and trading partners must submit each transaction type during the testing process which can be successfully processed by the division. The division will not approve an insurance carrier or trading partner for production submissions until the insurance carrier or trading partner has:

(1) successfully submitted ten percent of its anticipated monthly volume per service type, not to exceed 100 medical EDI records [~~bills~~] per service type;

(2) received and reviewed the acknowledgments generated by the division; and

(3) correctly resubmitted rejected records identified in the acknowledgments.

(f) Insurance carriers are responsible for the acts or omissions of their trading partners. The insurance carrier commits an administrative violation if the insurance carrier or its trading partner fails to timely or accurately submit medical EDI records.

(g) This section is effective September 1, 2015 [~~September 1, 2011~~].

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 October 17, 2014.

TRD-201404843
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: November 30, 2014
For further information, please call: (512) 804-4703

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.280

The Comptroller of Public Accounts proposes new §3.280, concerning aircraft. The new section replaces, in part, §3.297 of this title (relating to Carriers), which is being repealed and proposed as new to reflect policy clarifications and reorganize existing information for improved clarity and readability. Those portions of §3.297 that pertain to aircraft are relocated to new §3.280 to create a section dedicated solely to aircraft. Further, the portions of current §3.292 of this title (relating to Repair, Remodeling, Maintenance, and Restoration of Tangible Personal Property) that pertain to aircraft are also relocated to new §3.280.

Subsection (a) provides definitions. Paragraph (1) defines the term "affiliated entity." This definition is based upon the definitions of the terms "affiliate" and "person" provided in Texas Business Organizations Code, §1.002.

Several of the terms defined in subsection (a) relate to the use of aircraft in connection with agricultural operations. Paragraph (2) defines the term "agricultural aircraft operation." Pursuant to Tax Code, §151.316(a)(11), this definition is the same as the definition given in 14 CFR Section 137.3. Pursuant to Tax Code, §151.328(a)(5), paragraph (3) defines the term "agricultural use" by reference to Tax Code, §23.51. Paragraph (8) defines the term "exotic animals." The term references the definitions of the terms exotic fowl and exotic livestock given in Texas Agriculture Code, §161.001(a). Paragraphs (14), (20), and (28) define the terms "livestock," "predator control," and "wildlife," respectively, all of which appear in Tax Code, §151.328(a)(5) but are not defined therein. For purposes of this subsection, the term "livestock" is defined to refer to horses, mules, donkeys, llamas, alpacas, and animal life of a kind that ordinarily constitutes food for human consumption. This definition reflects the meaning of the term "livestock" as it appears in §3.296 of this title (relating to Agriculture, Animal Life, Feed, Seed, Plants, Ice Used by Commercial Fishermen and Others, Work Animals (including Guard Dogs), and Fertilizer). The definition of the term "predator control" refers to Texas Parks and Wildlife Code, Chapter 43, Subchapter G (Permits to Manage Wildlife and Exotic Animals from Aircraft). The definition of the term "wildlife" is based upon the definition of the term in Texas Parks and Wildlife Code, §43.103(6).

Paragraph (4) addresses the statutory change to the definition of "aircraft" in Tax Code, §151.328(c) enacted by House Bill 3319, 80th Legislature, 2007, which amended the types of flight simulation training devices that are defined as aircraft. The definition further incorporates prior comptroller determinations that "balloons" and "gliders" do not meet the definition of an aircraft for sales and use tax purposes. See, for example, Comptroller's Decision No. 33,078 (1995) and STAR Accession No. 8510L0667A14 (October 1, 1985).

Paragraph (5) defines the term "certificated or licensed carrier." This term appears in Tax Code, §151.328(a), but is not defined therein. The proposed definition is derived from the definition of the term "licensed and certificated carrier" in current §3.297, which is proposed for repeal, but is tailored to apply specifically to aircraft. This definition makes clear that only carriers who operate under Federal Aviation Regulations, Part 121, 125, or 135 are certificated or licensed carriers for purposes of this section. Letters of authorization, certificates of inspection, and airworthiness certificates are not appropriate evidence of authority to operate as a certificated or licensed carrier because such letters and certificates relate to the carrier device itself rather than to a person's right to operate a carrier business. Provisions related to other types of carriers are provided in §3.297.

Paragraph (6) defines the term "component part" using language derived from both §3.297 and Southwest Airlines Co. v. Bullock, 784 S.W.2d 563 (Tex. App.--Austin 1990, no writ). The definition for the term "qualified flight instruction" in paragraph (21) is also adapted, in part, from §3.297. Additional language is added to the definition to make clear that qualified flight instruction does not include training in aerobatic maneuvers. See STAR Accession No. 200210542L (October 30, 2002) (partially superseded on other grounds).

Paragraph (10) defines the acronym "FAA."

Paragraph (12) defines the term "hangar." The term was previously used in §3.297, but was not defined. The new definition, which is based upon Comptroller's Decision No. 43,525 (2006), is intended to assist taxpayers in determining when an aircraft brought into this state is subject to use tax.

Finally, several of the terms identified in subsection (a) are based upon definitions provided in other sections of this title. The terms "consumable supplies," "extended warranty or service contract," "maintenance," "manufacturer's written warranty," "repair," "restore," and "service provider" provided in paragraphs (7), (9), (16), (17), (23), (24), and (27), respectively, are defined by cross-reference to the definitions of those terms given in §3.292. The term "remodeling" in paragraph (22) is defined by providing a cross-reference to §3.300 of this title (relating to Manufacturing; Custom Manufacturing; Fabricating; Processing). The terms "fair market value," "normal course of business," and "sale in the regular course of business," provided in paragraphs (11), (18), and (25), respectively, are defined by providing a cross-reference to the definitions in §3.285 of this title (relating to Resale Certificate; Sales for Resale). The definitions of "incorporated materials" in paragraph (13), "lump-sum contract" in paragraph (15), and "separated contract" in paragraph (26) are based, in part, on §3.291 of this title (relating to Contractors). Paragraph (19) defines the term "person" by providing a cross-reference to the definition in §3.286 of this title (concerning Seller's and Purchaser's Responsibilities, Including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules).

Subsection (b) provides information about the taxability of the sale, lease, or rental of aircraft, aircraft engines, and component parts.

Subsection (c) provides information concerning use tax. Paragraph (1) reiterates that use tax is due when an aircraft purchased, leased, or rented outside of Texas is brought into Texas for use in Texas. See Tax Code, §151.101 and §151.105.

Subsection (c)(2) addresses when an aircraft is considered to be hangared in this state. The paragraph identifies some factors the comptroller may use to determine whether an aircraft is hangared in Texas for longer than a temporary period. Subparagraphs (A), (B), and (C) are incorporated from §3.297, which is proposed for repeal, while subparagraphs (D) and (E) are added pursuant to Comptroller's Decision Nos. 43,525 (2006) and 101,452 (2010).

Subsection (c)(3) states an aircraft is subject to use tax in Texas, even if it is not hangared in this state, if it is used for its intended purpose inside this state for more than 50% of the time for the 12-month period following the date that the owner or operator takes possession of the aircraft. This subsection is derived from current §3.297(c)(3), which is proposed for repeal. Subparagraph (B) further explains that in calculating the amount of time an aircraft is in this state, the comptroller will consider time on the ground as well as flight time. This provision is based on §151.011(a), which defines "use" as "the exercise of a right or power incidental to the ownership of tangible personal property."

Subsection (c)(4) memorializes longstanding comptroller guidance that an aircraft is not considered to be hangared in this state if it is brought into Texas for the sole purpose of repair, remodeling, maintenance, or restoration. See Tax Code, §151.011(f) and STAR Accession No. 9401L1283G12 (January 26, 1994).

Subsection (c)(5) addresses transactions that are not sales in the regular course of business. The proposed rule follows the plain language of Tax Code, §151.101, which provides that "[a] tax is imposed on the storage, use, or other consumption in this state of a taxable item." This subsection sets forth the comptroller's determination that, when an aircraft purchased out of state is transferred from one affiliated entity to another prior to coming into Texas, she may assess the use tax due against the person who purchased the aircraft from a retailer or against the person actually making use of the aircraft in this state. The comptroller's determination follows a recent Texas Supreme Court decision in which the court expressed approval of the substance over form doctrine. See Combs v. Roark Amusement & Vending, L.P, 422 S.W.3d 632 (Tex. 2013) ("The United States Supreme Court has long observed that statutory determinations in tax disputes should reflect the economic realities of the transactions in issue."). This subsection also explains that a sale in the regular course of business will not constitute a taxable use. See Tax Code, §151.011(c).

Subsection (c)(6) states that a taxpayer may be entitled to a credit for tax paid to another state and refers taxpayers to §3.338 of this title (relating to Multistate Tax Credits and Allowance of Credit for Tax Paid to Suppliers) for more information about taking a credit for tax paid on an aircraft to another state.

Subsection (d) addresses the sales and use tax exemptions in Tax Code, §151.328 that are specific to aircraft. This subsection reflects the comptroller's general policy that purchasers may issue a resale certificate, but are not required to do so in order to later claim the sale for resale exemption on a purchase. "Only sellers of taxable items are required to accept and maintain resale or exemption certificates to prove tax-free sales." Comptroller's Decision No. 46,537 (2009) (emphasis added). As one Comptroller's Decision has explained: "[W]hen a seller is audited, the Comptroller requires the seller to produce a resale or exemption certificate to prove tax-free sales. On the flip side, a purchaser issues a resale or exemption certificate when claiming an exemption. However, the purchaser is not required by law to keep a copy of the resale or exemption certificate, which means it must rely on a tax exemption statute to prove that its purchases were not taxable. As a result, the Comptroller states that the '[f]ailure on the purchaser's part to give an exemption [certificate] at the time of purchase has never been considered a bar that would prevent the purchaser from showing that the purchase was in fact exempt.' This policy incorporates the recognition that to require the actual issuance of a certificate to claim any statutory exemption would defeat the legislative intent behind the exemption." Comptroller's Decision No. 49,141 (2008) (internal citations omitted). Paragraph (1) incorporates the exemptions provided by Tax Code, §151.328(a)(1) and (e) for the sale, lease, or rental, to a certificated or licensed carrier, of aircraft, component parts, and tangible personal property necessary for the normal operation of, and pumped or poured into, an aircraft. Paragraph (1)(A) provides that an aircraft purchased under this exemption must be listed on the carrier's operations specifications. See, for example, Comptroller's Decision No. 102,678 (2010). Paragraph (1)(D) makes clear that the exemption does not extend to, and sales and use tax is due on, the sale, lease, or rental of taxable items that support the overall operation of a certificated or licensed carrier. In addition, subsection (d)(1)(E) incorporates from existing §3.297, which is proposed for repeal, the exemption from sales tax created by Tax Code, §151.330(h) for the sale of tangible personal property to a certificated or licensed carrier in Texas for use solely outside Texas if the carrier, using its own facilities, ships the items to a point outside this state under a bill of lading. Subsection (d)(1)(E) restates the language of the statute.

Subsection (d)(2) incorporates from §3.297, and expands upon, the exemption created by Tax Code, §151.328(a)(2) and (e) for the sale, lease, or rental, to a qualified flight school or instructor, of aircraft, component parts, and tangible personal property necessary for the normal operation of, and pumped or poured into,

an aircraft. Paragraph (2)(E) also incorporates from §3.297 an exemption from sales tax for the rental of an aircraft by a student enrolled in a program providing qualified flight instruction.

Subsection (d)(3) incorporates from §3.297 the sales and use tax exemption created by Tax Code, §151.328(a)(3) for the sale, lease, or rental of an aircraft to a foreign government. The paragraph further states that sales or use tax is due on the sale or lease of component parts or materials that are incorporated in this state into an aircraft owned by a foreign government, unless the sale or lease is otherwise exempt under Tax Code, Chapter 151.

Subsection (d)(4) restates Tax Code, §151.328(a)(4), (f), and (g), which creates an exemption from tax for the sale or lease of an aircraft in this state to a person for use and registration in another state or nation before any use in this state. This subsection also memorializes the holding of Energy Education of Montana, Inc. v. Comptroller of Public Accounts, 2013 Tex. App. LEXIS 5047 (Tex. App- Austin 2013, pet. denied). Subsection (d)(4)(A)(i) is added to establish that performing repairs, remodeling, maintenance, or restoration on the aircraft in Texas prior to flying the aircraft out of Texas does not cause a loss of the exemption. See STAR Accession No. 9401L1283G12 (December 26, 1994). Given the unique, highly mobile nature of aircraft, the comptroller has determined that aircraft purchased under the fly-away exemption should not be subject to the general rules regarding divergent use of property purchased under an exemption, and should instead be treated as aircraft purchased out-of-state. Subsection (d)(4)(B) is added to explain that an aircraft purchased under the fly-away exemption that is subsequently used in this state will be subject to tax to the extent provided in subsection (c), concerning use tax. Finally, subsection (d)(4)(C) provides that the tax exemption does not apply to short-term hourly rentals, and that filing a fixed term operating lease for the use of an aircraft with the Aircraft Registration Branch of the FAA pursuant to the Code of Federal Regulations constitutes registration for the purposes of the exemption.

Subsection (d)(5) provides an exemption for the sale of an aircraft for agricultural use, pursuant to Senate Bill 958, 81st Legislature, 2009, which amended Tax Code, §151.328 to exempt from tax the sale of an aircraft in this state to a person for use exclusively in connection with an agricultural use, and certain services provided on such aircraft. See also subsections (a)(3) and (f)(3). Subsection (d)(5)(C) states that selling a gunner's seat on an aircraft used in agriculture operations to a person who will take depredating feral hogs or coyotes is subject to Texas sales and use tax as an amusement service. See Tax Policy News, June 2012 (STAR Accession No. 201207530L). The comptroller has long held that hunting is not a taxable amusement service. See, for example, §3.298(a)(2)(H) of this title; see also STAR Accession No. 200807120L (July 17, 2008) ("No tax is due on a separate charge for hunts or hunting guide services.") Using a helicopter to take feral hogs or coyotes is not hunting. A Texas hunting license is not required to take nuisance feral hogs and coyotes; rather, a special permit must be obtained from the Texas Parks and Wildlife Department. See Parks and Wildlife Code, §43.1075. Further, it is a violation of state law to sport hunt from an aircraft. See Parks and Wildlife Code, §43.1095(c).

Subsection (d)(6) implements House Bill 3144, 81st Legislature, 2009 and Senate Bill 958, 81st Legislature, 2009, both of which amended Tax Code, §151.316 to exempt from sales and use tax the sale, lease, or rental of machinery and equipment exclusively used in an agricultural aircraft operation. Subsection (d)(6)(C) implements House Bill 268, 82nd Legislature, 2011, which added Tax Code, §151.1551 requiring an agricultural aircraft operation to obtain an Agriculture/Timber registration number from the comptroller and to provide that registration number to the seller when purchasing taxable items exempt under Tax Code, §151.316.

Subsection (e) provides information for calculating the tax due when an aircraft or other taxable item that was sold, leased, or rented tax-free under a resale or exemption certificate is subsequently put to a divergent use. This information is taken from §3.285 and §3.287 of this title (relating to Exemption Certificates).

Subsection (f) provides information concerning the tax responsibilities of service providers repairing, remodeling, maintaining, or restoring aircraft, aircraft engines, or component parts. Paragraphs (1) - (3) pertaining to the tax responsibilities of service providers are incorporated from existing §3.292(i), which is proposed for repeal.

Subsection (f)(2)(A)(ii) implements Senate Bill 1, 82nd Legislature, First Called Session, 2011, which amended Tax Code, §151.006 to allow a tax exemption for the purchase of taxable items that are transferred in the performance of a nontaxable service under a contract with certain branches of the federal government.

Subsection (f)(4) incorporates longstanding comptroller guidance concerning the taxability of the repair, remodeling, maintenance, or restoration of aircraft brought into this state by out-of-state owners or operators pursuant to Tax Code, §151.330(a). This guidance was previously provided in STAR Accession Nos. 8804L0873G11 (April 6, 1988) and 200008645L (August 28, 2000). The provisions in paragraph (5), concerning the repair, remodeling, maintenance, or restoration of component parts removed from and returned to an aircraft pursuant to the repair, remodeling, maintenance, or restoration of that aircraft, also incorporate longstanding comptroller guidance. See STAR Accession No. 200810222L (October 9, 2008).

Subsection (g)(1) and (2) are incorporated from existing §3.297, which is proposed for repeal. These paragraphs grant an exemption for persons providing electrochemical plating or a similar process used in overhauling, retrofitting, or repairing jet turbine aircraft engines and their components, as provided by Tax Code, §151.318(n). Paragraph (3) addresses the exemption for the sale of electricity or natural gas used in the off-wing processing, overhaul, or repair of a jet turbine engine or its parts for a certificated or licensed carrier provided by Tax Code, §151.317(a)(7). This paragraph is also incorporated from existing §3.297, which is proposed for repeal.

Subsection (h)(1) and (2), concerning manufacturer's written warranty and extended warranties, respectively, are incorporated from §3.292(i), which is proposed for repeal. Paragraph (3) memorializes comptroller guidance provided in STAR Accession No. 200105244L (May 17, 2001) concerning "goodwill repairs" to aircraft and component parts.

Subsection (i) addresses the occasional sale exemption provided in Tax Code, §151.304. Additional guidance appears in §3.316 of this title (relating to Occasional Sales; Joint Ownership Transfers; Sales by Senior Citizens' Organizations; Sales by University and College Student Organizations; and Sales by Nonprofit Animal Shelters).

Subsection (j) addresses the sale, lease, or rental of an aircraft for resale. Paragraph (1) provides the requirements sellers must meet in order for there to be a sale for resale in good faith. These requirements are derived from §3.285 and §3.294 of this title and are reflected in prior Comptroller's Decisions, such as, Comptroller's Decision No. 105,680 (2013). Paragraph (2) explains when a person purchasing, leasing, or renting an aircraft, aircraft engine, or component part may provide a properly completed resale certificate in lieu of paying tax on the purchase, lease, or rental. Paragraph (3) addresses longstanding agency policy that the purchaser of an aircraft must transfer exclusive possession of the aircraft to a lessor in order to qualify for the sale for resale exemption. See, for example, Comptroller's Decision Nos. 15,996 (1987) and 13,848 (1985). Rather than explaining when a lease does not qualify the purchaser/lessor for the sale for resale exemption, this paragraph clarifies what a purchaser/lessor must do in order to transfer exclusive possession- lease the aircraft to a third party under an agreement that transfers to the lessee both operational control of the aircraft, as defined by the FAA at 14 CFR 1.1, and control over when, by whom, and for whom the aircraft is used, for the entire term of the lease. A service or management agreement with a Part 135 carrier does not transfer control of the aircraft from the lessor to the lessee. Similarly, an agreement under which the owner of the aircraft retains or reserves rights over the aircraft, including, but not limited to, the right to use the aircraft at any time, does not transfer control of the aircraft. See, for example, Comptroller's Decision No. 102,771 (2013). Paragraph (4) memorializes current comptroller guidance regarding the lease of aircraft in the normal course of business. See, for example, Comptroller's Decision Nos. 101,302 (2011). Paragraph (5) memorializes the comptroller's determination, based on a review of information provided by the Conklin and De Decker Associates, Inc. Aircraft Cost Evaluator, that the fair market value rental rate of aircraft is 1.0% of the purchase price. The paragraph provides that, if the effective monthly lease rate for an aircraft is less than 1.0% of the purchase price of the aircraft, the aircraft will be presumed not to have been leased or rented in the normal course of business, in the absence of evidence to the contrary. See, for example, Comptroller's Decision Nos. 101,302 and 103,610 (2012). Paragraph (6) addresses the circumstance under which a purchaser cannot claim a sale for resale exemption. Finally, paragraph (7) addresses the circumstances under which a purchaser must pay tax on the divergent use of an aircraft purchased for resale.

Finally, subsection (k) addresses the application of local sales and use tax to the sale, lease, and rental of aircraft.

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

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

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

The new section is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §§151.006 (Sale for Resale), 151.011 (Defining Use and Storage), 151.0101(a)(5) (Taxable Services), 151.101 (Use Tax Imposed), 151.105 (Importation for Storage, Use, or Consumption Presumed), 151.1551 (Registration Number Required for Timber and Certain Agricultural Items), 151.304 (Occasional Sales), 151.316 (Agricultural Items), 151.317(a)(7) (Gas and Electricity), 151.318(n) (Property Used in Manufacturing), 151.328 (Aircraft), and 151.330 (Interstate Shipments, Common Carriers, and Services).

§3.280. Aircraft.

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

(1) Affiliated entity--A person, including an organization formed under the laws of this or another state, who, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with a specified person, entity, or organization.

(2) Agricultural aircraft operation--The operation of an aircraft licensed by the FAA under 14 Code of Federal Regulations, Part 137.

(3) Agricultural use--This term has the meaning given in Tax Code, §23.51 (Appraisal of Agricultural Land; Definitions).

(4) Aircraft--A fixed-wing, heavier-than-air craft that is driven by propeller or jet and is supported by the dynamic reaction of the air against its wings; a helicopter; or an airplane flight simulation training device approved by the FAA under Appendices A and B, 14 Code of Federal Regulations, Part 60. The term does not include balloons, gliders, rockets, or missiles.

(5) Certificated or licensed carrier--A person authorized by the FAA, in compliance with the certification and operation specification requirements of 14 Code of Federal Regulations, Parts 121, 125, or 135, to operate an aircraft to transport persons or property for hire. Letters of authorization, certificates of inspection, and airworthiness certificates are not appropriate evidence of authority to operate as a certificated or licensed carrier. Refer to §3.297 of this title (relating to Carriers, Commercial Vessels, Locomotives and Rolling Stock, and Motor Vehicles) for provisions related to other types of carriers.

(6) Component part--Tangible personal property that is intended to be permanently affixed to, and become a part of, an aircraft; is necessary to the normal operations of the aircraft, or is required by FAA regulations; and is secured or attached to the aircraft. The term includes tangible personal property that is necessary to the normal operations of the aircraft that can be removed temporarily from the aircraft for servicing, such as, engines, seats, radar equipment, and other electronic devices used for navigational or communications purposes, and air cargo containers, food carts, fire extinguishers, survival rafts, and emergency evacuation slides. Items such as pillows, blankets, trays, ice for drinks, kitchenware, and toilet articles are not component parts.

(7) Consumable supplies--This term has the meaning given in §3.292 of this title (relating to Repair, Remodeling, Maintenance, and Restoration of Tangible Personal Property).

(8) Exotic animals--Exotic livestock and fowl that are not indigenous to this state as defined by Agriculture Code, §161.001(a). Examples include, but are not limited to, nilgai antelope, blackbuck antelope, axis deer, fallow deer, sika deer, aoudad, ostriches, and emus.

(9) Extended warranty or service contract--This term has the meaning given in §3.292 of this title.

(10) FAA--Federal Aviation Administration, an agency of the United States Department of Transportation.

(11) Fair market value--This term has the meaning given in §3.285 of this title (relating to Resale Certificate; Sales for Resale).

(12) Hangar--To store an aircraft for any purpose, including parking, housing, repairing, or otherwise, for longer than a temporary period. The term includes attaching or tying down an aircraft on an airport apron, parking ramp, or any other location used to store aircraft.

(13) Incorporated materials--Tangible personal property that is attached or affixed to, and becomes a part of, an aircraft, aircraft engine, or component part in such a manner that the property may lose its distinct identity as separate tangible personal property.

(14) Livestock--Horses, mules, donkeys, llamas, alpacas, and animal life of a kind that ordinarily constitutes food for human consumption. The term livestock does not include exotic animals, wildlife, or pets.

(15) Lump-sum contract--A written agreement in which the agreed price is one lump-sum amount and in which the charge for incorporated materials is not separated from the charge for skill and labor. Separated invoices or billings issued to the customer will not change a written lump-sum contract into a separated contract unless the terms of the contract require separated invoices or billings.

(16) Maintenance--This term has the meaning given in §3.292 of this title.

(17) Manufacturer's written warranty--This term has the meaning given in §3.292 of this title.

(18) Normal course of business--This term has the meaning given in §3.285 of this title.

(19) Person--This term has the meaning given in §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules).

(20) Predator control--A form of wildlife and exotic animal management regulated by the Texas Department of Parks and Wildlife pursuant to Parks and Wildlife Code, Chapter 43, Subchapter G (Permits to Manage Wildlife and Exotic Animals from Aircraft) used to protect or aid in the administration or protection of land, water, wildlife, livestock, domesticated animals, human life, or crops. Feral hog eradication using an aircraft is one form of predator control.

(21) Qualified flight instruction--Training recognized by the FAA that is designed to lead to a pilot certificate or rating issued by the FAA, or is otherwise required by rule or regulation of the FAA, and that is conducted under the direct or general supervision of a flight instructor certified by the FAA. Qualified flight instruction includes FAA-required check flights, maintenance flights, and test flights, but does not include demonstration flights for marketing purposes or training in aerobatic maneuvers.

(22) Remodeling--This term has the meaning given in §3.300 of this title (relating to Manufacturing; Custom Manufacturing; Fabricating; Processing).

(23) Repair--This term has the meaning given in §3.292 of this title.

(24) Restore--This term has the meaning given in §3.292 of this title.

(25) Sale in the regular course of business--This term has the meaning given in §3.285 of this title.

(26) Separated contract--A written agreement in which the agreed price is divided into a separately stated charge for incorporated materials and a separately stated charge for skill and labor. An agreement is a separated contract if the charge for incorporated materials and the charge for labor are separately stated on an invoice or billing that, according to the terms of the contract, is deemed to be a part of the contract. Adding the separated charge for incorporated materials and the separated charge for labor together to give a lump-sum total does not transform a separated contract into a lump-sum contract. An aircraft repair, remodeling, maintenance, or restoration contract that separates the charge for incorporated materials from the charge for labor is a separated contract even if the charge for labor is zero.

(27) Service provider--This term has the meaning given in §3.292 of this title.

(28) Wildlife--Animals, other than insects, that normally live in a state of nature and are not ordinarily domesticated.

(b) Sales Tax.

(1) The sale, lease, or rental of an aircraft, aircraft engine, or component part in this state is the sale, lease, or rental of tangible personal property, and is subject to sales tax, unless otherwise exempt under Tax Code, Chapter 151. The lease or rental of an aircraft complete with pilot or crew at fair market value for a single charge, whether lump-sum or separated, is a nontaxable transportation service, rather than the lease or rental of an aircraft. For more information about leases and rentals, refer to §3.294 of this title (relating to Rental and Lease of Tangible Personal Property).

(2) Sales tax is due on the total sales, lease, or rental price of the aircraft, aircraft engine, or component part. The total sales, lease, or rental price includes separately stated charges for any service or expense connected with the sale, lease, or rental, including transportation or delivery charges. The total sales, lease, or rental price does not include separately stated cash discounts or the value of any tangible personal property taken as a trade-in by the seller in lieu of all or part of the price of the aircraft in the normal course of business. For more information on determining the taxable sales price of an item of tangible personal property, refer to Tax Code, §151.007 and §3.294 of this title.

(c) Use Tax.

(1) General rule. An aircraft that is purchased, leased, or rented outside this state and brought into this state to be hangared or otherwise used in this state is subject to Texas use tax as provided in this subsection. For more information about the application of the use tax to aircraft engines and component parts, refer to §3.346 of this title (relating to Use Tax).

(2) Determining that an aircraft is hangared in Texas. An aircraft is subject to use tax in Texas when the comptroller determines that the aircraft is stored in this state for longer than a temporary period during the 12 months following the date that the owner or operator takes possession of the aircraft. In making this determination, some factors that the comptroller will consider include, but are not limited to:

(A) where the aircraft is rendered for ad valorem taxes;

(B) declarations made to the FAA, an insurer, or another taxing authority concerning the place of storage of the aircraft;

(C) whether the owner or operator of the aircraft owns, leases, or occupies hangar or other storage space in this state;

(D) whether the owner or operator of the aircraft is a resident of this state; and

(E) whether the owner or operator of the aircraft is engaged in business in this state, as that term is defined by §3.286 of this title.

(3) Use in Texas more than 50% of the time. An aircraft that is not hangared in this state is subject to use tax in Texas when it is used more than 50% of the time inside this state during the 12 months following the date that the owner or operator takes possession of the aircraft.

(A) The owner or operator of the aircraft must maintain records sufficient to show where the aircraft was hangared outside this state, where the aircraft was stored inside this state, if at all, and the percentage of time the aircraft was used both inside and outside this state.

(B) In determining the percentage of time the aircraft was used in this state, the comptroller will consider all time spent on the ground in this state and all flight time in this state, including the portion of interstate flights in Texas airspace, and the comptroller may examine all flight, engine, passenger, airframe, and other logs and records maintained on the aircraft.

(4) Repairing, remodeling, maintaining, or restoring aircraft in Texas. An aircraft is not considered to be hangared in this state if the aircraft is purchased, leased, or rented outside this state and then brought into this state for the sole purpose of repairing, remodeling, maintaining, or restoring the aircraft. Such repair, remodeling, maintenance, or restoration includes flights solely for troubleshooting, testing, or training, and flights between service locations under an FAA-issued ferry permit. Any use of the aircraft for business or pleasure travel during the time that the aircraft is being repaired, remodeled, maintained, or restored means the aircraft was not brought into Texas for the sole purpose of repair, remodel, maintenance, or restoration. Flight and maintenance logs and passenger lists must be provided to establish the actual use of the aircraft. Refer to subsection (f)(4) of this section for more information concerning repair, remodeling, maintenance, and restoration of aircraft, aircraft engines, or component parts purchased outside of Texas.

(5) Sale or transfer not in the regular course of business. When a person purchases an aircraft outside this state and, within one year of the purchase, transfers title or possession of the aircraft to an affiliated entity for hangaring or other use in this state by any means other than a sale in the regular course of business, both the purchaser and the affiliated entity are considered to be storing, using, or consuming the aircraft in this state and the comptroller may recover use tax against either person. The liability for use tax continues until the tax is paid to the state. A sale in the regular course of business does not constitute use of the aircraft in this state.

(6) Use tax credit. The purchaser or lessee of an aircraft, aircraft engine, or component part is allowed to claim a credit against Texas use tax due on the aircraft, aircraft engine, or component part for any legally imposed sales or use tax due and paid on the property by the purchaser or lessee to another state or any political subdivision of another state. For information on taking a credit for tax paid to another state, refer to §3.338 of this title (relating to Multistate Tax Credits and Allowance of Credit for Tax Paid to Suppliers).

(d) Tax exemptions specific to aircraft. In addition to the other exemptions from tax provided under Tax Code, Chapter 151, the following tax exemptions apply specifically to the sale, lease, rental, and use in this state of aircraft, aircraft engines, and component parts. A person claiming a sales tax exemption under this subsection may provide the seller with a properly completed exemption certificate at the time of the transaction. For more information, refer to §3.287 of this title (relating to Exemption Certificates). For information about exemptions related to the repair, remodeling, maintenance, and restoration of aircraft, aircraft engines, or component parts, refer to subsection (f) of this section.

(1) Certificated or licensed carriers.

(A) Sales and use tax is not due on the sale, lease, or rental of an aircraft to a certificated or licensed carrier if the aircraft is used by the carrier to transport persons or property for hire and is specifically identified in the carrier's Operations Specifications as required by 14 Code of Federal Regulations, §119.49. Any use of the aircraft other than that described in this paragraph is subject to tax as a divergent use pursuant to subsection (e) of this section, unless otherwise exempt under Tax Code, Chapter 151.

(B) Sales and use tax is not due on the sale, lease, or rental of component parts of an aircraft, provided that the aircraft is owned or operated by a certificated or licensed carrier and is specifically identified in the carrier's Operations Specifications as required by 14 Code of Federal Regulations, §119.49.

(C) Sales and use tax is not due on tangible personal property that is necessary for the normal operations of, and is pumped, poured, or otherwise placed in, an aircraft, provided that the aircraft is owned or operated by a certificated or licensed carrier and is specifically identified in the carrier's Operations Specifications as required by 14 Code of Federal Regulations, §119.49.

(D) Sales and use tax is due on the sale, lease, or rental of machinery, tools, and equipment that support the overall operation of a certificated or licensed carrier, such as baggage loading or handling equipment, reservation or booking machinery and equipment, garbage and other waste disposal equipment, and office supplies and equipment, unless otherwise exempt under Tax Code, Chapter 151.

(E) Sales tax is not due on the sale of tangible personal property transferred to a certificated or licensed carrier in this state, if the carrier, using its own facilities, ships the items to a point outside this state under a bill of lading, and the items are purchased for use by the carrier in the conduct of its business as a certificated or licensed carrier solely outside this state.

(2) Flight schools, instructors, and students.

(A) Sales or use tax is not due on the sale, lease, or rental of an aircraft by a person who:

(i) holds a flight school or flight instructor certificate issued by the FAA;

(ii) holds a sales and use tax permit issued under Tax Code, Chapter 151; and

(iii) uses the aircraft to provide qualified flight instruction.

(B) Any use of the aircraft other than that described in this paragraph is subject to tax as a divergent use pursuant to subsection (e) of this section, unless otherwise exempt under Tax Code, Chapter 151.

(C) Sales or use tax is not due on component parts of an aircraft owned or operated by a flight school or flight instructor to provide qualified flight instruction.

(D) Sales or use tax is not due on tangible personal property that is necessary for the normal operations of, and is pumped, poured, or otherwise placed in, an aircraft owned or operated by a flight school or flight instructor to provide qualified flight instruction.

(E) A student enrolled in a program providing qualified flight instruction may claim an exemption from sales tax on the short-term hourly rental of an aircraft for qualified flight instruction, including solo flights and other flights. When completing an exemption certificate claiming this sales tax exemption, the student must identify the flight school by name and address or, if the student is not enrolled in a flight school program, the student must identify the student's flight instructor and the instructor's address. The student must also retain copies of written tests and instructor's endorsements. Without evidence that the student is in pursuit of a FAA-certified pilot certificate or flight rating, aircraft rentals are subject to sales tax.

(3) Foreign governments. Sales tax is not due on the sale, lease, or rental of an aircraft to a foreign government. Sales tax is due on the sale or lease of component parts or materials incorporated in this state into an aircraft owned by a foreign government, unless otherwise exempt under Tax Code, Chapter 151. Refer to subsection (f) of this section for information concerning the repair, remodeling, maintenance, and restoration of aircraft, aircraft engines, and component parts.

(4) Fly-away exemption.

(A) Sales tax is not due on the sale or lease of an aircraft in this state to a person for use and registration in another state or nation before any use in this state other than:

(i) performing repairs, remodeling, maintenance, or restoration on the aircraft in this state, including necessary flights for troubleshooting, testing, or flights between service locations under an FAA-issued ferry permit; or

(ii) flight training in the aircraft.

(B) Any use of the aircraft in this state other than that described in subparagraph (A) of this paragraph before the aircraft is flown out of this state for use and registration in another state or nation will result in the loss of the exemption. Any use of the aircraft in this state after the aircraft has left the state will result in the loss of the exemption, and tax will be due on the purchase price, unless the owner or operator can show that:

(i) for the 12 months following the date that the aircraft left the state, the aircraft was hangared solely outside this state and is used for its intended purpose more than 50% of the time outside this state, pursuant to subsection (c) of this section; or

(ii) the aircraft is otherwise exempt from sales and use tax under this section or Tax Code, Chapter 151.

(C) The fly-away exemption does not apply to the short-term hourly rental of an aircraft in this state, even if the person renting the aircraft intends to use the aircraft in another state. The filing of a fixed-term operating lease for the use of an aircraft with the Aircraft Registration Branch of the FAA pursuant to 14 Code of Federal Regulations, §91.23, constitutes registration for the purposes of qualifying for the fly-away exemption under this paragraph.

(D) Exemption certificate required.

(i) A purchaser claiming the fly-away exemption under this paragraph must provide the seller with a properly completed Texas Aircraft Exemption Certificate Out-of-State Registration and Use, Form 01-907, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form. The seller may only accept the certificate if the seller lacks actual knowledge that the claimed exemption is invalid. Within 30 days of the sale of the aircraft, a copy of the completed certificate signed by both the seller and the purchaser must be provided to the Comptroller of Public Accounts, Business Activity Research Team, P.O. Box 13003, Austin, Texas, 78711-3003.

(ii) By signing the certificate, the purchaser authorizes the comptroller to provide a copy of the certificate to the state or nation in which the aircraft is intended to be used and registered.

(iii) Issuing an invalid certificate is a misdemeanor punishable by a fine not to exceed $500 in addition to the assessment of tax and, when applicable, penalty and interest on the purchase price of the aircraft.

(5) Agricultural use.

(A) Sales or use tax is not due on the sale, lease, or rental of an aircraft for use exclusively in connection with an agricultural use, as defined in this section, when used for:

(i) predator control;

(ii) wildlife or livestock capture;

(iii) wildlife or livestock surveys;

(iv) census counts of wildlife or livestock;

(v) animal or plant health inspection services; or

(vi) crop dusting, pollination, or seeding.

(B) For purposes of this paragraph only, use of an aircraft is considered to be "for use exclusively in connection with an agricultural use" if 95% of the use of the aircraft is for a purpose described by subparagraph (A) of this paragraph. Travel of less than 30 miles each way to a location to perform a service described by subparagraph (A) of this paragraph will not disqualify the sale, lease, or rental of an aircraft from the exemption, and will not be regarded as divergent use pursuant to subsection (e) of this section.

(C) Selling the use of a gunner's seat on an aircraft that is exempt under this paragraph to a person participating in aerial wildlife management, as authorized by Parks and Wildlife Code, §43.1075 (Using Helicopters to Take Certain Animals), will not result in a loss of the exemption. The sale of the gunner seat is subject to sales tax as a taxable amusement service pursuant to Tax Code, §151.0028 and §3.298 of this title (relating to Amusement Services).

(D) A person who claims an exemption under this paragraph must maintain and make available to the comptroller upon request flight records for all uses of the aircraft, as well as any other records requested by the comptroller, such as Aerial Wildlife Management Permits issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter G. Failure to maintain adequate records will result in the loss of this exemption.

(6) Agricultural aircraft operations.

(A) Sales or use tax is not due on the sale, lease, or rental of an aircraft used exclusively in an agricultural aircraft operation, as defined in this section. The exemption extends to all machinery, equipment, and tangible personal property that is necessary and essential to the agricultural aircraft operation and without which the use of the aircraft in agricultural aircraft operations could not be accomplished. This exemption does not include firearms, ammunition, or other equipment or tangible personal property used to perform predator control, wildlife census counts, or any other activity not included in the definition of agricultural aircraft operation in this section.

(B) For purposes of this paragraph only, an aircraft is considered to be exclusively used in an agricultural aircraft operation if 100% of its use is for that purpose.

(C) Exemption certificate required. A person claiming the exemption under this paragraph must have a valid Texas Agricultural and Timber Exemption Registration Number issued by the comptroller, and must issue a properly completed Texas Agricultural Sales and Use Tax Exemption Certification, Form 01-924, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form, or a signed confirmation letter with a current Texas Agricultural and Timber Exemption Registration Number.

(e) Divergent use.

(1) Sales and use tax is due when an aircraft, aircraft engine, or component part sold, leased, or rented tax-free under a properly completed resale or exemption certificate is subsequently put to a taxable use other than the use allowed under the certificate. For more information regarding divergent use, refer to §3.285 of this title and §3.287 of this title.

(A) The tax due is based on the fair market value of a rental of the aircraft or other taxable item for the period of time used in a divergent manner.

(B) The person using the aircraft or other taxable item has the burden of providing evidence sufficient to determine the fair market value of a rental of the item and the amount of time the item was used in a divergent manner. If the person using the item is unable to determine a reasonable fair market value during the period of divergent use, the measure of the tax is the original purchase price of the aircraft or other taxable item.

(C) At any time, the person using the item in a taxable manner may stop paying tax on the fair market value of a rental and instead pay sales tax on the original purchase price. When the person elects to pay sales tax on the purchase price, credit will not be allowed for sales or use tax previously paid on the fair market value of a rental.

(2) Agricultural use and agricultural aircraft operations. No divergent use may be made of an aircraft exempted under subsection (d)(5) of this section, relating to agricultural use, or subsection (d)(6) of this section, relating to agricultural aircraft operations, without a total loss of the exemption. Similarly, no divergent use of machinery, equipment, or tangible personal property exempted under subsection (d)(6) of this section, except for an exempt agricultural use under Tax Code, §151.316 (Agricultural Items), can be made without a total loss of that exemption. In the case of such divergent use, the measure of the tax due is the original purchase price of the aircraft or other taxable item.

(f) Repair, remodeling, maintenance, and restoration.

(1) Labor to repair, remodel, maintain, or restore aircraft in this state is not subject to sales or use tax. The sale or use of materials incorporated into an aircraft, aircraft engine, or component part being repaired, remodeled, maintained, or restored in this state is subject to sales and use tax either by the service provider or the purchaser of the service, as provided in paragraph (2) of this subsection, unless otherwise exempt in this subsection.

(2) Tax responsibilities of service providers.

(A) Incorporated materials. Whether the service provider owes tax on the purchase of materials that will become incorporated materials as part of the repair, remodeling, maintenance, or restoration of the aircraft, aircraft engine, or component part depends upon whether the service provider is operating under a lump-sum or separated contract.

(i) Separated contracts. If the services are performed under a separated contract, the service provider is regarded as the seller of the incorporated materials. If the service provider has a sales and use tax permit, the service provider may issue a properly completed resale certificate to the supplier in lieu of paying sales tax on the purchase of the incorporated materials. The service provider must then collect sales tax from the customer on either the agreed contract price for the incorporated materials, or the amount the service provider paid for the incorporated materials, whichever amount is greater. The service provider may also use incorporated materials removed from an inventory of items upon which sales or use tax was paid at the time of purchase. In such a case, sales tax is to be collected from the customer on the agreed contract price of the incorporated materials as though the incorporated materials had been purchased tax-free with a resale certificate. The service provider must remit sales tax to the comptroller on the difference between the agreed contract price for the incorporated materials and the price paid to the supplier by adjusting the "taxable sales" on its sales tax return or by taking a credit on its sales tax return pursuant to §3.338 of this title.

(ii) Lump-sum contracts. If the services are performed under a lump-sum contract, the service provider is the ultimate consumer of all incorporated materials. The service provider may not collect sales tax from the customer. The service provider must pay sales or use tax to the suppliers of the incorporated materials at the time of purchase, unless the service provider works under both lump-sum and separated contracts, uses incorporated materials removed from a valid tax-free inventory that was originally purchased tax-free by use of a resale certificate, and chooses to perform the service under a lump-sum contract. In such a case, the service provider incurs a tax liability based upon the purchase price of the incorporated materials and must report and remit the tax to the comptroller. The service provider owes sales or use tax on the purchase of incorporated materials even when the services are performed for a customer that is exempt from sales and use tax, unless the incorporated materials are purchased for the purpose of reselling them to the United States in a contract, or a subcontract of a contract, with any branch of the Department of Defense, Department of Homeland Security, Department of Energy, National Aeronautics and Space Administration, Central Intelligence Agency, National Security Agency, National Oceanic and Atmospheric Administration, or National Reconnaissance Office. See §3.285 of this title.

(B) Tools, equipment, and consumable supplies. Sales and use tax is due on the purchase, lease, or rental of tools, equipment, and consumable supplies used by the service provider but not incorporated into the aircraft, aircraft engine, or component part at the time of the service, regardless of the type of contract used to perform the service, and the service provider may not collect sales or use tax from the customer on any charges for such items.

(3) Exemption for certificated or licensed carriers, flight schools or instructors, and persons operating aircraft for agricultural purposes.

(A) The total charge for services to repair, remodel, maintain, or restore aircraft, aircraft engines, or component parts by or for a certificated or licensed carrier, a flight school or instructor providing qualified flight instruction, or a person operating aircraft for an agricultural use is exempt from sales and use tax, whether the charge is lump-sum or separately stated, when purchased by the aircraft owner or operator, the aircraft manufacturer, or a repair, remodeling, maintenance, or restoration facility.

(B) Sales and use tax is not due on the sale, lease, or rental of machinery, tools, supplies, and equipment used directly and exclusively in the repair, remodeling, maintenance, or restoration of

aircraft, aircraft engines, or component parts by or for a certificated or licensed carrier, a flight school or a flight instructor providing qualified flight instruction, or person conducting an agricultural aircraft operation, provided the purchaser issues the seller a properly completed exemption certificate. This includes equipment, such as battery chargers and diagnostic equipment, used to sustain or support safe and continuous operations and to keep the aircraft in good working order by preventing its decline, failure, lapse, or deterioration.

(4) Aircraft used exclusively outside this state. The following guidelines apply to aircraft brought into this state by out-of-state owners or operators for repair, remodeling, maintenance, or restoration.

(A) Separated contracts. Sales or use tax is not due on the separately stated charge for labor to repair, remodel, maintain, or restore an aircraft, aircraft engine, or component part performed under a separated contract. The cost of incorporated materials is:

(i) subject to sales tax when the owner or operator takes delivery of the aircraft in this state; or

(ii) not subject to sales tax when the aircraft is delivered to an out-of-state location by the service provider.

(B) Lump-sum contracts. Sales tax is not owed by the owner or operator of an aircraft repaired, remodeled, maintained, or restored under a lump-sum contract. The service provider does owe sales or use tax on the incorporated materials, whether the service provider delivers the aircraft out of state or the owner or operator takes delivery of the aircraft in this state.

(5) The repair, remodeling, maintenance, or restoration of component parts removed from and returned to an aircraft pursuant to the repair, remodeling, maintenance, or restoration of that aircraft is to be treated in accordance with the provisions of this paragraph. The repair, remodeling, maintenance, or restoration of a component part removed from an aircraft that is not returned to the aircraft in connection with the repair, remodeling, maintenance, or restoration of the aircraft is subject to the provisions of §3.292 of this title.

(g) Jet turbine aircraft engines.

(1) Sales or use tax is not due on the sale, lease, or rental of the following items used in electrochemical plating or a similar process by persons overhauling, retrofitting, or repairing jet turbine aircraft engines and their component parts:

(A) machinery, equipment, or replacement parts or accessories with a useful life in excess of six months; and

(B) supplies, including aluminum oxide, nitric acid, and sodium cyanide.

(2) A person claiming an exemption under paragraph (1) of this subsection must maintain documentation sufficient to show that no exclusion under Tax Code, §151.318 applies. Also refer to §3.300 of this title.

(3) Sales tax is not due on the sale of electricity or natural gas used in the off-wing processing, overhaul, or repair of a jet turbine engine or its parts for a certificated or licensed carrier. For more information, refer to §3.295 of this title (relating to Natural Gas and Electricity).

(h) Warranties.

(1) Manufacturer's written warranty or recall campaign.

(A) Sales or use tax is not due on incorporated materials or services furnished by the manufacturer to repair an aircraft, aircraft engine, or component part under a manufacturer's written warranty or recall campaign.

(B) Records must be kept by a service provider showing that the incorporated materials or services were used in repairing an item under a manufacturer's written warranty or recall campaign.

(C) A service provider may purchase incorporated materials used in a repair under a manufacturer's written warranty or recall campaign tax-free by issuing a properly completed exemption certificate to the seller.

(2) Extended warranties and service contracts.

(A) Sales tax is not due on the sale of an extended warranty or service contract that covers an aircraft, aircraft engine, or component part.

(B) A service provider performing services under an extended warranty or service contract must collect sales or use tax on incorporated materials as required under subsection (f)(2)(A) of this section, unless the aircraft, aircraft engine, or component part is owned by a certificated or licensed carrier or a flight school or instructor providing qualified flight instruction.

(3) Goodwill repairs. A service provider does not owe tax on incorporated materials purchased for use in repairing an aircraft, aircraft engine, or component part pursuant to an implied warranty within seven calendar days of the purchase of the aircraft being repaired. A service provider otherwise owes sales or use tax on incorporated materials used in performing a repair on an aircraft, aircraft engine, or component part other than an aircraft, aircraft engine, or component part owned by a certificated or licensed carrier or a flight school or instructor providing qualified flight instruction, even if the service provider does not charge the purchaser for the repair.

(i) Occasional sales. The purchase of an aircraft, aircraft engine, or component part is exempt from sales and use tax if the purchase meets the definition of an occasional sale provided by §3.316 of this title (relating to Occasional Sales; Joint Ownership Transfers; Sales by Senior Citizens' Organizations; Sales by University and College Student Organizations; and Sales by Nonprofit Animal Shelters).

(j) Sales for resale.

(1) A person selling, leasing, or renting an aircraft, aircraft engine, or component part may accept a properly completed and signed resale certificate from the purchaser at the time of sale in lieu of collecting tax on the sale if the person does not know, and does not have reason to know, that the sale is not a sale for resale. For more information on good faith acceptance of a resale certificate, refer to §3.285(e) of this title.

(2) A person purchasing, leasing, or renting an aircraft, aircraft engine, or component part may only provide the seller or lessor with a properly completed resale certificate if the person:

(A) holds a valid sales and use tax permit as required by §3.285 of this title at the time of the transaction;

(B) acquires the aircraft, aircraft engine, or component part for the sole purpose of leasing or renting it to another person, or for the purpose of transferring title to the aircraft to another person, for consideration in the normal course of business;

(C) does not intend to lease the aircraft with a crew or pilot; and

(D) does not intend to make a personal or business use of the aircraft, aircraft engine, or component part.

(3) Sole purpose of leasing or renting aircraft to another person. A person purchases an aircraft for the sole purpose of leasing or renting the aircraft to another person in the normal course of business when the person enters into lease agreements that transfer to the lessee operational control of the aircraft, as defined by the FAA at 14 Code of Federal Regulations 1.1, and control over when, by whom, and for whom the aircraft is used, for the duration of the lease term. An agreement under which the purchaser of the aircraft reserves the right to use the aircraft at any time, retains the right to control the scheduling or the chartering of the aircraft to a third party, or remains responsible for the insurance, maintenance, or storage of the aircraft does not transfer control of the aircraft to the lessee. A management agreement or service agreement under which another party manages the aircraft for the purchaser does not transfer control of the aircraft to the lessee.

(4) Normal course of business. In determining whether a lessor has purchased an aircraft for the sole purpose of leasing or renting it to another person in the normal course of business, the comptroller will review all the facts and circumstances, taken as a whole, including whether the lessee is an affiliated entity. Where the lease agreement is between affiliated entities, the lessor must show that a similar transaction would take place between unrelated entities. Factors to be considered include, but are not limited to, the following:

(A) whether the lessor markets the aircraft for rent to unrelated parties;

(B) whether the lease payments received by the lessor are sufficient to meet any loan obligations, if applicable, and defray all overhead and operating expenses;

(C) whether the aircraft has appreciated in value; and

(D) the terms of any insurance policies on the aircraft.

(5) For purposes of this subsection, if the effective monthly lease rate for an aircraft is less than 1.0% of the purchase price of the aircraft, the lease is presumed, in the absence of evidence to the contrary, to be leased at a rate that is below fair market value and not within the normal course of business. The owner of the aircraft may rebut this presumption with contemporaneous evidence that the transaction was executed at a fair market value.

(6) A person who knows at the time of purchase that the aircraft, aircraft engine, or component part will be used for purposes other than retention, demonstration, or display while holding the aircraft for sale, lease, or rental cannot claim a sale for resale exemption. For example, an aircraft owner who intends to retain the ability to determine when the aircraft will be used by others, or to approve pilots and crews that will be used by others, has not purchased the aircraft for the sole purpose of leasing or renting it to another person, as required by §3.294 of this title, and no resale exemption can be claimed on the purchase of the aircraft.

(7) Divergent use. When aircraft held in a valid tax-free inventory is used for any purpose other than retention, demonstration, or display while holding it for resale, lease, or rental, the purchaser is liable for sales tax based on the fair market value of a rental of the aircraft for the period of time used. For more information regarding divergent use, see §3.285 of this title.

(k) Local tax. Local sales and use taxes, including taxes imposed by a city, county, transit authority, or special purpose district, apply to aircraft in the same manner as any other tangible personal property.

(1) Sales consummated in Texas. Generally, local sales taxes are allocated to the local taxing jurisdictions in which the seller's place of business is located, and the seller must collect the local sales tax, without regard to whether the aircraft is actually delivered to, or intended for use in, a Texas location in a different local taxing jurisdiction. If the seller does not collect the applicable local tax, the purchaser must accrue and remit local tax to the comptroller. The criteria set forth in subsection (c)(2) of this section may be considered in determining where an aircraft is first stored or used.

(2) Sales consummated outside of the state. When an aircraft is purchased or leased outside the state and brought into this state, local use tax is due based on the local taxing jurisdiction(s) in which the aircraft is first stored or used. The purchaser must accrue and remit to the comptroller any local use tax due.

(3) For more information regarding the local tax collection and reporting responsibilities of sellers and purchasers, refer to Tax Code, Title 3 (Local Tax), Subtitle C (Local Sales and Use Taxes).

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 October 20, 2014.

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Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: November 30, 2014
For further information, please call: (512) 475-0387

34 TAC §3.285

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Comptroller of Public Accounts or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Comptroller of Public Accounts proposes the repeal of existing §3.285, concerning resale certificate; sales for resale. The existing §3.285 is being repealed in order to update the content of the existing section under a new §3.285 to reflect the changes made to Tax Code, §151.006 by House Bill 3319, 80th Legislature, 2007, and Senate Bill 1, 82nd Legislature, First Called Session, 2011; the interpretation of sale for resale provided by the decisions of the Texas Supreme Court in Combs v. Health Care Services Corp, 401 S.W.3d 623 (Tex. 2013) and Combs v. Roark Amusement & Vending, L.P., 422 S.W.3d 632 (Tex. 2013); to incorporate longstanding comptroller policies that are not addressed in the existing rule; and to make various other revisions to improve the clarity and organization of the section.

John Heleman, Chief Revenue Estimator, has determined that repeal of the rule will not result in any fiscal implications to the state or to units of local government.

Mr. Heleman also has determined the repeal would benefit the public by accommodating the adoption of a new rule incorporating current legal and judicial provisions and would provide improved clarity and organization. There would be no anticipated significant economic cost to the public. This repeal is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the repeal proposal may be submitted to Teresa G. Bostick, Manager, Tax Policy Division, P.O. Box 13528,

Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The repeal is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The repeal implements Tax Code, §§151.006, 151.025, 151.054, 151.151, 151.152, 151.154, and 151.302.

§3.285. Resale Certificate; Sales for Resale.

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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Ashley Harden
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34 TAC §3.285

The Comptroller of Public Accounts proposes new §3.285, concerning resale certificate; sales for resale. The new section replaces existing §3.285, which is being repealed. New §3.285 updates the content of the existing section to reflect the changes made to Tax Code, §151.006 by House Bill 3319, 80th Legislature, 2007, and Senate Bill 1, 82nd Legislature, First Called Session, 2011, which was effective October 1, 2011; to incorporate guidance regarding sales for resale provided by the Texas Supreme Court in Combs v. Health Care Services Corp., 401 S.W.3d 623 (Tex. 2013) and Combs v. Roark Amusement & Vending, L.P., 422 S.W.3d 632 (Tex. 2013); to memorialize longstanding comptroller policies that are not addressed in the existing section; and to make various other revisions to improve the clarity and organization compared to the current section that is being proposed for repeal.

Subsection (a) restates the definitions of the terms "Mexico" and "United States" from the version of the section that is proposed for repeal. See paragraphs (7) and (13). Subsection (a) also defines several additional terms which are not expressly defined in the current section that is proposed for repeal. These include "care of tangible personal property," "control of tangible personal property," and "custody of tangible personal property," which are defined in paragraphs (1) - (3). These definitions follow Sharp v. Clearview Cable TV, Inc., 960 S.W.2d 424 (Tex. App.--Austin 1998, pet. denied) and several Comptroller's Decisions interpreting that case, including Comptroller's Decision Nos. 100,294 (2012), 43,728 (2004), and 41,730 (2004).

Subsection (a)(4) defines the term "fair market value." This definition is provided to memorialize the comptroller's understanding of this term, which appears in the Tax Code and the Texas Administrative Code, but which was not previously defined. The proposed definition reflects longstanding comptroller policy that fair market value is the price for which tangible personal property or a service would be sold on the open market. This defined term is used in subsection (a)(8), defining the term "normal course of business;" subsection (a)(9), defining the term "sale in the regular course of business;" subsection (c), addressing divergent use; and subsection (d)(2), addressing the taxability of items removed from a valid tax-free inventory.

Subsection (a)(5) defines the term "federal government." The definition is consistent with the definition of that term provided in §3.322 of this title (relating to Exempt Organizations). This term is defined in order to clarify the meaning of Tax Code, §151.006(a)(5), which states that a sale for resale includes the sale of tangible personal property to a purchaser who will transfer title to the property to the federal government.

The term "integral part" appears in current §3.285 but is not defined therein. A proposed definition of the term is provided in subsection (a)(6) to give taxpayers additional guidance as to when one taxable item may be transferred as an integral part of another taxable item.

Subsection (a)(8) defines the term "normal course of business." This definition reflects current comptroller policy as established by Comptroller's Decision Nos. 18,493 (1986), 45,207 (2005), and 101,302 (2011), among others. This definition does not limit activities "in the normal course of business" to sales that generate a profit. For example, the use of "loss leaders," inventory reduction sales, or other means of selling items below cost in order to draw in customers are among the usual and customary activities of retailers. Under the proposed section, if a taxable item is resold outside of the normal course of business, the comptroller will still respect the sale, but the seller will not be allowed to claim the sale for resale exemption on the initial purchase of the taxable item.

The term "regular course of business" appears in the Tax Code in several contexts, and no uniform definition of the term is provided. Those sections of the Tax Code relating directly to sales for resale and resale certificates use the phrases "normal course of business" and "regular course of business" interchangeably. See Tax Code, §§151.006 ("Sale for Resale"); 151.054(b) (Gross Receipts Presumed Subject to Tax); 151.104(b) (Sale for Storage, Use, or Consumption Presumed); 151.151 (Resale Certificate); 151.152 (Resale Certificate: Form); and 151.154 (Resale Certificate: Liability of Purchaser). In other contexts, however, the terms are not synonymous. See, for example, Tax Code, §151.025(d) (Records Required to be Kept) ("[T]he combined charge is subject to tax unless the provider can identify the portion of the charges that are nontaxable through the provider's books and records kept in the regular course of business.") (Emphasis added).

To provide greater clarity, the comptroller proposes to define the term "sale in the regular course of business" in subsection (a)(9). This term appears in Tax Code, §151.011 ("Use" and "Storage") but is not defined therein. It is used in this section in the definition of the term "tax-free inventory." The proposed definition in subsection (a)(9) establishes that a transaction undertaken outside of the day-to-day operations of a business is not a sale in the regular course of business, even if it might otherwise be a normal business activity.

It is the comptroller's intent that the terms "normal course of business" and "regular course of business" be given the same meaning for purposes of sales for resale and resale certificates only. The comptroller is revising existing language taken from current §3.285 to replace the ambiguous term "regular course of business" with the defined term "normal course of business" or the

defined term "sale in the regular course of business," as appropriate.

Subsection (a)(10) defines the term "seller" by providing a cross-reference to §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules). Paragraph (11) restates the Tax Code's definition of the term "taxable item." See Tax Code, §151.010 (Taxable Item).

The term "tax-free inventory" is defined in subsection (a)(12). In addition to being used throughout this section, this term appears in §§3.280 (relating to Aircraft), 3.290 (relating to Motor Vehicle Repair and Maintenance; Accessories and Equipment Added to Motor Vehicles; Moveable Specialized Equipment), and 3.291 (relating to Contractors) of this title. This definition is based upon Tax Code, §151.011(e) ("Use" and "Storage"), which establishes that the keeping or retaining of tangible personal property "for sale in the regular course of business" does not constitute a taxable use of that tangible personal property, as well as longstanding comptroller policy established in decisions such as Comptroller's Decision Nos. 31,088 (1995) and 32,194 (1998).

Subsection (a)(12)(B) states that a purchaser may only purchase a stock of tangible personal property tax-free if the purchaser makes sales of "the same or similar types of tangible personal property." The "same or similar" requirement reflects the comptroller's interpretation of a sale in the regular course of business in the context of a tax-free inventory. It is derived from prior comptroller guidance imposing limitations on the types of property that can be included in a tax-free inventory. See, for example, STAR Accession No. 9509L1368C07 (September 12, 1995) ("[The tax-free inventory provision] only applies to items that the client resells and not to office supplies, construction equipment, etc.") and Comptroller's Decision No. 19,030 (1986) ("[T]hree over-the-counter sales of oil field anchors made during the entire audit period do not qualify Petitioner to maintain a complete tax-free inventory of anchors. Tax Code Section 151.151 simply cannot be stretched far enough to cover this situation.")

Subsection (b) revises the definition of the term "sale for resale." The revision reflects the changes enacted by House Bill 3319, 80th Legislature, 2007 and Senate Bill 1, 82nd Legislature, First Called Session, 2011, as well as guidance regarding the interpretation of Tax Code, §151.006 (Sale for Resale) provided by the decisions of the Texas Supreme Court in Combs v. Health Care Services Corp., and Combs v. Roark Amusement & Vending, L.P.

In order to claim an exemption from the sales tax that would otherwise be due on a purchase, a purchaser claiming the sale for resale exemption must show that the item is purchased for resale "in the normal course of business." Exemptions from tax are disfavored and strictly construed. See, for example, North Alamo Water Supply Corp. v. Willacy County Appraisal Dist., 804 S.W.2d 894, 899 (Tex. 1991); Sharp v. Tyler Pipe Indus., 919 S.W.2d 157, 161 (Tex. App.--Austin 1996, writ denied). The comptroller's proposed interpretation of the phrase "normal course of business" is provided in subsection (a)(8). As explained in that definition, a sale for less than fair market value may fall within the normal course of business, provided that the sale is one of the usual or customary activities undertaken in an enterprise or endeavor generally involving the sale, lease, rental, or trade of tangible personal property, or the provision of a service, at fair market value. If a taxable item is purchased for resale outside of the normal course of business, the initial purchase of that item does not fall within the scope of the resale exemption, because the initial purchase of a taxable item is exempted from taxation on the premise that the taxable item will subsequently be resold in the normal course of business--a transaction that will fall within the category of transactions that are subject to sales tax, unless otherwise exempted under Chapter 151. This is in keeping with the Legislature's general policy goals underlying the sale-for-resale exemption--"to avoid pyramiding of sales tax on successive transactions preceding sale to the ultimate purchaser." DTWC Corp. v. Combs, 400 S.W.3d 149, 153 (Tex. App.--Austin, no pet.).

Subsection (b)(1) identifies five general categories of sales for resale. The first category of sales for resale involves the sale of tangible personal property or a taxable service to a purchaser who is engaged in the business of selling, leasing, or renting taxable items and who acquires the taxable item for the purpose of reselling it in the United States or Mexico in the normal course of business. The requirement that the purchaser be engaged in the business of selling, leasing, or renting taxable items is not expressly stated in the current version of the section that is proposed for repeal. This requirement is mandated, however, by three statutory provisions.

The first of these statutory provisions is Tax Code, §151.104(b), which has long stated, "A sale is exempt if the seller receives in good faith from a purchaser, who is in the business of selling, leasing, or renting taxable items, a resale certificate..." The second is Tax Code, §151.006(a)(1), as amended in 2011, which now provides that the purchaser in a sale for resale transaction must purchase the taxable item for the purpose of reselling it "with or as a taxable item...in the normal course of business." Given that a purchaser can only resell a taxable item in the normal course of business if the purchaser is engaged in business activities involving the sale of taxable items, the requirement that a purchaser making a sale for resale be engaged in the business of selling, leasing, or renting taxable items is clearly implied.

The third statutory provision that supports the comptroller's policy is Tax Code, §151.006(c), which was enacted by the legislature in 2011, and which states that a sale for resale does not include the sale of a taxable item to a purchaser for the purpose of performing a nontaxable service. While a person who performs taxable services is engaged in the business of selling taxable items, a person who performs nontaxable services is not. Thus, the requirement that the purchaser be engaged in the business of selling, leasing, or renting taxable items reflects the intent of the legislature in enacting Tax Code, §151.006(c), which was to exclude sales to purchasers providing nontaxable services from the scope of the sale for resale exemption.

Subsection (b)(1)(A) also requires that the purchaser acquire the taxable item for the purpose of selling it "with or as a taxable item." This phrase was added to Tax Code, §151.006(a)(1) by Senate Bill 1, 82nd Legislature, First Called Session, 2011. This affirms the comptroller's longstanding policy that a sale for resale may only be made to a purchaser engaged in the business of selling, leasing, or renting taxable items who intends to resell the tangible personal property or taxable service acquired with or as a taxable item--a transaction that is subject to sales and use tax as provided in Tax Code, Chapter 151.

Finally, subsection (b)(1)(A) provides that the taxable item that is purchased for resale must be resold in the form or condition in which it is acquired; as an attachment to or integral part of other tangible personal property; or as an integral part of another taxable service. This restates Tax Code, §151.006(a)(1) and (3). Clause (ii) of this subparagraph also incorporates the limitation

set out in Tax Code, §151.302(c) that wrapping, packing, and packaging supplies cannot be purchased for resale. In addition, clause (iii) incorporates the requirement that tangible personal property that is purchased as a sale for resale and used by the purchaser in performing a taxable service must be transferred to the care, custody, and control of the purchaser of the service. See Tax Code, §151.302(b). No such statutory limitation is created with respect to taxable services that are used by the purchaser in providing another taxable service.

Subsection (b)(1)(B) addresses the second general category of sales for resale, which is the purchase of tangible personal property for the sole purpose of maintaining the tangible personal property temporarily in a valid tax-free inventory. The contents of this subparagraph are not expressly stated in the current version of the section that is proposed for repeal. The subparagraph is added to memorialize the comptroller's longstanding policy that a sale for resale includes the sale of tangible personal property for the purpose of maintaining the tangible personal property in a tax-free inventory. This is based on Tax Code, §151.011(e) and Comptroller's Decision Nos. 31,088 (1995) and 32,194 (1998).

Subsection (b)(1)(C) addresses the third general category of sales for resale, which is the purchase of tangible personal property for the sole purpose of leasing or renting the tangible personal property to another person. This subsection follows the language of Tax Code, §151.006(a)(2). Subsection (b)(1)(D) implements House Bill 3319, 80th Legislature, 2007, which added Tax Code, §151.006(b) creating a fourth category of sales for resale for certain wireless communications devices. Finally, subsection (b)(1)(E) reflects the sale for resale exemption created by Tax Code, §151.006(a)(4) for the sale of a taxable service to a purchaser who acquires the service for performance on tangible personal property that the purchaser holds for sale, lease, or rent in the normal course of business.

Subsection (b)(2) implements Tax Code, §151.006(c), enacted by the Senate Bill 1, 82nd Legislature, First Called Session, 2011. This paragraph states that the sale of a taxable item to a purchaser who acquires the taxable item for the purpose of performing a nontaxable service is not a sale for resale. It creates an exception, however, for nontaxable services performed for one of the federal agencies identified in paragraph (3)(B) of this subsection. This paragraph also clarifies that a nontaxable service is a service that is not specifically enumerated in Tax Code, §151.0101 (Taxable Services). The sale of a taxable service that is exempted from sales tax by Tax Code, Subchapter H (Exemptions) is still the sale of a taxable service. As the Supreme Court explained in Combs v. Roark Amusement & Vending, L.P., "[U]nder chapter 151, an item exempt from taxation may nevertheless be included in the universe of taxable items."

Subsection (b)(3) addresses two types of sales for resale that apply only in the context of federal contracts. The Tax Code provisions that create these sales for resale, Tax Code, §151.006(a)(5) and §151.006(c), were both enacted by the legislature in 2011. The first category, described in subparagraph (A), reflects the legislature's adoption of Day & Zimmermann, Inc. v. Calvert, 519 S.W.2d 106 (Tex. 1975), but only to the extent that the sales of tangible personal property are made to a purchaser for the purpose of transferring the tangible personal property to the federal government under a contract for the performance of a taxable service. The second category, described in subsection (b)(3)(B), is an exception to the general rule that a purchaser providing a nontaxable service cannot make a sale for resale. Under Tax Code, §151.006(c), the sale of tangible personal property or a taxable service to a purchaser who acquires the taxable item for the purpose of transferring the taxable item to the federal government in a contract, or a subcontract of a contract, with certain specifically enumerated federal agencies, is a sale for resale. Tax Code, §151.006(a)(5) and §151.006(c) reverse the comptroller's longstanding policy of extending the Day & Zimmerman holding to Texas state and local governmental entities. See Combs v. Health Care Services Corp., 401 S.W.3d 623, 631 (Tex. 2013) ("Since at least Day & Zimmerman, items consumed while performing a contract with a title-transfer provision have clearly been covered by the sale-for-resale exemption. If the Legislature considered this a loophole worth closing, it could have done so. In fact, lawmakers in 2011 narrowed it via Section 151.006(c), which reserves this sale-for-resale exemption to contractors that are partnering with federal national security-related agencies.")

Finally, subsection (b)(4) memorializes longstanding comptroller policy that the sale of tangible personal property to a purchaser who acquires the tangible personal property for the purpose of reselling or transferring the tangible personal property outside of the United States or Mexico does not fall within the definition of a sale for resale. See, for example, Comptroller's Decision No. 29,343 (1993), which states, "Sales of goods destined for another country must qualify for exemption under §151.307 rather than §151.302." The paragraph provides additional information regarding the taxability of purchases made for resale outside of the United States and Mexico and refers such purchasers to §3.323 of this title (relating to Imports and Exports).

Subsection (c) addresses divergent use by providing information about a purchaser's tax responsibilities in the event that the purchaser makes a taxable use of an item purchased tax-free for resale. Paragraph (1) restates the last sentence of subsection (e)(1) of the current section that is proposed for repeal (relating to the improper use of items purchased for resale). The remainder of this subsection generally restates information provided in subsection (e)(2) - (6) of the current section. New paragraph (1)(C) states that the purchaser has the burden of proof as to the fair market value of the taxable service or the fair market value of a rental of tangible personal property and the amount of time the taxable item was used in a divergent manner. New paragraph (1)(E) states that more detailed information regarding divergent use and the fair market rental value of aircraft is provided in §3.280 of this title.

Subsection (d) addresses valid tax-free inventories. Subsection (d)(1) states that tangible personal property that a purchaser knows at the time of purchase will be used or consumed by the purchaser may not be maintained in a valid tax-free inventory. It also restates the language in §3.291 of this title (Contractors) providing that a purchaser may issue a properly completed resale certificate instead of paying tax on items that are purchased for a tax-free inventory when the purchaser does not know at the time of purchase whether the item will be resold or used in the performance of a service. This subsection also explains the tax consequences to a purchaser who makes a taxable use of tangible personal property held in a valid tax-free inventory. Subsection (d)(2)(C) memorializes comptroller policy, which is not reflected in the current section that is proposed for repeal, that tax is not due on tangible personal property that is totally destroyed or permanently disposed of in a manner other than for use or sale in the normal course of business. See Comptroller's Decision No. 28,901 (1993) and STAR Accession No. 9606L1417A08 (June 10, 1996).

Subsection (e) establishes the circumstances in which a seller may accept a resale certificate in lieu of tax on the sale of a taxable item. Subsection (e)(1) restates the provision in Tax Code, §151.054(a) that all gross receipts of a seller are presumed to have been subject to the sales tax unless a properly completed resale or exemption certificate is accepted by the seller.

Tax Code, §151.054(c) states that a sale is exempt if the seller accepts a resale certificate from the purchaser in good faith. Subsection (e)(2) of this section memorializes longstanding comptroller policy regarding the elements required for such good faith acceptance. See STAR Accession No. 9105L1110D06 (May 20, 1991) and Comptroller's Decision Nos. 35,834 (1997), 48,258 (2009), and 105,608 (2012). Subparagraph (C) revises the statement in the current section that, in order to accept a resale certificate in good faith, a seller must lack actual knowledge that the sale is not a sale for resale and must take responsibility for notice of the type business generally engaged in by the purchaser as shown on the resale certificate. For clarity and readability, these requirements are now described as follows: "the seller does not know, and does not have reason to know, that the sale is not a sale for resale." See, Comptroller's Decision No. 48,258 (2009) ("The Comptroller has construed her rule to require 'no reason or basis for the seller to suspect that the certificate is invalid.' It reflects the "should have known" concept.") (internal citations omitted). Subparagraph (D) reflects well-established comptroller policy that a copy of a purchaser's sales tax permit, or the use of a purchaser's permit number or tax number on an invoice, does not meet the requirements of a properly completed resale certificate.

Subsection (e)(3) addresses auditor verification of resale certificates. All certificates obtained on or after the date that the comptroller's auditor actually begins work on the audit at the seller's place of business, or on the seller's records after the entrance conference, are subject to verification. All incomplete certificates will be disallowed. These statements are taken from subsection (b)(4) of the current section, which is proposed for repeal. p>Subsection (e)(4) restates the statutory bar that precludes the comptroller from accepting resale certificates provided by a taxpayer after the 60-day period has expired. The statutory basis for this provision is found at Tax Code, §151.054(e).

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

Subsection (e)(6) cross-references §3.281 of this title (relating to Records Required; Information Required) and provides that resale certificates are subject to the record-keeping requirements set out in that section. Certificates maintained by a seller in an electronic format must be unalterable.

Subsection (f) addresses blanket exemption certificates. Current §3.285(c) that is proposed for repeal states that a retailer may accept a blanket resale certificate from "a purchaser who purchases only items for resale." (Emphasis added). Under the current rule, few entities qualify to use a blanket sale for resale certificate. See, for example, Comptroller's Decision No. 41,244 (2003) ("[T]he certificate and letter do not meet the requirements of a valid resale certificate. Even if COMPANY B and COMPANY A were connected, neither entity would meet Rule 3.285(c)'s requirement that an issuer of a blanket resale certificate be a 'purchaser who purchases only items for resale,' inasmuch as both entities are retailers of books but users of store equipment.") The proposed language in draft §3.285(f) is intended to reflect economic realities and current comptroller practice by construing "only" to refer to purchases in a single transaction. The seller may make taxable sales to such a purchaser, provided that taxable purchases and items that are purchased for resale under the blanket certificate may not be billed on the same invoice. Subsection (f) also explains that a seller may not rely on a blanket exemption certificate that no longer states a valid basis for exemption due to a change in the law. This requirement is derived from the comptroller's previous determination that a seller cannot accept in good faith a resale certificate that is no longer facially valid due to a change in the law. See, for example, Comptroller's Decision Nos. 37,381 (2000) and 35,834 (1997).

Subsection (g) addresses the content and form of resale certificates. It first identifies all of the information that a purchaser must include in a resale certificate. The subsection then provides information about the proper form for a resale certificate. It explains how taxpayers can obtain copies of the Texas Sales and Use Tax Resale Certificate issued by the comptroller. This subsection provides that resale certificates do not have to be in the exact form provided by the comptroller.

Subsection (h) provides guidance to both purchasers located outside of Texas and Texas sellers accepting resale certificates from such purchasers. Paragraph (1) explains when a Texas seller may accept a resale certificate from an out-of-state purchaser, and paragraph (2) identifies the information that must be included on a resale certificate issued by an out-of-state purchaser. Paragraph (3) identifies the additional information that must be included on resale certificates issued by Mexican purchasers. Sales for resale made to foreign purchasers from countries other than Mexico are addressed in paragraph (4).

Subsection (i) provides a cross-reference to §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules) to assist resellers located outside of Texas in obtaining information about their obligations under Texas law.

Finally, subsection (j) restates information provided in the current §3.285, which is proposed for repeal, regarding improper use of a resale certificate. Paragraph (1) describes the actions that constitute improper use of a resale certificate. Paragraph (2) explains that it is a criminal offense to intentionally or knowingly make, present, use, or alter a resale certificate for the purpose of evading Texas sales or use tax, and then provides a cross reference to §3.305 of this title (Criminal Offenses and Penalties). The comptroller has determined that a description of criminal penalties associated with such an offense is not necessary in this section as criminal offenses and penalties are addressed in detail in §3.305.

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

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by incorporating current legal and judicial provisions and providing improved clarity and or-

ganization. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

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

This new section is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §§151.006, ("Sale for Resale"), 151.010 (Taxable Item), 151.011 ("Use" and "Storage"), 151.025 (Records Required to be Kept), 151.054 (Gross Receipts Presumed Subject to Tax), 151.104 (Sale for Storage, Use, or Consumption Presumed), 151.151 (Resale Certificate), 151.152 (Resale Certificate: Form), 151.154 (Resale Certificate: Liability of Purchaser), and 151.302 (Sales for Resale).

§3.285. Resale Certificate; Sales for Resale.

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

(1) Care of tangible personal property--The primary responsibility to properly maintain the tangible personal property. Care of tangible personal property may require active maintenance of the tangible personal property, or may be limited to a contractual commitment to refrain from intentionally causing harm to the tangible personal property, depending upon the circumstances.

(2) Control of tangible personal property--The right to determine when, how, and by whom the tangible personal property is used.

(3) Custody of tangible personal property--Possession of and the right to remove or relocate tangible personal property, or the right to personalize tangible personal property in some manner. Custody requires more than mere physical possession, but may be less than complete ownership of the tangible personal property.

(4) Fair market value--The sales price at which an unrelated purchaser and seller in a good faith, arm's-length contractual relationship would agree to transfer tangible personal property or a service. Fair market value may be determined by reference to the prices charged by similarly situated sellers in comparable transactions on the open market.

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

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

(7) Mexico--Within the geographical limits of the United Mexican States.

(8) Normal course of business--The usual or customary activities undertaken in furtherance of an enterprise or endeavor involving the sale, lease, rental, or trade of tangible personal property, or the provision of a service, at fair market value for the purpose of attempting to derive a gain, benefit, advantage, income, or profit. Activities undertaken in the normal course of business may include the sale of items at below cost for the purpose of inventory reduction or to attract customers.

(9) Sale in the regular course of business--A sale made at fair market value in an arm's length transaction that is part of the day-to-day operations of a business. The term does not include the transfer of title or possession of tangible personal property by means of a contribution, distribution, liquidation, dissolution, merger, or similar action to an affiliated entity for storage, use, or other consumption by the affiliated entity in this state.

(10) Seller--This term has the meaning given in §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules).

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

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

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

(B) makes sales in the regular course of business of the same or similar types of tangible personal property; and

(C) does not know that the tangible personal property will not be resold in the normal course of business.

(13) United States--Within the geographical limits of the United States of America or within the territories and possessions of the United States of America.

(b) Sale for resale.

(1) Each of the following is a sale for resale:

(A) the sale of a taxable item to a purchaser engaged in the business of selling, leasing, or renting tangible personal property, or selling taxable services, who acquires the taxable item for the purpose of reselling it in the United States or Mexico in the normal course of business as a taxable item, or with another taxable item:

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

(ii) as an attachment to, or as an integral part of, tangible personal property, except for certain tangible personal property described in §3.314 of this title (relating to Wrapping, Packing, Packaging Supplies, Containers, Labels, Tags, Export Packers, and Stevedoring Materials and Supplies); or

(iii) as an integral part of a taxable service, except that if the purchaser acquires tangible personal property that the purchaser uses in providing the taxable service, then the purchase is not a sale for resale unless the purchaser transfers care, custody, and control of that tangible personal property to the purchaser of the taxable service;

(B) the sale of tangible personal property for the sole purpose of maintaining the tangible personal property temporarily in a valid tax-free inventory in the normal course of business;

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

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

(E) the sale of a taxable service to a purchaser who acquires the service for performance on tangible personal property that the purchaser holds for sale, lease, or rental in the normal course of business.

(2) Nontaxable services. The sale of a taxable item to a purchaser who acquires the taxable item for the purpose of performing a nontaxable service is not a sale for resale, except if the nontaxable service is performed for one of the federal agencies identified in paragraph (3)(B) of this subsection. For purposes of this section, a nontaxable service is a service that is not specifically enumerated in Tax Code, §151.0101 (Taxable Services). A taxable service that is exempted from sales tax by Tax Code, §151.309 (Governmental Entities) or §151.310 (Religious, Educational, and Public Service Organizations) is not a nontaxable service.

(3) Federal contracts. The sale of a taxable item under the following circumstances is a sale for resale.

(A) The sale of tangible personal property, but not taxable services, to a purchaser who acquires the tangible personal property for the purpose of transferring it as an integral part of performing a contract, or a subcontract of a contract, for a service that is specifically enumerated in Tax Code, §151.0101, solely with the federal government, provided that the purchaser:

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

(ii) allocates and bills the cost of the tangible personal property to the contract or subcontract as a direct or indirect cost.

(B) The sale of tangible personal property or a taxable service to a purchaser who acquires the taxable item for the purpose of transferring the taxable item to the federal government in a contract, or a subcontract of a contract, with any branch of the Central Intelligence Agency, Department of Defense, Department of Homeland Security, Department of Energy, National Aeronautics and Space Administration, National Security Agency, National Oceanic and Atmospheric Administration, or National Reconnaissance Office, to the extent the tangible personal property or taxable service is allocated and billed to the contract or subcontract. This is an exception to the general rule that a sale for resale does not include the sale of a taxable item to a purchaser who acquires the item for the purpose of performing a nontaxable service.

(4) Foreign purchasers. A sale for resale does not include the sale of a taxable item to a purchaser who acquires the taxable item for the purpose of reselling or transferring the taxable item outside the territorial limits of the United States or Mexico.

(A) Foreign purchasers other than purchasers from Mexico, including purchasers from Canada, must pay tax at the time of sale when taking possession of a taxable item in this state for use outside the territorial limits of the United States, unless the sale is exempt under Chapter 151 and the purchaser issues the seller a properly completed exemption certificate pursuant to §3.287 of this title (relating to Exemption Certificates). Otherwise, in order for the sale of a taxable item purchased in this state for resale or a nonexempt use outside the territorial limits of the United States to be exempt from Texas sales tax, the sale must comply with the requirements of §3.323 of this title (relating to Imports and Exports).

(B) Purchasers from Mexico should refer to subsection (h) of this section.

(c) Taxable use of items purchased tax-free for resale.

(1) Divergent use; paying tax on fair market rental value. When tangible personal property or a taxable service purchased under a resale certificate is used for any purpose other than retention, demonstration, or display while holding it for sale, lease, or rental, or for transfer as an integral part of a taxable service, the purchaser is liable for sales tax based on the value of the tangible personal property or taxable service for the period of time used.

(A) The value of tangible personal property is the fair market value of a rental of the tangible personal property. The value of a taxable service is the fair market value of the taxable service.

(B) If the fair market value cannot be determined, sales tax is due based upon the original purchase price of the taxable item.

(C) The purchaser has the burden of proof as to the fair market value of a taxable service or the fair market value of a rental of tangible personal property and the amount of time the tangible personal property was used in a divergent manner.

(D) A purchaser who makes a use of a taxable item may stop paying sales tax on the value of the taxable item, and instead pay sales tax on the original purchase price, at any time. When the purchaser elects to pay sales tax on the original purchase price, credit will not be allowed for sales tax previously paid based on value.

(E) Aircraft. For guidance on divergent use and determining the fair market rental value of aircraft, see §3.280 of this title (relating to Aircraft).

(2) Donation of taxable item. A purchaser who gives a properly completed resale certificate in lieu of paying tax on the purchase of a taxable item is not liable for sales tax if the purchaser later donates the taxable item to an organization exempt under Tax Code, §151.309 or §151.310(a)(1) or (2), provided that the purchaser did not make any use of the taxable item prior to its donation.

(3) Use of taxable item as a trade-in. A purchaser who issues a properly completed resale certificate for the purchase of a taxable item is liable for sales tax if the purchaser uses the taxable item as a trade-in on the purchase of another taxable item. Tax must be paid on the original purchase price of the taxable item used as a trade-in.

(d) Valid tax-free inventory.

(1) A purchaser may not maintain in a valid tax-free inventory tangible personal property that the purchaser knows, at the time of purchase, will be used or consumed by the purchaser. A purchaser may issue a properly completed resale certificate instead of paying tax on items that are purchased for a tax-free inventory if the purchaser does not know at the time of purchase whether the item will be resold or used in the performance of a service. The purchaser must collect,

report, and remit tax to the comptroller as required by §3.286 of this title when the purchaser sells, leases, or rents taxable items.

(2) Taxability of items removed from a valid tax-free inventory.

(A) Texas sales or use tax is due on tangible personal property removed from a valid tax-free inventory for use in this state based on the value of the tangible personal property for the period of time used, except when the use is for the purpose of retention, demonstration, or display. The value of tangible personal property is the fair market value of a rental of the tangible personal property. If the fair market value cannot be determined, sales tax is due based upon the original purchase price of the taxable item. The purchaser has the burden of proof as to the fair market value of tangible personal property and the amount of time the tangible personal property was used in a divergent manner. Also see subsection (c)(1) of this section.

(B) Texas sales or use tax is not due on tangible personal property removed from a valid tax-free inventory for use by the purchaser outside the state.

(C) Texas sales or use tax is not due on tangible personal property removed from a valid tax-free inventory that is totally destroyed or permanently disposed of by the purchaser in a manner other than for use or sale in the normal course of business: for example, documented theft, casualty damage or loss, or disposal in a landfill. This does not apply to consumable items that are completely used up or destroyed by the purchaser in the course of performing a service in this state.

(e) Acceptance of resale certificate.

(1) All gross receipts of a seller are presumed to be subject to sales or use tax. A seller may overcome this presumption by obtaining a properly completed resale or exemption certificate from the purchaser, subject to the limitations in paragraph (3) of this subsection. A copy of a purchaser's sales tax permit, or the use of a purchaser's permit number or tax number on an invoice, does not meet the requirements of a properly completed resale certificate. See also §3.287 of this title.

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

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

(B) the resale certificate is properly completed, meaning that all of the information required by either subsections (g) or (h) of this section, whichever is applicable, is legible, including the signature of the purchaser; and

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

(3) All resale certificates obtained on or after the date the comptroller's auditor actually begins work on the audit at the seller's place of business, or on the seller's records after the entrance conference, are subject to independent verification by the comptroller. All incomplete resale certificates will be disallowed regardless of when they were obtained.

(4) Written notice requesting the production of all resale certificates shall be given by the comptroller upon the filing by the seller of a petition for redetermination or claim for refund. The seller has 60 days from the date written notice is received by the seller from the comptroller in which to deliver the resale certificates to the comptroller. For the purposes of this section, written notice given by mail is presumed to have been received by the seller within three business days from the date of deposit in the custody of the United States Postal Service. The seller may overcome the presumption by submitting proof from the United States Postal Service or by other competent evidence showing a later delivery date. Any resale certificates delivered to the comptroller during the 60-day period will be subject to independent verification by the comptroller before any deductions will be allowed. Resale certificates delivered after the 60-day period will not be accepted and the deduction will not be granted. See §3.282 of this title (relating to Auditing Taxpayer Records) and §3.286 of this title.

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

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

(f) Blanket resale certificate. A blanket resale certificate describing the general nature of the taxable items purchased for resale may be issued to a seller by a purchaser who purchases items for resale. Each invoice from the seller must clearly identify the taxable items purchased tax-free for resale under the blanket resale certificate and must be attached, or refer directly, to the blanket resale certificate. Items purchased for resale under the blanket resale certificate cannot be billed on the same invoice as other taxable purchases. A seller may rely on a blanket resale certificate until the certificate is revoked in writing by the issuer or no longer states a valid basis for exemption due to a change in the law.

(g) Content and form of resale certificates.

(1) Contents of a resale certificate. A properly completed resale certificate must contain:

(A) the name and address of the purchaser;

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

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

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

(E) the date of sale; and

(F) the name and address of the seller.

(2) Form of a resale certificate. A resale certificate must be substantially either in the form of a Texas Sales and Use Tax Resale Certificate or a Border States Uniform Sale for Resale Certificate. Copies of both certificates are available online at http://window.state.tx.us/taxinfo/taxforms/ or may be obtained by calling the comptroller's toll-free number 1-800-252-5555. A seller may also accept as a resale certificate the Uniform Sales and Use Tax Certificate-Multijurisdiction promulgated by the Multistate Tax Commission and available online at http://www.mtc.gov. The Streamlined Sales and Use Tax Agreement Certificate of Exemption may not be accepted as a resale certificate.

(h) Resale certificates issued by purchasers outside Texas.

(1) Acceptance of resale certificates from purchasers outside of Texas.

(A) A seller in Texas may accept a properly completed resale certificate in lieu of tax from an out-of-state purchaser engaged in business within the United States who makes purchases that constitute sales for resale.

(B) A properly completed resale certificate may be accepted from an out-of-state purchaser even if the Texas seller ships or delivers the taxable item directly to a recipient located inside Texas at the direction of the out-of-state purchaser. The Texas seller is not responsible for determining whether the out-of-state purchaser is required to hold a Texas sales and use tax permit or to enter a Texas permit number on the resale certificate.

(2) Content of resale certificates. A properly completed resale certificate obtained from an out-of-state purchaser must contain:

(A) the name and address of both the seller and the purchaser;

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

(C) the date of sale;

(D) the state in which the purchaser intends to resell the taxable item;

(E) the sales tax permit number, if any, or the registration number assigned to the purchaser by the state in which the purchaser is authorized to do business or a statement that the purchaser is not required to be permitted or registered in the state in which the purchaser is authorized to do business;

(F) as an attachment, an invoice describing the taxable item purchased and showing the exact street address or office address from which the taxable item will be resold; and

(G) the type business engaged in by the purchaser, the type items sold in the purchaser's normal course of business, and the taxable items to be purchased tax-free by use of the resale certificate.

(3) A resale certificate obtained from a Mexican purchaser must contain, in addition to the requirements in paragraph (2) of this subsection, the purchaser's Federal Taxpayers Registry (RFC) identification number for Mexico. The purchaser must also give a copy of their Mexican Registration Form to the Texas seller.

(4) Foreign purchasers other than purchasers from Mexico, including purchasers from Canada, may issue a properly completed resale certificate, as described in paragraph (2) of this subsection, in lieu of paying tax on the purchase of taxable items delivered or shipped to a location outside of this state but within the territorial limits of the United States. However, a foreign purchaser cannot issue a resale certificate for taxable items purchased for resale outside of the territorial limits of the United States. For items to be exported outside the territorial limits of the United States, see subsection (b)(4) of this section.

(i) Out-of-state or foreign purchasers. An out-of-state or foreign purchaser who acquires goods or services from a Texas seller for resale in Texas should refer to §3.286 of this title.

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

(1) A resale certificate may only be signed by a purchaser at the time of purchase if the purchaser intends to resell, lease, or rent the taxable item, or transfer the taxable item as an integral part of a taxable service, in the normal course of business. A purchaser may not issue a resale certificate at the time of purchase for a taxable item if the purchaser knows the item is being purchased for a specific taxable use.

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

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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34 TAC §3.292

The Comptroller of Public Accounts proposes amendments to §3.292, concerning repair, remodeling, maintenance, and restoration of tangible personal property. The proposed amendments delete information in current subsections (a)(8) and (i) relating to the repair, remodeling, maintenance, and restoration of aircraft because this information is being included in new §3.280 (relating to Aircraft). The proposed amendments also update information relating to vessels to better distinguish between services provided on noncommercial vessels, which are covered by this section, and services provided on commercial vessels, which are being included in new §3.297 (relating to Carriers, Vessels, Locomotives and Rolling Stock, and Motor Vehicles).

Subsection (a) is amended to add definitions for several terms which appear in the current section but are not expressly de-