Tax Code, §321.108, that is located in all or part of a municipality that imposes a tax on the residential use of natural gas and electricity as provided under Tax Code, §321.105 may impose tax on residential use of natural gas and electricity at locations within the district. A list of the special purpose districts that impose tax on residential use of natural gas and electricity and those districts eligible to impose the tax that do not currently do so is available on the comptroller's website.

(2) Telecommunication services. Telecommunications services are exempt from all local sales taxes unless the governing body of a city, county, transit authority, or special purpose district votes to impose sales tax on these services. However, since 1999, under Tax Code, §322.109(d), transit authorities created under Transportation Code, Chapter 451 cannot repeal the exemption unless the repeal is first approved by the governing body of each city that created the local taxing jurisdiction. The local sales tax is limited to telecommunications services occurring between locations within Texas. See §3.344 of this title. The comptroller's website provides a list of local taxing jurisdictions that impose tax on telecommunications services.

(3) Emergency services districts.

(A) Authority to exclude territory from imposition of emergency services district sales and use tax. Pursuant to the provisions of Health and Safety Code, §775.0751(c-1), an emergency services district wishing to enact a sales and use tax may exclude from the election called to authorize the tax any territory in the district where the sales and use tax is then at 2.0%. The tax, if authorized by the voters eligible to vote on the enactment of the tax, then applies only in the portions of the district included in the election. The tax does not apply to sales made in the excluded territories in the district and sellers in the excluded territories should continue to collect local sales and use taxes for the local taxing jurisdictions in effect at the time of the election under which the district sales and use tax was authorized as applicable.

(B) Consolidation of districts resulting in sales tax sub-districts. Pursuant to the provisions of Health and Safety Code, §775.018(f), if the territory of a district proposed under Health and Safety Code, Chapter 775 overlaps with the boundaries of another district created under that chapter, the commissioners court of each county and boards of the counties in which the districts are located may choose to create a consolidated district in the overlapping territory. If two districts that want to consolidate under Health and Safety Code, §775.024 have different sales and use tax rates, the territory of the former districts located within the consolidated area will be designated as sub-districts and the sales tax rate within each sub-district will continue to be imposed at the rate the tax was imposed by the former district that each sub-district was part of prior to the consolidation.

(4) East Aldine Management District.

(A) Special sales and use tax zones within district; separate sales and use tax rate. As set out in Special District Local Laws Code, §3817.154(e) and (f), the East Aldine Management District board may create special sales and use tax zones within the

boundaries of the District and, with voter approval, enact a special sales and use tax rate in each zone that is different from the sales and use tax rate imposed in the rest of the district.

(B) Exemptions from special zone sales and use tax. The sale, production, distribution, lease, or rental of; and the use, storage, or other consumption within a special sales and use tax zone of; a taxable item sold, leased, or rented by the entities identified in clauses (i)- (vi) of this subparagraph are exempt from the special zone sales and use tax. State and all other applicable local taxes apply unless otherwise exempted by law. The special zone sales and use tax exemption applies to:

(i) a retail electric provider as defined by Utilities Code, §31.002;

(ii) an electric utility or a power generation company as defined by Utilities Code, §31.002;

(iii) a gas utility as defined by Utilities Code, §101.003 or §121.001, or a person who owns pipelines used for transportation or sale of oil or gas or a product or constituent of oil or gas;

(iv) a person who owns pipelines used for the transportation or sale of carbon dioxide;

(v) a telecommunications provider as defined by Utilities Code, §51.002; or

(vi) a cable service provider or video service provider as defined by Utilities Code, §66.002.

(5) Imposition of city sales tax and transit tax on certain military installations; El Paso and Fort Bliss. Pursuant to Tax Code, §321.1045 (Imposition of Sales and Use Tax in Certain Federal Military Installations), for purposes of the local sales and use tax imposed under Tax Code, Chapter 321, the city of El Paso includes the area within the boundaries of Fort Bliss to the extent it is in the city's extraterritorial jurisdiction. However, the El Paso transit authority does not include Fort Bliss. See Transportation Code, §453.051 concerning the Creation of Transit Departments.

(m) Restrictions on local sales tax rebates and other economic incentives. Pursuant to Local Government Code, §501.161, Section 4A and 4B development corporations may not offer to provide economic incentives, such as local sales tax rebates authorized under Local Government Code, Chapters 380 or 381, to persons whose business consists primarily of purchasing taxable items using resale certificates and then reselling those same items to a related party. A related party means a person or entity which owns at least 80% of the business enterprise to which sales and use taxes would be rebated as part of an economic incentive.

(n) Prior contract exemptions. The provisions of §3.319 of this title (relating to Prior Contracts) concerning definitions and exclusions apply to prior contract exemptions.

(1) Certain contracts and bids exempt. No local taxes are due on the sale, use, storage, or other consumption in this state of taxable items used:

(A) for the performance of a written contract executed prior to the effective date of any local tax if the contract may not be modified because of the tax; or

(B) pursuant to the obligation of a bid or bids submitted prior to the effective date of any local tax if the bid or bids and contract entered into pursuant thereto are at a fixed price and not subject to withdrawal, change, or modification because of the tax.

(2) Annexations. Any annexation of territory into an existing local taxing jurisdiction is also a basis for claiming the exemption provided by this subsection.

(3) Local taxing jurisdiction rate increase; partial exemption for certain contracts and bids. When an existing local taxing jurisdiction raises its sales and use tax rate, the additional amount of tax that would be due as a result of the rate increase is not due on the sale, use, storage, or other consumption in this state of taxable items used:

(A) for the performance of a written contract executed prior to the effective date of the tax rate increase if the contract may not be modified because of the tax; or

(B) pursuant to the obligation of a bid or bids submitted prior to the effective date of the tax rate increase if the bid or bids and contract entered into pursuant thereto are at a fixed price and not subject to withdrawal, change, or modification because of the tax.

(4) Three-year statute of limitations.

(A) The exemption in paragraph (1) of this subsection and the partial exemption in paragraph (3) of this subsection have no effect after three years from the date the adoption or increase of the tax takes effect in the local taxing jurisdiction.

(B) The provisions of §3.319 of this title apply to this subsection to the extent they are consistent.

(C) Leases. Any renewal or exercise of an option to extend the time of a lease or rental contract under the exemptions provided by this subsection shall be deemed to be a new contract and no exemption will apply.

(5) Records. Persons claiming the exemption provided by this subsection must maintain records which can be verified by the comptroller or the exemption will be lost.

(6) Exemption certificate. An identification number is required on the prior contract exemption certificates furnished to sellers. The identification number should be the person's 11-digit Texas taxpayer number or federal employer's identification (FEI) number.

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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Jenny Burleson

Director, Tax Policy Division

Comptroller of Public Accounts

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For further information, please call: (512) 475-2220

CHAPTER 16. BROADBAND DEVELOPMENT

SUBCHAPTER B. BROADBAND DEVELOPMENT PROGRAM

34 TAC §§16.30 - 16.46

The Comptroller of Public Accounts proposes new §16.30, concerning definitions, §16.31, concerning notice of funds availability, §16.32, concerning federal funding; conflict with laws, rules, regulations, or guidance, §16.33, concerning designated area eligibility, §16.34, concerning designated area reclassification, §16.35, concerning program eligibility requirements, §16.36, concerning application process generally, §16.37, concerning overlapping applications or project areas, §16.38, concerning special rule for overlapping project areas in noncommercial applications, §16.39, concerning application requirements, §16.40, concerning evaluation criteria, §16.41, concerning application protest process, §16.42, concerning awards; grant agreement, §16.43, concerning reporting, §16.44, concerning records retention; audit, §16.45, concerning failure to perform, and §16.46, concerning forms; notices. These new sections implement the Texas Broadband Development Office. The new sections will be located in Chapter 16 (Broadband Development), new Subchapter B (Broadband Development Program).

The proposal is to comply with Government Code, Chapter 490I, which was enacted by House Bill 5, 87th Legislature, R.S., 2021. Government Code, §490I.0109, permits the comptroller to adopt rules regarding the Texas Broadband Development Office as necessary to implement that chapter.

Section 16.30 provides definitions.

Section 16.31 provides that the office shall publish a notice of funds availability.

Section 16.32 establishes that the office may establish eligibility and program requirements and preferences and make award decisions in compliance with state or federal law, rule, regulation, or guidance applicable to the type of funding to the extent necessary to avoid a conflict between the relevant law, rule, regulation, or guidance and this subchapter.

Section 16.33 describes designated area eligibility requirements in compliance with state and federal law, rule, regulation and guidance.

Section 16.34 establishes the process for petitioning for designated area reclassification.

Section 16.35 describes program eligibility requirements.

Section 16.36 describes the application process.

Section 16.37 establishes criteria for overlapping project areas.

Section 16.38 establishes an application amendment process for applications from noncommercial broadband service providers that contain project areas that overlap with project areas in applications from commercial broadband service providers.

Section 16.39 establishes application requirements.

Section 16.40 establishes criteria the office shall use to evaluate applications and provides preferences the office may use to make award decisions.

Section 16.41 establishes an application protest process.

Section 16.42 provides award decisions will be made at the sole discretion of the office, requires awards to be used only for certain specified purposes, and establishes a timeline for grant recipients to negotiate and sign grant agreements.

Section 16.43 provides requirements for the submission of reports and documentation by a grant recipient.

Section 16.44 provides records retention requirements and describes requirements for providing records, documentation, or other information required by the office and authorizes the office, upon reasonable notice, to audit the activities of a grant recipient as necessary to ensure that grant funds are used for the intended purpose of the reimbursement award and that the grant recipient has complied with the terms, conditions, and requirements of the grant.

Section 16.45 provides for forfeiture of grant funds in the event a grant recipient fails to perform under the grant agreement.

Section 16.46 permits the office to prescribe all forms or documents that may be required to implement this subchapter and permits the office to require that such forms be submitted electronically.

Brad Reynolds, Chief Revenue Estimator, has determined that during the first five years that the proposed new rules are in effect, the rules: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy.

Mr. Reynolds also has determined that the proposed new rules would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed new rules would benefit the public by implementing Government Code, Chapter 490I, regarding the Texas Broadband Development Office. There would be no significant anticipated economic cost to the public. The proposed new rules would have no fiscal impact on small businesses or rural communities.

Comments on the proposal may be submitted to Greg Conte, Director, Broadband Development Office, at broadband@cpa.texas.gov or at 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 new sections are proposed under Government Code, §490I.0109.

The new sections implement Government Code, Chapter 490I.

§16.30.Definitions.

As used in this subchapter and in these rules, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise:

(1) Applicant--A person that has submitted an application for an award under this subchapter.

(2) Application protest period--A period of thirty days beginning on the first day after an application is posted under §16.36(d) of this subchapter.

(3) Broadband service--Internet service that delivers transmission speeds capable of providing a minimum download or upload threshold speed that are the greater of:

(A) a download speed of 25 Mbps or faster; and an upload speed of three Mbps or faster as established under Government Code, §490I.0101; or

(B) the upload or download threshold speeds for advanced telecommunications capability under 47 U.S.C. §1302 as adopted by the Federal Communications Commission and as published on the comptroller's website under Government Code, §490I.0101.

(4) Broadband development map--The map created under Government Code, §490I.0105.

(5) Census block--The smallest geographic area for which the U.S. Bureau of the Census collects and tabulates decennial census data as shown on the most recent on Census Bureau maps.

(6) Census tract--A cluster of census blocks consisting of small, relatively permanent statistical subdivisions of a county or statistically equivalent entity that can be updated by local participants prior to each decennial census as part of the U.S. Census Bureau's Participant Statistical Areas Program.

(7) Designated area--A census block or other area as determined under §16.33 of this subchapter.

(8) Grant funds--Grants, low-interest loans, and other financial incentives awarded to applicants under this subchapter for the purpose of expanding access to and adoption of broadband service in designated areas determined to be eligible areas by the office under Government Code, §490I.0105.

(9) Grant recipient--An applicant who has been awarded grant funds under this subchapter.

(10) Mbps--Megabits per second.

(11) Office--The Broadband Development Office created under Government Code, §490I.0102.

(12) Project area--The area identified by an applicant by reference to census blocks, census tracts, shapefile areas, individual addresses, or any portions thereof, for funding under this subchapter.

(13) Unserved area--A designated area or location within a designated area that does not have access to broadband service.

(14) Underserved area--A designated area or location within a designated area that has access to broadband service but lacks access to internet service offered with a download speed of at least 100 Mbps and an upload speed of at least 20 Mbps.

§16.31.Notice of Funds Availability.

(a) The office may publish a notice of funds availability in the Texas Register, the *Texas.gov eGrants* website, or on the comptroller's website. The date the notice is issued is the first day the notice is published in the *Texas Register.*

(b) The notice may include:

(1) the total amount of grant funds available for awards;

(2) the minimum and maximum amount of grant funds available for each application;

(3) limitations on the geographic distribution of grant funds;

(4) eligibility requirements;

(5) application requirements;

(6) award and evaluation criteria;

(7) the date by which applications must be submitted to the office;

(8) the anticipated date of award; and

(9) any other information necessary for award as determined by the office.

§16.32.Federal Funding; Conflict with Laws, Rules, Regulations, or Guidance.

(a) If federal funding is used to make an award, the office may establish eligibility and program requirements and preferences, and make award decisions, based upon any criteria required by federal law, regulation, or guidance applicable to the type of funding used to make the award.

(b) If a state or federal law, rule, regulation, or guidance applicable to the type of funding used to make the reimbursement award conflicts with this subchapter, the state or federal law, rule, regulation, or guidance applicable to the type of funding used to make the reimbursement award prevails over this subchapter to the extent necessary to avoid the conflict.

§16.33.Designated Area Eligibility.

(a) For the purpose of developing the broadband development map, the scope of a designated area in this state shall consist of a census block, unless the comptroller determines that using a census block is not technically feasible or data is not available at the census block level.

(b) If the comptroller determines that developing the broadband development map at the census block level is not feasible, the comptroller shall develop the map using the smallest level for which information is available from the Federal Communications Commission.

(c) The comptroller shall determine whether a designated area is eligible for funding based on the broadband development map, if available, or if not available may:

(1) Use a map produced by the Federal Communications Commission that complies with Government Code, §490I.0105(q); or

(2) Use information available from the Federal Communications Commission, political subdivisions of this state, or broadband service providers, to make a determination regarding whether a designated area is eligible for funding.

(d) A designated area is eligible for funding under the program if:

(1) fewer than 80% of the addresses in the designated area have access to broadband service; and

(2) the federal government has not awarded funding under a competitive process to support the deployment of broadband service to addresses in the designated area.

(e) A designated area is ineligible for funding under the program if:

(1) 80% or more of the addresses in the designated area have access to broadband service; or

(2) the federal government has awarded funding under a competitive process to support the deployment of broadband service to addresses in the designated area.

(f) Notwithstanding subsection (e)(2) of this section, a designated area where a political subdivision or broadband service provider has received or has been designated to receive federal funding related to the construction of broadband infrastructure shall be considered to be an unserved area and therefore eligible for funding under the program if:

(1) the funds:

(A) were awarded more than two years immediately prior to the date a notice of funds availability was issued by the office;

(B) have been designated for award and are not intended to result in the initiation of related construction activity in the designated area within two years after the date the notice of funds availability is issued; or

(C) were awarded less than two years immediately prior to the date a notice of funds availability was issued by the office and the project for which the funding was awarded has been completed; and

(2) the designated area otherwise meets the qualifications to be eligible for funding.

§16.34.Designated Area Reclassification.

(a) A broadband service provider or a political subdivision of this state may petition the office to reclassify a designated area as eligible or ineligible for funding. The office shall provide notice of the petition to each impacted political subdivision, and each broadband service provider that provides broadband service to the designated area, if known to the office, and post notice of the petition on the comptroller's website.

(b) Not later than the 45th day after the date that an impacted political subdivision or a broadband service provider that provides broadband service to the designated area receives a notice of a petition under subsection (a) of this section:

(1) an impacted political subdivision may provide information to the office showing whether the designated area should or should not be reclassified; and

(2) each broadband service provider that provides broadband service to the designated area shall provide information to the office showing whether the designated area should or should not be reclassified.

(c) Not later than the 75th day after the date that a broadband service provider that provides broadband service to the designated area receives the notice of a petition under subsection (a) of this section, the office shall determine whether to reclassify the designated area.

(d) The office shall consider the following criteria in making a determination to reclassify a designated area under subsection (c) of this section:

(1) an evaluation of Internet speed test data and information on end user addresses within the designated area;

(2) community surveys regarding the reliability of Internet service within the designated area, where available;

(3) information related to the loss of funding from the state or federal government through forfeiture or disqualification; and

(4) other information useful in determining funding eligibility.

(e) The office may reclassify a designated area that is classified as ineligible for funding on account of the existence of state or federal funding as eligible for funding if:

(1) funding from the state or federal government is forfeited or the recipient of the funding is disqualified from receiving the funding; and

(2) the designated area otherwise meets the qualifications to be eligible for funding.

(f) A determination made by the office under this subsection is not a contested case for purposes of Government Code, Chapter 2001.

(g) If after making an award the office determines that at the time of making the award a designated area was not eligible to receive funding under this subchapter, the office may rescind the award and the grant recipient shall return any grant funds that were awarded. The office may, at its sole discretion, reduce the amount required to be returned under this subsection if the office determines that the grant funds or any portion thereof have already been expended.

§16.35.Program Eligibility Requirements.

(a) Eligible participants of the program include:

(1) political subdivisions of this state;

(2) commercial broadband service providers;

(3) non-commercial broadband services providers; and

(4) partnerships between political subdivisions of this state, cooperatively organized entities, broadband service providers, or any combination thereof;

(b) The office may not award grant funds to an otherwise eligible participant under subsection (a)(3) of this section if a commercial broadband service provider has submitted an eligible application for the same area.

(c) An entity that does not provide information requested by the office under Government Code, §490I.0105, is not eligible to participate in the program and the office may not award grant funds to a broadband service provider that does not report information requested by the office under Government Code, §490I.0105.

§16.36.Application Process Generally.

(a) No awards for funding will be disbursed by the office except pursuant to an application submitted in accordance with this subchapter.

(b) An application for funding under this subchapter shall be submitted on the forms and in the manner prescribed by the office. The office may require that applications be submitted electronically.

(c) Prior to publication of application information pursuant to Government Code, §490I.0106(e), the office may undertake an examination to determine whether the application appears on its face to comply with applicable program requirements. The office may not accept an application that does not appear to comply with applicable program requirements on its face.

(d) The office shall publish on its website information from each accepted application, including the applicant's name, the project area targeted for expanded broadband service access or adoption by the application, and any other information the office considers relevant or necessary. The information will remain on the website for a period of at least 30 days before the office makes a decision on the application.

(e) During the 30-day posting period described by subsection (d) of this section for an application, the office shall accept from any interested party a written protest of the application relating to whether the applicant or project is eligible for an award or should not receive an award based on the criteria prescribed by the office. A protest of an application must be submitted as provided under §16.41 of this subchapter.

(f) Notwithstanding any deadline for submitting an application, if the office upholds a protest on the grounds that one or more of the locations in a project area have access to broadband service, the applicant may resubmit the application without the challenged locations not later than 30 days after the date that the office upheld the protest.

(g) If the office upholds a protest and the applicant resubmits an application in accordance with subsection (f) of this section, the resubmitted application is not subject to further protest.

§16.37.Overlapping Applications or Project Areas.

(a) Except as provided under §16.38 of this subchapter, if at the close of the application period one or more applications or project areas overlap one or more other applications or project areas, relative to one or more unserved or underserved areas, including census blocks, census tracts, shapefile areas, individual addresses, or portions thereof, the office shall inform the impacted applicants of the project area overlap prior to publishing information regarding the applications as required by §16.36 of this subchapter and provide the impacted applicants with an opportunity to resolve the overlapping unserved or underserved area.

(b) Applicants working to resolve an instance of overlapping applications or project areas shall jointly notify the office of such efforts not later than the 10th day after the first day of the application protest period.

(c) Applicants who have provided notice under subsection (b) of this section may submit their proposed resolution to the office and may amend their application not later than the last day of the application protest period. The proposed resolution between impacted applicants may not result in the addition of partners to a previously submitted application or project area nor the expansion of an application's project area.

(d) If the impacted applicants do not resolve the overlapping unserved census blocks, census tracts, shapefile areas, individual addresses, or portions thereof, each impacted application shall be evaluated independently; and the office shall:

(1) score each impacted application and the application receiving the highest score shall proceed to grant funding consideration with its project area boundary intact.

(2) remove the overlapping project area from the lower scored applications and provide notice to the impacted applicants that the overlapping project areas have been removed from the application.

(e) If, as a result of removing overlapping project areas, the remaining project area is less than 50% of the original project area, the office may remove the application from grant funding consideration. The office may use any reasonable method to calculate the remaining project area.

(f) If the office removes an overlapping project area from an application, an applicant may amend and resubmit an application without the overlapping area if:

(1) The remaining project area is greater than 50% of the original project area; or

(2) The remaining project area is less than 50% of the original project area and the office does not remove the application from grant funding consideration under subsection (e) of this section.

(g) If an amended application without the overlapping areas is not received by the office by the 10th day after receiving notice under subsection (d)(2) of this section, the office may remove the application from grant funding consideration.

§16.38.Special Rule for Overlapping Project Areas in Noncommercial Applications.

(a) If a commercial and noncommercial broadband service provider submit an eligible application to provide broadband service access to the same project area, or a portion thereof, the office shall inform the noncommercial provider of the overlap and the noncommercial provider shall be required to submit an amended application eliminating the areas of overlap for which the commercial provider proposes to provide expanded broadband service access.

(b) If a noncommercial broadband service provider required to amend its application under subsection (a) of this section does not submit an amended application to the office by the 30th day after receiving notice of the overlapping areas, the office may remove the application from grant funding consideration.

§16.39.Application Requirements.

(a) As set forth in greater detail in the notice of funds availability or the application instructions prescribed by the office, each application shall include:

(1) applicant information, statement of qualifications, and partnerships;

(2) maps of the project area and locations to be served;

(3) a technical description of the project;

(4) project budget(s), matching funds, costs, and proof of funding availability;

(5) proposed services, marketing, adoption, and community support;

(6) information required by the notice of funds availability; and

(7) any other information or documentation that the office may require.

(b) During the application process, the office may require an applicant to submit additional information the office determines is necessary to make an award determination.

§16.40.Evaluation Criteria.

(a) The office shall prioritize applications that:

(1) expand access to and adoption of broadband service in designated areas that are eligible for funding in which the lowest percentage of addresses have access to broadband service; and

(2) expand access to broadband service in public and private primary and secondary schools and institutions of higher education.

(b) In making award decisions, the office shall consider and may give preference to applications based upon the following evaluation criteria:

(1) application participant(s) experience;

(2) technical specifications including broadband transmission speeds (Mbps upload and download) that will be deployed as a result of the project;

(3) estimated project completion date;

(4) matching funds amount, percentage, and source of matching funds;

(5) cost effectiveness and overall impact as measured by the total project cost, the total number of prospective broadband service recipients to be served by the project, the proportion of recipients to be served by the project compared to the population in the designated area, and the project cost per prospective broadband service recipient;

(6) geographic location;

(7) the number and percentage of unserved and underserved households and businesses in the project area;

(8) community, non-profit, or cooperative involvement or participation in the project;

(9) affordability of broadband services in a project area prior to the deployment of broadband services as a result of the project;

(10) consumer price of broadband services that applicant proposes to deploy as a result of the project;

(11) participation in federal programs that provide low-income consumers with subsidies for broadband services;

(12) small business and historically underutilized business involvement or subcontracting participation; and

(13) any additional factors listed in a notice of funds availability published by the office.

§16.41.Application Protest Process.

(a) The protesting party bears the burden to establish that an applicant or project is ineligible for an award or should not receive an award based on the criteria prescribed by the office.

(b) Protests shall be submitted electronically in the manner and on the forms prescribed by the office and shall be accompanied by all relevant supporting documentation.

(c) As set forth in greater detail in the application instructions prescribed by the office, each protest shall, at a minimum, include:

(1) a notarized statement verifying that the protest and submitted information are true and submitted in good faith;

(2) data from the broadband development map, if available, or if not available the current Federal Communications Commission (FCC) Form 477 or equivalent;

(3) a detailed map, using the project area map(s) submitted by the applicant, delineating the general challenged areas and indicating where the protested serviceable locations are within the proposed project area;

(4) street level data for customers receiving service within the challenged area including, but not limited to, the area number of serviceable locations within the proposed project area and the minimum and maximum speeds those serviceable locations are able to receive; and

(5) GIS data files, including shapefiles and file geodatabases.

(d) The office shall review the protest and make a written determination as to whether the protest should be upheld.

(e) If the office upholds a protest, an applicant may amend and resubmit an application without the challenged locations and re-scope the application or project area.

(f) If an amended application without the challenged areas is not received by the office by the 10th day after receiving the determination under subsection (d) of this section, the office may remove the application from grant funding consideration.

(g) A determination made by the office under this section is not a contested case for purposes of Government Code, Chapter 2001.

§16.42.Awards; Grant Agreement.

(a) All award decisions shall be made at the sole discretion of the office and are not appealable or subject to protest.

(b) Awards for grant funds awarded to applicants under this subchapter may only be used for capital expenses, purchase or lease of property, and other expenses, including backhaul and transport, that will facilitate the provision or adoption of broadband service.

(c) A grant recipient shall have 30 days from the date of award to negotiate and sign the grant agreement. If the grant agreement is not signed by the grant recipient and received by the office by the 30th day after the award of the grant agreement, the office may rescind the award.

§16.43.Reporting.

(a) Grant recipients shall submit to the office periodic reports for each funded project for the duration of the grant agreement. The frequency, format and requirements of the reports shall be determined at the discretion of the office.

(b) Grant recipients, upon request from the office, shall provide:

(1) project and expenditure reports, including but not limited to, expenditures, project status, subawards, civil rights compliance, equity indicators, community engagement efforts, geospatial data, workforce plans and practices, and information about subcontracted entities; and

(2) performance reports, including but not limited to project outputs and outcomes.

(c) The office, at its sole discretion and at any time, upon reasonable notice, may request any additional data and reporting information that the office deems necessary to substantiate that grant funds are being used for the intended purpose and that the grant recipient has complied with the terms, conditions, and requirements of the grant agreement.

§16.44.Records Retention; Audit.

(a) Grant recipients must maintain all financial records, supporting documents, and all other records pertinent to the project or award for the later of:

(1) five years following the submission of a final report;

(2) if any litigation, claim, or audit is started, or any open records request is received, before the expiration of the five-year records retention period, one year after the completion of the litigation, claim, audit, or open records request and resolution of all issues which arise from it; or

(3) the period required by the specific federal funding source applicable to the grant.

(b) At any time during the grant agreement and for a period of five years after the project has been completed, the office or its designee may, upon reasonable notice, request any records from or audit the books and records of a grant recipient to verify that the grant recipient has complied with the terms, conditions, and requirements of the grant agreement and this subchapter. Grant recipients shall provide the requested records or information to the office not later than 30 days after a written request is made by the office.

§16.45.Failure to Perform.

(a) A grant recipient shall forfeit up to the amount of the grant funds received if it fails to perform, in material respect, the obligations established in the grant agreement. The amount forfeited shall be determined at the sole discretion of the office.

(b) A grant recipient shall not be required to forfeit the amount of the grant funds received if it fails to perform due to acts of war, terrorism, natural disaster declared by the governor of this state, an act of God, force majeure, a catastrophe, or such other occurrence over which the grant recipient has no control.

(c) A failure to perform resulting in forfeiture of grant funds may be cause for the office to bar an applicant from future consideration for grant funds under this program.

§16.46.Forms; Notices.

(a) Unless otherwise required by law, the office may prescribe all forms or other documents required to implement this subchapter and may require that the forms or other documents be submitted electronically.

(b) Any notice required by these rules to be sent by the office may be provided electronically and the office is entitled to rely on an email address provided by an applicant, grant recipient or other person, including a political subdivision or broadband service provider, for all purposes relating to notification. Applicants and grant recipients must provide an email address that is designated for receipt of notices from the office.

(c) If notice cannot be sent electronically, the office shall provide notice by regular U.S. Mail and the office is entitled to rely on the mailing address currently on file for all purposes relating to notification.

(d) Service of notice by the office is complete and receipt is presumed on:

(1) the date the notice is sent, if sent before 5:00 p.m. by electronic mail;

(2) the date after the notice is sent, if sent after 5:00 p.m. by electronic mail; or

(3) three business days after the date it is placed in the mail, if sent by regular U.S. Mail.

(e) When multiple recipients receive notice under §16.34(a) of this subchapter resulting in more than one date of service as determined under subsection (d) of this section, the date that a broadband provider receives notice for the purpose of §16.34 of this subchapter is the latest service date for that notice.

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 September 9, 2022.

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Victoria North

General Counsel for Fiscal and Agency Affairs

Comptroller of Public Accounts

Earliest possible date of adoption: October 23, 2022

For further information, please call: (512) 475-2220
