TAX SECTION
State Bar of Texas

August 15, 2014

Via email to Teresa.bostick@cpa.state.tx.us

Teresa G. Bostick
Texas Comptroller of Public Accounts
Manager, Tax Policy Division
P. O. Box 13528, Capitol Station
Austin, TX 78711-3528

RE: Response to Comptroller Invitation for Comments Regarding Draft Comptroller Rules 3.280 and 3.285 Relating to Aircraft and Sales for Resale

Dear Ms. Bostick:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed response to the request of the Texas Comptroller of Public Accounts for comments concerning draft Comptroller Rules 3.280 and 3.285. THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE TAX SECTION OF THE STATE BAR OF TEXAS. THE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE TAX SECTION OF THE STATE BAR OF TEXAS, WHICH HAS SUBMITTED THIS LETTER, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENTAL SUBMISSIONS OF THE STATE BAR OF TEXAS TAX SECTION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED AND THE COMMENTS REPRESENT THE VIEWS OF THE TAX SECTION MEMBERS WHO PREPARED THEM.

We commend the Texas Comptroller of Public Accounts for permitting us to submit these comments and we appreciate being extended the opportunity to participate in the rule-making process.

Respectfully submitted,

Andrius R. Kontrimas
Chair, Tax Section
The State Bar of Texas

RESPONSE TO COMPTROLLER'S INVITATION FOR COMMENTS REGARDING DRAFT COMPTROLLER RULES 3.280 AND 3.285

This response to request for comments with respect to proposed publication of Comptroller Rules 3.280 and 3.285 is presented on behalf of the Tax Section of the State Bar of Texas (the "Section"). The principal drafters of these comments include the Chair and Vice Chair of the Section's Committee on State and Local Taxation, Charolette Noel and Sam Megally, and Section members David Colmenero, David Cowling, Justin Hepworth, Ira Lipset, Cindy Ohlenforst, and Alyson Outenreath. The Section's Committee on Government Submissions ("COGS") has approved these comments. Robert Probasco, Chair of COGS, reviewed these comments.

Although many of the persons who participated in preparing this letter have clients who would be affected by the state tax principles addressed by this letter or have advised clients on the application of such principles, no such person (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of this letter.

Contact Persons:

David Cowling
Jones Day
2727 North Harwood Street
Dallas, Texas 75201-1515
Tel: (214) 969-2991
Fax: (214) 969-5100
decowling@jonesday.com

Alyson Outenreath
Assistant Professor of Law
Texas Tech University School of Law
1802 Hartford Avenue
Lubbock, Texas 79409
Tel: (806) 742-3990 ext. 238
Alyson.outenreath@ttu.edu

Date: August 15, 2014

I. INTRODUCTION AND REQUEST FOR MEETING

This comment letter is in response to the invitation of the Texas Comptroller of Public Accounts (the "Comptroller") for comments concerning the proposed adoption of 34 Tex. Admin. Code § 3.280, relating to Aircraft, ("Draft Rule 3.280") and § 3.285, relating to Resale Certificate; Sales for Resale ("Draft Rule 3.285").[1]

We recognize and truly appreciate the tremendous amount of time and thoughtful work invested by the Comptroller in crafting by these draft rules. We also appreciate the efforts of the Comptroller to survey existing authority and draft new Rules. These efforts are extremely useful to taxpayers and practitioners. We particularly appreciate the circulation of drafts early in the process and the opportunity for groups such as ours to provide observations and comments on such drafts. We recognize and appreciate the challenges facing the Comptroller when balancing the task of providing a fair and transparent administrative policy regarding aircraft issues and the applicability of the statutory sale-for-resale exemption against the Comptroller's need for an efficient administrative process to resolve related claims and controversies. It is our intent to present items for consideration that may help and support Comptroller personnel.

The focus in these comments is on the modification and/or addition of draft Rule provisions that dictate the circumstances under which a purchase, and, specifically, the purchase of an aircraft, may qualify for the sale-for-resale exemption.

While most of our comments focus on draft rule provisions regarding aircraft, we recognize that the resale and other interpretations in the draft rules have broader application. Because of that broader application – and because some of the draft proposals appear to change longstanding policy – we respectfully request a meeting with Comptroller staff to discuss these drafts. Such a meeting would offer both taxpayers and the Comptroller the opportunity to discuss these issues in more detail as well as other issues (e.g., relating to aircraft in the state for repair and remodeling, and definitions applicable to certificated carriers) and other draft rules.

II. THE STATUTORY SALE-FOR-RESALE EXEMPTION

Chapter 151 of the Texas Tax Code (the "Sales Tax Law") provides an exemption for certain sales for resale, including the sale for resale of a taxable item. Tex. Tax Code § 151.302(a). The term "sale for resale" is defined to include a sale of:

> [T]angible personal property or a taxable service to a purchaser who acquires the property or service for the purpose of reselling it with or as a taxable item as defined by Section 151.010 in the United States of America or a possession or territory of the United States of America or in the United Mexican States in the normal course of business in the form or condition in which it is acquired

[1] Hereinafter, all references to "Rule" or "Rules" (as appropriate) are to Chapter 34 of the Texas Administrative Code.

or as an attachment to or integral part of other tangible personal property or taxable service.

Tex. Tax Code § 151.006(a)(1). The term "taxable item" means tangible personal property ("TPP") and taxable services. Tex. Tax Code § 151.010.

III. DRAFT RULE 3.280 COMMENTS

The sale-for-resale provisions enacted by the Legislature generally do not draw a distinction between aircraft and other types of TPP.[2] Rather, as long as the statutory requirements identified above are met, the purchase of any type of TPP qualifies as an exempt sale for resale. Certain provisions of Draft Rule 3.280(j), however, appear to impose additional requirements not found in the statute, or supported by other authority, in order for the purchase of an aircraft to qualify as an exempt sale for resale. We suggest that restrictive provisions applicable only to one industry should be reconsidered because such provisions do not appear to be supported by the Sales Tax Law and may not constitute appropriate Texas sales tax policy.

A. Transfer of title or exclusive possession

Draft Rule 3.280(j)(2)(B) requires that the person purchasing, leasing, or renting the aircraft transfer title or *exclusive* possession of the aircraft in order to qualify for the sale-for-resale exemption.

The Sales Tax Law requires only that the purchaser acquire the TPP for the purpose of reselling it with or as a taxable item. Tex. Tax Code § 151.302(a). The term "sale" includes both "a transfer of title or possession" and "the exchange, barter, or lease" of TPP. Tex. Tax Code § 151.005(1), (2). A transfer of "exclusive possession" is not required.

The Sales Tax Law does not define the term lease. However, "lease" has long been defined by Rule 3.294(a)(2) to include "a transaction, by whatever name called, in which possession but not title to tangible personal property is transferred for a consideration." Under the statute and current Rules, a transfer of "exclusive possession" is not required in order for a purchase and subsequent lease to qualify as a sale for resale under Sales Tax Law Section 151.302(a).

We note that the sale-for-resale exemption is statutorily applied differently to a sale for resale of "tangible personal property used to perform a taxable service." *Compare* Tex. Tax Code § 151.302(a) *and* § 151.302(b). In the case of TPP used to perform a service, the TPP is not considered resold unless the care, custody, and control of the TPP is transferred to the purchaser of the services. Tex. Tax Code § 151.302(b). However, even in the context of Sales Tax Law Section 151.302(b), Texas Courts have rejected an "exclusive possession" standard

[2] The Sales Tax Law does draw a distinction between certain types of TPP. For example, TPP used to perform a taxable service is not considered resold unless the care, custody, and control of the TPP is transferred to the purchaser of the services. Tex. Tax Code § 151.302(b). Internal or external wrapping, packing, and packaging supplies used by a person in wrapping, packing, or packaging TPP or in the performance of a service of furthering the sale of TPP or the service may not be purchased by the person for resale. Tex. Tax Code § 151.302(c).

involving a purchase and subsequent lease of TPP, supplanting it with "a more reasonable interpretation of section 151.302(b)," which is based on determining, among other factors, "who has *primary possession*." *Sharp v. Clearview Cable TV*, 960 S.W.2d 424 (Tex. App.—Austin 1998, pet. denied) (emphasis in original).

Draft Rule 3.280(j)(3) also provides "if the purchaser has reserved the right to use the aircraft for his or her own purposes at any time, the purchaser has not transferred title or exclusive possession of the aircraft." We recognize that the Comptroller may wish to provide specific guidance related to determining when an aircraft has been resold, in the form of a lease, such that the purchase of the aircraft qualifies as an exempt sale for resale. However, rather than providing clear guidance as to when transfer of possession of an aircraft has occurred, the draft Rule merely provides one circumstance under which transfer of possession will not be considered to have occurred. Further, this circumstance does not appear to be supported by the statute or any other authority. If the Comptroller wishes to provide specific guidance as to when possession of an aircraft has been transferred, we suggest the guidance be provided in the form of an affirmative standard that is rationally related to the industry. For example, the Comptroller could define possession of an aircraft by reference to the party having "operational control" of the aircraft under Part 135 of the FAA regulations. Draft Rule 3.280 currently contains reference to these FAA provisions, which standards we understand are well delineated and enforced in the charter aircraft industry.

Moreover, the exclusive possession requirement appears contrary to the broader scope of resale exemption as construed by the courts. *See, e.g., Combs v. Roark Amusement & Vending, L.P.*, 422 S.W.3d 632 (rejecting an extra-statutory requirement for resale exemption where the statute does not impose such a requirement and noting the statute requires only transfer of "care, custody, and control" to purchaser in order for TPP to qualify as sale for resale as part of a taxable service); *7-Eleven, Inc. v. Combs*, 311 S.W.3d 676 (Tex. App.—Austin 2010, pet. denied) (holding statutory sale-for-resale exemption does not support the asserted requirement that the recipient of the service be the sole benefiting party or that the property be committed solely to the performance of the taxable service).

Because we are aware of no support for an exclusive possession requirement and Sales Tax Law Section 151.302(a) does not distinguish among aircraft and other types of TPP, we suggest that the Comptroller remove the "exclusive possession" requirement from Draft Rule 3.280.

B. Normal course of business

Presently, the phrase "normal course of business" is not defined in either the Sales Tax Law or the Rules. Concurrent with the issuance of Draft Rule 3.280, the Comptroller is proposing to repeal and replace current Rule 3.285, concerning Resale Certificate; Sales for Resale. Draft Rule 3.285(a)(8) would define "normal course of business" as "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." This definition in Draft Rule 3.285(a)(8) would apply to the phrase "normal course of business" as it is used in Draft Rule 3.280. *See* Draft Rule 3.280(a)(18). As the statutory sale for resale

exemption uses this currently undefined term, we commend the Comptroller's effort to provide taxpayers a meaningful definition of that term.

However, Draft Rule 3.280(j)(5) would effectively assign a different meaning to "normal course of business" in the context of the lease of an aircraft as compared to other situations. Draft Rule 3.280(j)(5) provides that an aircraft is not leased or rented in the normal course of business if the effective monthly lease rate for the aircraft is less than 1.0% of the purchase price paid for the aircraft. This requirement appears to conflict with the proposed definition of "normal course of business," which may be determined by reference to the "fair market value" of a lease. *See* Draft Rule 3.285(a)(8). "Fair market value," in turn, is defined as "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." *See* Draft Rule 3.285(a)(4). This meaning would likewise apply to the phrase "fair market value" as it is used in Draft Rule 3.280. *See* Draft Rule 3.280(a)(11).

By providing that an aircraft is not leased in the normal course of business if the effective monthly lease rate is less than 1.0% of the aircraft's purchase price, Draft Rule 3.280(j)(5) effectively negates the generally applicable meanings of "normal course of business" and "fair market value." Mandating a standard applicable only to one industry also does not allow taking in to account factors that are specific to the particular transaction such as (for example) age and condition of the aircraft, type of aircraft, availability (or lack thereof) of similar aircraft, price range of the aircraft, ramp-up time requirements for new leasing businesses, whether similar types of aircraft are acquired for dry lease or air transportation service purposes and the general state of the economy. Ultimately it is the market that will determine what is a fair rental or lease rate, just as contemplated by Draft Rule 3.285(a)(4). We suggest that the Comptroller consider removing Subsection (j)(5) from Draft Rule 3.280, and that the definitions of "normal course of business" and "fair market value" be equally applicable to aircraft and other types of TPP, consistent with the statutory sale-for-resale exemption.

C. Sole purpose and use by purchaser

Draft Rule 3.280(j) contains additional requirements in order for aircraft to qualify for the sale-for-resale exemption, including a requirement that the person purchase or lease the aircraft for the "sole purpose" of leasing or renting it to another person, and providing that the purchaser may not make any personal or business use of the aircraft prior to transfer of the aircraft. Draft Rule 3.280(j)(1), (2)(D). In our view, neither of these requirements is contained in the Sales Tax Law or supported by judicial authority.

Instead, the Sales Tax Law and current Rules address a purchaser's use of TPP purchased as an exempt sale for resale through their divergent-use provisions. *See, e.g.*, Texas Sales Tax Law Section 151.154; Comptroller Rule 3.285. *See also* Draft Comptroller Rule 3.285. These long standing divergent-use provisions provide that, if a taxpayer uses TPP purchased as an exempt sale for resale in a divergent manner, the taxpayer must pay tax on its use of the TPP during the period of divergent use. In contrast, the language of Draft Rule 3.280 Subsections (j)(1) and (j)(2)(D), applicable again solely to one industry, would wholly disqualify the aircraft from the sale-for-resale exemption.

We suggest that the Comptroller consider applying the existing divergent-use provisions to all types of property, including aircraft, rather than adding aircraft-centric requirements for which there is no statutory basis.

D. **The doctrine of legislative acquiescence**

We are concerned that some draft rule provisions appear designed to change long-standing policies that the Legislature has confirmed by acquiescence and on which taxpayers rely in working to comply with the Sales Tax Law. The doctrine of legislative acquiescence applies when a particular construction of a statute is of such longstanding significance that it should not be changed in the absence of clear statutory authorization. *Humble Oil & Ref. Co. v. Calvert*, 414 S.W.2d 172, 180 (Tex. 1967). The sale-for-resale exemption was adopted with the original Texas Sales Tax statutes in 1961 and enacted (in its current form) in 1981 during the recodification of the prior Tax Code. For many years, the Comptroller applied the exemption to aircraft and other types of TPP in the same manner. During this time, the Legislature amended Texas Tax Code § 151.302 (the sales for resale exemption) on two separate occasions, and Section 151.006 (the definition of sale for resale) on three separate occasions. None of these amendments impacted or limited the manner in which the sale-for-resale exemption applies to aircraft. When a statute that has been construed by the proper administrative officers is reenacted without any substantial change in verbiage, it will ordinarily receive the same construction. *Humble Oil*, 414 S.W.2d at 172.

Notwithstanding the November 2006 Comptroller announcement of a departure from the Comptroller's prior policy, pronouncing that the Comptroller would henceforth consider whether there were economic substance and valid business purposes present in certain aircraft transactions, the Legislature has not explicitly adopted the Comptroller's new approach. *See, e.g.*, Comptroller Letter Ruling STARS Accession No. 200611755L (Nov. 15, 2006); Comptroller Letter Ruling 200908387L (Aug. 6, 2009). Since this change in policy, the Legislature has not amended Section 151.302 (the sale-for-resale exemption). While Sales Tax Law Section 151.006 (the definition of sale for resale) was amended in 2011, such amendments were made during an Extraordinary Legislative Session and enacted in response to recent cases addressing the applicability of the exemption to purchases of property to be resold as an integral part of a service not subject to tax. The amendments did not address the applicability of the sale-for-resale exemption to aircraft. These 2011 amendments do not evidence that the Legislature has acquiesced in the Comptroller's 2006 change in policy. *See Sharp v. House of Lloyd, Inc.*, 801 S.W.2d 245, 248 (Tex. 1991) (clarifying that the doctrine of legislative acquiescence applies only where there has been an affirmative longstanding administrative policy); *Sharp v. Park 'n Fly*, 696 S.W.2d 572 (Tex. App. 1998—Austin, pet. denied) (holding that the passage of only five years before the Comptroller asserted a contradictory construction does not rise to such a level as to be an affirmative long-standing departmental construction giving rise to the doctrine of legislative acquiescence).

The Comptroller's economic substance principle is set forth in Draft Rule 3.280(c)(5), relating to use tax, which provides:

> When a person purchases an aircraft outside this state and, within one year of the purchase, transfers title or possession of the aircraft

> to another person for hangering or other use in this state by any means other than sale in the regular course of business, both the purchaser and the transferee are considered to be storing, using, or consuming the aircraft in the state and the comptroller may recover use tax against either person . . . .

The preamble to Draft Rule 3.280 cites the Texas Supreme Court's decision in *Combs v. Roark Amusement & Vending, L.P.*, 422 S.W.2d 632 (Tex. 2013), as support for the economic substance principle. The preamble states: "The comptroller's determination follows a recent Texas Supreme Court decision in which the court expressed approval of the substance over form doctrine." The *Roark* decision, however, did not create a substance over form doctrine broadly applicable to the Sales Tax Law. Rather, the doctrine was merely mentioned in a footnote in the context of statutory construction. Because *Roark* does not stand for the proposition set forth in the preamble, we suggest that Subsection (c)(5) of Draft Rule 3.280 be deleted in its entirety.

For these reasons, we suggest the Comptroller consider revising Draft Rule 3.280 as outlined above, such that any aircraft-specific requirements for the sale-for-resale exemption are consistent with the text of the statutory exemption.

E. **Determining use of aircraft in Texas**

Draft Rule 3.280(c) addresses when an aircraft purchased, lease, or rented outside the state will be considered used (and therefore subject to use tax) in Texas. Subsection (c)(3) specifies "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 calendar year following the date that the owner or operator takes possession of the aircraft."

In determining the percentage of time the aircraft will be considered used in the state, both current Rule 3.297(c)(3)(A) and Draft Rule 3.280(c)(3)(B) specify flight time (including interstate flights in Texas airspace) is to be taken into account. However, Draft Rule 3.280(c)(3)(B) adds an additional factor relating to the determination of use in the state – time the aircraft spends on the ground in Texas. This additional factor significantly changes the equation in making the determination as to what constitutes a taxable use. In other tax contexts, an aircraft is typically considered "used" when it is in flight. In our view, adopting this new requirement of including time on the ground as a basis for determining use of an aircraft in Texas would be inconsistent with longstanding Texas law.

F. **Resale certificate requirement**

Draft Rule 3.280(j)(2) specifies that an aircraft, engine or component part can only be purchased, leased or rented under a properly completed resale certificate if the person purchasing, leasing, or renting the aircraft, aircraft engine, or component part satisfies five requirements set out in Draft Rule 3.280(j)(2)(A)-(E). One such requirement is that the purchaser of the aircraft (or component part) provide the seller or lessor with a properly completed and signed resale certificate pursuant to Rule 3.285 at the time of the transaction. Draft Rule 3.280(j)(2)(E).

A properly completed resale certificate is necessary to document the exempt nature of the seller's receipts. Both current Rule 3.285(b)(1) and Draft Rule 3.285(e)(1) specify that all gross receipts of a **seller** are subject to sales or use tax unless a properly completed resale or exemption certificate is accepted by the seller. The resale certificate is for the benefit of the seller. Absent obtaining a properly executed resale certificate, the gross receipts from the sale of a taxable item are presumed to be subject to tax.

However, the language of Draft Rule 3.280(j)(2)(E) appears to require that the **purchaser** provide the seller with a resale certificate at the time of the transaction. In contrast, Sales Tax Law Section 151.151 provides that a purchaser **may** give a resale certificate for the acquisition of a taxable item if the purchaser intends to sell the item in the regular course of business. Similarly, current Rule 3.285(b)(4) and Draft Rule 3.285(e)(3)(A) both provide that the seller **should** obtain a properly executed resale certificate at the time the taxable transaction occurs. Furthermore, current Rule 3.285(b)(1) and Draft Rule 3.285(e)(1) provide that if the seller fails to obtain a resale certificate at the time of the transaction but does so within 60 days of receiving written notice from the comptroller to deliver such notices, the resale certificate is still valid (albeit subject to verification).

While a purchaser of an item intended to be acquired for resale is supposed to give a resale certificate to the seller at the time of the transaction, failure to do so – whether at the time of the transaction or thereafter – does not cause the acquisition to be considered an invalid purchase for resale with respect to the purchaser. For that reason and because the Sales Tax Law does not draw a distinction as to the applicability of resale certificates to aircraft as compared to other types of TPP, we suggest that the Comptroller consider deleting the portion of Draft Rule 3.285(j)(2)(E) requiring that the purchaser provide the seller or lessor with a properly completed resale certificate at the time of the transaction.

IV. DRAFT RULE 3.285 COMMENTS

Draft Rule 3.280 and Draft Rule 3.285 demonstrate the Comptroller's recognition that rules and policies on resale and other issues must work for all types of property. Because Draft Rule 3.285 will undoubtedly impact more taxpayers than the aircraft rule, we have several comments on Draft Rule 3.285.

Due to a dearth of time to respond in detail in writing concerning these issues, we specify below highlights of issues we note concerning Draft Rule 3.280 which we hope to discuss with the Comptroller in more detail in a meeting:

A. **Resale concepts:** Several of our questions about Draft Rule 3.280 (e.g., what constitutes a resale and when must resale certificates be provided?) are relevant to Draft Rule 3.285 too.

B. **Resale of services:** The text and punctuation surrounding Subsection (b)(1)(A)(iv) of Draft Rule 3.285 create ambiguity that could cause that subsection to be interpreted as requiring the purchaser to undertake some unspecified action to "direct" each taxable service to be resold, inconsistent with the holding in *Combs v. Health Care Services Corp.*, 401 S.W.3d 623 (Tex 2013),

which states that "[s]ale-for-resale of a taxable service **can occur** . . . by directing that the service be performed for another party in return for consideration from that party." (emphasis added).

C. **Federal contracts:** Subsection (b)(3) of Draft Rule 3.285 addresses two types of sales for resale that apply in the context of federal contracts. The preamble states that 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 TPP are made to a purchaser for the purpose of transferring TPP to the federal government. The preamble goes on to state that "[t]his reverses the comptroller's longstanding policy of extending the *Day & Zimmermann* holding to Texas state and local governmental entities." This reversal appears contrary to the Sales Tax Law and to the doctrine of legislative acquiescence.

D. **Sale outside the U.S.:** Subsection (b)(4) of Draft Rule 3.285 states: "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 Unites States." This particular statement appears to be incorrect; Texas Sales Tax Law Section 151.006(a) specifically refers to a possession or territory of the United States and the United Mexican States.

E. **Divergent Use:** We believe the language in Draft Rule 3.285 about divergent use should more carefully track the applicable statute.

F. **Tax-Free Inventory:** Subsection (d)(1) of Draft Rule 3.285 states: "A purchaser may maintain tangible personal property in a tax-free inventory only if, at the time of purchase, the purchaser intends to sell more than 50% of the tangible personal property acquired. The purchaser's intent must be supported by the purchaser's business records, which may include, but are not limited to, historical purchase and sale records, a business plan, or similar documentation based on twelve consecutive months of normal business operation." This requirement does not appear to be required – or permitted – by the applicable statute. Similarly, Subsection (d)(2) of Draft Rule 3.285 appears to impose limitations that are inconsistent with the Sales Tax Law. For example, Draft Rule 3.285 states that the following cannot be maintained in a tax-free inventory: (i) TPP that is purchased under a direct pay permit; and (ii) TPP that a seller special orders for a customer or takes delivery of at a customer's location.

G. **Form of Certificate:** Subsection (e)(2)(B) of Draft Rule 3.285 includes ambiguous terms and requirements beyond those required by statute that fail provide clear guidance to taxpayers. For example, Draft Rule 3.285 states that all required information must be "clearly presented" and that the certificate not contain any "obvious" errors or omissions. Additionally, Subsection (e)(3)(B) of Draft Rule 3.285, which states: "All incomplete certificates will be disallowed regardless of when they were obtained," would appear to disallow certificates that are timely submitted and contain all statutorily-required information.

V. CONCLUSION

We very much appreciate the opportunity to provide informal comments to the Draft Rules prior to their submission to the Texas Register and the formal comment period that will follow that submission. We hope you find these comments helpful as you continue to consider the Comptroller's position on the issues discussed herein.

We also hope you will grant our request for a meeting that would allow us as well as industry representatives to discuss the Draft Rules.

Thank you for your consideration.