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C O M B S

TEXAS COMPTROLLER of PUBLIC ACCOUNTS

P.O. Box 13528 • AUSTIN, TX 78711-3528



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July 28, 2011

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OPINION COMMITTEE

FILE # ML-46795-11
I.D. # 46795

RQ-0988-GA

The Honorable Greg Abbott
Attorney General
State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Re: Attorney General Opinion request relating to the interpretation of Section 74.501(e),
Property Code

Dear Attorney General Abbott:

The Comptroller of Public Accounts (Comptroller) respectfully requests an Attorney General opinion relating to whether an assignee, as defined by the Texas Property Code Section 74.501(e), includes a purchaser for value as authorized under an order of a court of competent jurisdiction.

The Comptroller has recently received a significant number of unclaimed property claims from claimants that have purchased unclaimed property or unclaimed property rights in proceedings before various courts of competent jurisdiction throughout the United States. The Comptroller is aware of a substantial number of similar claims of far greater value that have been purposefully withheld from presentment. The claimant's argument is that such purchases avoid the Texas Property Code's prohibition against paying assignees. The fiscal impact of the claimant's position will subject Texas to hundreds or thousands of such claims per year and millions of dollars will be paid to such purchasers for value as unclaimed property claimants

It has been longstanding Comptroller policy that the Comptroller will only pay unclaimed property claims of claimants that are the reported owner of the property or statutory claimants as specified in Section 74.501(d) of the Texas Property Code. The Comptroller's policy prohibits the payment of assignees, transferees or purchasers of unclaimed property or unclaimed property rights.

In 2003, the Texas Legislature amended Section 74.501 by adding subsections (d) and (e) to Section 74.501, Property Code, which clarified which claimants were eligible to receive direct payment of unclaimed property proceeds and *codified the Comptroller's longstanding policy of not making direct payments of unclaimed property proceeds to creditors, heir finders, assignees, and other persons with power of attorney.*

(emphasis added) (see Exhibit 1 - Senate Research Center Bill Analysis of House Bill 2425, 78th Legislature).

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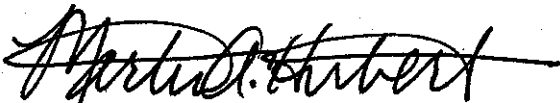
Texas Property Code Section 74.501(e) states as follows:

- (e) Except as provided in Subsection (f), the comptroller *may not* pay to the following persons a claim to which this section applies:
- (1) a creditor, a judgment creditor, a lienholder, or an assignee of the reported owner or of the owner's heirs: or
 - (2) a person holding a power of attorney from the reported owner or the owner's heirs.

The term "may not" in Section 74.501(e) means "shall not" as defined under the Code Construction Act. (Section 311.016(5), Government Code). The Comptroller has continuously interpreted Section 74.501(e), Property Code, as a mandatory provision that prohibits the Comptroller from paying assignees or any other type of purchaser of unclaimed property or unclaimed property rights

It has been argued to the Comptroller that a court's decision affirming the sale or purchase of assets is sufficient proof necessary for the Comptroller to pay unclaimed property claims under the permissive payee provisions of Section 74.501(d). The Comptroller has countered that an assignment or sale of assets, even if reflected in a court order, is not sufficient to overcome the statutory prohibition against the Comptroller from paying assignees or other entities that are not the reported owner of the unclaimed property.

Sincerely,



Martin A. Hubert
Deputy Comptroller

Enclosure

cc: Ashley Harden, Director, General Counsel Division
Anna Presley Burnham, Director, Unclaimed Property Division

BILL ANALYSIS

EXHIBIT 1

Senate Research Center H.B. 2425
By: McCall (Duncan)
Finance

5/24/2003
Committee Report (Substituted)

This analysis utilizes the latest version of the House Ways and Means Committee analysis and incorporates House floor amendments and amendments made in the Senate committee. A list of Senate committee amendments adopted on May 24, 2003, is attached at the end of this analysis.

DIGEST AND PURPOSE

As the sole administrator of the treasury and the state=s many financial resources, the Comptroller of Public Accounts (comptroller) office relies on statutory authority and rulemaking power to manage those resources. As the dynamics of financial markets and our economic systems continue to evolve, the tools available to the comptroller often require adjustment to maximize the effectiveness of the agency=s resource control. Being the sole administrator of the state=s financial resources also places the comptroller in the unique position of working in concert with other state governmental entities that rely on the comptroller=s expertise to adequately provide the necessary financial support. C.S.H.B. 2425 makes adjustments in various portions of the Texas statutes to facilitate the administration of the state =s financial resources.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the comptroller of public accounts in SECTIONS 31 and 73 of this bill. Any rulemaking authority that might have been added by the senate committee amendments adopted on May 24, 2003, is not reflected in this Section of the analysis.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 103.051(a), Civil Practice and Remedies Code, adding to the list of items that must be submitted to the Comptroller of Public Accounts (comptroller) for wrongful imprisonment compensation. The addition consists of a certification of the claimant=s actual innocence signed by the current prosecuting attorney of the county in which the sentence was rendered.

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SECTION 2. Amends Section 14(e), Article 42.12, Code of Criminal Procedure, clarifying when a county must remit substance abuse court fees. The reporting requirement is eliminated in the event that no fees are collected.

SECTION 3. Amends Section 19(f), Article 42.12, Code of Criminal Procedure, clarifying when a community corrections and supervision department must remit substance abuse court fees. The reporting requirement is eliminated in the event that no fees are collected.

SECTION 4. Amends Sections 42.259(c), (d), and (f), Education Code, to adjust the manner in which payments from the foundation school fund are made to each category 2 and 3 school district.

SECTION 5. Amends Section 44.901, Education Code, authorizing school district boards of trustees to enter into energy savings performance contracts. The section also requires payment of a performance bond. Methods of finance for energy savings performance contracts may include lease-purchase, bond proceeds, and vendor financing.

SECTION 6. Amends Section 51.927, Education Code, authorizing institutions of higher education boards to enter into energy savings performance contracts. The section also requires payment of a performance bond. Methods of finance for energy savings performance contracts may include lease-purchase, bonds proceeds, and vendor financing. Contracts under this section must be let as professional services.

SECTION 7. Amends Section 54.619, Education Code, authorizing the Prepaid Higher Education Tuition Board to suspend new enrollment in the program to ensure actuarial soundness of the fund.

SECTION 8. Amends Section 54.624, Education Code, to make provisions regarding a prepaid tuition contract.

SECTION 9. Amends Section 403.016(f), Government Code, to authorize the comptroller to use the electronic funds transfer system to deposit a portion of an employee=s gross pay into an account of an eligible state employee organization for a membership as prescribed by Subchapter G, Chapter 659.

SECTION 10. Amends Section 403.020, Government Code, to provide for performance reviews of institutions of higher education by the comptroller.

SECTION 11. Amends Section 403.027(g), Government Code, placing the definition of "digital signature" in the Government Code and deleting cross-references to portions of the Business & Commerce Code that no longer exist.

SECTION 12. Amends Section 403.054, Government Code, by amending Subsection (b) and adding Subsection (i), as follows:

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(b) Prohibits the comptroller from issuing a replacement warrant under certain circumstances.

(i) Defines Apayment law.@

SECTION 13. Amends Section 403.092, Subsections (a) and (b), Government Code, expanding the comptroller=s authority to borrow available cash from funds outside the treasury being managed by the comptroller.

SECTION 14. Amends Sections 403.1042(b), (c), (e), and (f), Government Code, by changing the way persons are appointed to the tobacco settlement permanent trust account investment advisory committee.

SECTION 15. Amends Section 404.024, Government Code, allowing the comptroller to invest state monies in pooled funds established by the Texas Treasury Safekeeping Trust Company (trust company) and operated like mutual funds and whose portfolios consist only of dollar-denominated securities. This Section also makes explicit the comptroller=s authority to lend securities as an investment option.

SECTION 16. Amends Section 404.102, Government Code, making explicit the trust company=s authority to pool funds and lend securities in order to manage funds and securities more efficiently and economically.

SECTION 17. Amends Section 404.107(b), stating that a participant having funds deposited with the trust company is required to pay fees developed under Section 404.103(f). The trust company may deduct fees from the principal or earning of a participant on deposit with the trust company or require a participant to pay a fee from an amount not on deposit with the trust company.

SECTION 18. Amends Section 404.123(b), Government Code, allowing the cash management committee to set the cap on outstanding notes and eliminating the 25 percent cap.

SECTION 19. Amends Chapter 447, Government Code, as amended by Chapters 573, 1158, and 1983, 77th Legislature, Regular Session, 2001, consolidating three bills amended to State Energy Conservation Office statutes and eliminating conflicting provisions.

SECTION 20. Amends Subchapter A, Chapter 609, Government Code, by adding Section 609.014, to provide that an institution of higher education participating in a group benefits program may participate only in a deferred compensation plan.

SECTION 21. Amends Section 659.102, Government Code, by amending Subsection (c) and adding Subsection (d), to provide that a supplemental optional benefits program may include a qualified transportation benefit. Defines qualified transportation benefit, and requires the Employees Retirement System of Texas (ERS) to determine a fee or charge

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regarding the transportation benefit.

SECTION 22. Amends Subchapter G, Chapter 659, Government Code, by adding Section 659.1031, to authorize an employee of a state agency to authorize a salary deduction for payment to a certain organization of a membership fee.

SECTION 23. Amends Section 659.104(a), Government Code, to amend provisions regarding an authorized payroll deduction for membership in an eligible state employee organization.

SECTION 24. Amends Section 659.110, Government Code, to make conforming changes.

SECTION 25. Amends Section 659.131(8), Government Code, to redefine "indirect services."

SECTION 26. Amends Section 659.146(c), Government Code, to remove provisions regarding an international federation or fund.

SECTION 27. Amends Section 659.150(b), Government Code, to prohibit a participating charitable organization from directly or indirectly funding, rather than conducting, litigation.

SECTION 28. Amends Section 659.253, Government Code, to make provisions regarding a state employee who transfers within a state agency from an exempt to a classified position or a classified to an exempt position. Defines "classified position" and "exempt position."

SECTION 29. Amends Subchapter K, Chapter 659, Government Code, making salary provisions for a state employee transferring within an agency between classified positions.

SECTION 30. Amends Section 659.255, Government Code, to make provisions regarding a merit salary increase and a one-time merit payment.

SECTION 31. Amends Subchapter K, Chapter 659, Government Code, to authorize the comptroller to establish procedures and adopt rules to administer this subchapter.

SECTION 32. Amends Section 661.152(d), Government Code, to amend provisions regarding an employee's accrual of vacation leave and the schedule for carrying vacation leave from one fiscal year to the next.

SECTION 33. Amends Subchapter A, Chapter 811, Government Code, by adding Sections 811.007 and 811.008, to make ERS and its board and director not liable for certain actions. Authorizes the ERS board to self-insure or purchase liability insurance.

SECTION 34. Amends the heading to Section 813.104, Government Code, to read as

follows:

Sec. 813.104. ALTERNATIVE PAYMENTS AND METHODS TO ESTABLISH OR REESTABLISH SERVICE CREDIT.

SECTION 35. Amends Section 813.104, Government Code, by adding Subsection (e), to authorize ERS to provide for the electronic filing of agreements to establish or reestablish service credit. Defines "electronic filing."

SECTION 36. Amends Subchapter A, Chapter 814, Government Code, by adding Section 814.010, to authorize an authorized ERS member to file certain information electronically.

SECTION 37. Amends Section 815.103, Government Code, by adding Subsection (f), to provide that Chapter 412, Labor Code, does not apply to ERS. Authorizes the ERS board to acquire certain services in any manner or amount the board considers reasonable.

SECTION 38. Amends Section 832.002, Government Code, providing the authority to make a payroll deduction for the \$10 annual fee for the Judicial Retirement System Plan One fee.

SECTION 39. Amends Section 2101.0115, Subsections (a) and (b), Government Code, so that the comptroller no longer receives a copy of the non-financial information submitted as a part of the comptroller's annual financial report.

SECTION 40. Amends Section 2113.205(b), Government Code, allowing the comptroller to approve the use of money appropriated for a fiscal year to pay for other costs of a similar nature that may cross fiscal years.

SECTION 41. Amends Section 2162.001, Government Code, providing a definition for "local government" in the portion of the Government Code dealing with the State Council on Competitive Government.

SECTION 42. Amends Section 2162.102, Government Code, allowing local governments to participate in the State Council on Competitive Government contracts.

SECTION 43. Amends Chapter 2166.406, Government Code, authorizing state agencies to enter into energy performance contracts. Requires the payment of a performance bond. Methods of finance for energy saving performance contracts may include lease-purchase, bond proceeds, and vendor financing. Requires contracts to be let as professional services.

SECTION 44. Amends Section 2201.002, Government Code, to amend provisions regarding the use of the Texas Capital Trust Fund.

SECTION 45. Amends Section 2201.003(b), Government Code, to remove a provision specifying that the unencumbered balance of the Texas Capital Trust Fund in excess of \$500 million be transferred to the general revenue fund, instead requiring that any unencumbered balance be transferred.

SECTION 46. Amends Section 2251.025(b), Government Code, adjusting the interest rate on late payments by state agencies to vendors to the prime rate plus one percent.

SECTION 47. Amends Section 2252.903(e), Government Code, eliminating verification of warrant hold within seven days prior to letting a contract if the contract will be paid using funds held in the treasury.

SECTION 48. Amends Section 2305.012, Government Code, revising the statutory language for the State Energy Conservation Office. Many of the original programs have run their course or all available funding has been used.

SECTION 49. Amends Section 2305.032(a), Government Code, revising the statutory language for the State Energy Conservation Office. Many of the original programs have run their course or all available funding has been used.

SECTION 50. Amends Section 2305.033, Subsections (b) and (d), Government Code, revising the statutory language for the State Energy Conservation Office. Many of the original programs have run their course or all available funding has been used.

SECTION 51. Amends Section 2305.034, Government Code, revising the statutory language for the State Energy Conservation Office. Many of the original programs have run their course or all available funding has been used.

SECTION 52. Amends Section 2305.039(b), Government Code, revising the statutory language for the State Energy Conservation Office. Many of the original programs have run their course or all available funding has been used.

SECTION 53. Amends Section 2306.783(a), Government Code, removing the comptroller from the membership list of the Texas Interagency Council for the Homeless.

SECTION 54. Amends Article 4.73(a), Insurance Code, to amend a date pertaining to the amount of certified capital a certified capital company has invested in qualified businesses.

SECTION 55. Amends Section 101.251, Insurance Code, by amending Subsections (b), (g), (i), and (j), and adding Subsection (k), to make provisions regarding premium receipts taxes. Defines Ainsurer.@

SECTION 56. Amends the heading of Chapter 302, Local Government Code, to read: ENERGY SAVINGS PERFORMANCE CONTRACTS.

SECTION 57. Amends Section 302.001, Local Government Code, clarifying that this section of the code applies specifically to energy savings performance contracts, not energy conservation measures in general.

SECTION 58. Amends Section 302.002, Local Government Code, clarifying that this section of the code applies specifically to energy savings performance contracts, not energy conservation measures in general.

SECTION 59. Amends Chapter 302.003, Local Government Code, clarifying that this section of the code applies specifically to energy savings performance contracts, not energy conservation measures in general.

SECTION 60. Amends Section 302.004, Local Government Code, clarifying that this section of the code applies specifically to energy savings performance contracts, not energy conservation measures in general.

SECTION 61. Amends Chapter 302.005, Local Government Code, clarifying that this section of the code applies specifically to energy savings performance contracts, not energy conservation measures in general.

SECTION 62. Amends Section 74.103, Property Code, giving the comptroller the authority to DETERMINE an unclaimed property audit if records are incomplete or unavailable.

SECTION 63. Amends Section 74.501, Property Code, by adding Subsections (d) and (e), clarifying which individuals are eligible to receive direct payment of unclaimed property proceeds, and codifying current policy of not making direct payments to creditors, heir finders, assignees, and other persons with power of attorney.

SECTION 64. Amends Sections 111.104(b) and (c), Tax Code, to make nonsubstantive clarifying changes.

SECTION 65. Amends Section 111.1042, Tax Code, by adding Subsection (d), pertaining to a hearing on a full or partial denial of a claim for refund.

SECTION 66. Amends Section 111.105, Tax Code, by amending subsection (a) and adding Subsection (e) to set forth guidelines for an administrative hearing process.

SECTION 67. Amends Section 111.107, Tax Code, to prohibit a person from refiling a refund claim for the same transaction or item, tax type, period, and ground or reason that was previously denied by the comptroller.

SECTION 68. Amends Sections 111.206(b), (c), and (d), Tax Code, as follows:

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(b) Requires a final determination that affects the amount of liability of a tax imposed by this title to be reported to the comptroller before the expiration of 120 days, rather than 60 days, after the day on which the determination becomes final.

(c) Authorizes the comptroller to assess and collect or bring suit for the collection of any tax deficiency resulting from a final determination by a certain time.

(d) Authorizes a taxpayer to file a claim for refund with the comptroller for the amount of the overpayment before the first anniversary of the date the final determination becomes final. Authorizes the taxpayer to file a limited claim for refund for an amount of tax that has been found due in a deficiency determination by a certain date. Deletes text relating to a requirement to issue a credit or refund.

SECTION 69. Amends Sections 111.207(a) and (b), Tax Code, to provide the periods that are not considered in determining the expiration date for when a tax may be imposed and that the suspension of a period of limitation is limited to contested issues.

SECTION 70. Amends Section 112.058(a), Tax Code, to provide the method by which payments made under protest are to be handled.

SECTION 71. Amends Section 142.002, Tax Code, by amending Subdivisions (1), (2), (3), (4), and (6) and adding Subdivisions (3-a), (3-b), and (3-c) to define certain terms.

SECTION 72. Amends Section 142.005, Tax Code, by adding Subsection (c) to authorize the comptroller to enter into the agreement on behalf of the state under certain circumstances.

SECTION 73. Amends Chapter 142, Tax Code, by adding Section 142.0055, as follows:

Sec. 142.0055. RULES. Authorizes the comptroller to adopt certain rules relating to the administration and collection of the sales and use tax.

SECTION 74. Amends Chapter 142, Tax Code, by adding Section 142.011, as follows:

Sec. 142.011. SETTLEMENT OF TAX, PENALTY, AND INTEREST. Authorizes the comptroller to settle certain claims.

SECTION 75. Amends Section 151.011(a), Tax Code, to redefine AUSE.@

SECTION 76. Amends Subchapter A, Chapter 151, Tax Code, by adding Section 151.012, as follows:

Sec. 151.012. EFFECTIVE DATE OF TAX RATE CHANGES. (a) Requires a change in tax rate to take effect on a certain date.

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(b) Provides when the change in tax rate applies.

SECTION 77. Amends Section 151.025, Tax Code, by adding Subsection (d) to address nontaxable charges.

SECTION 78. Amends Section 151.103, Tax Code, by adding Subsection (d) to require a retailer who holds a sales tax permit to collect any local use tax due from a purchaser.

SECTION 79. Amends Section 151.152(b), Tax Code, to require a resale certificate to meet certain requirements.

SECTION 80. Amends Section 151.202, Tax Code, by adding Subsection (c) to require a person desiring to be a seller in this state to agree to collect local use tax.

SECTION 81. Amends Section 151.307(b), Tax Code, to authorize proof of export to be shown in a certain manner.

SECTION 82. Amends Section 151.314, Tax Code, by amending Subsections (c), (e), (f), and (g) and adding Subsections (c-1), (c-2), and (c-3) to redefine Afood products@ and amends provisions regarding certain food products.

SECTION 83. Amends Section 151.317(a), Tax Code, to provide certain exemptions from the taxes imposed by this chapter in relation to gas and electricity.

SECTION 84. Reenacts Section 151.317(c), Tax Code, to define Aresidential use.@

SECTION 85. Amends Section 151.318, Tax Code, by amending Subsections (b) and (s) and adding Subsection (g-1), to exempt certain pharmaceutical biotechnology cleanrooms and equipment, and to define those terms.

SECTION 86. Amends Section 151.3181, Tax Code, by adding Subsection (h), to make provisions regarding the use of pharmaceutical biotechnology cleanrooms and equipment.

SECTION 87. Amends Section 153.119(d), Tax Code, to provide that the climate-control air conditioning or heating system of a motor vehicle that has a primary purpose of providing for the convenience or comfort of the operator or passengers is not a power take-off system, and a refund may not be allowed for the tax paid on any portion of the gasoline that is used for that purpose.

SECTION 88. Amends Section 153.222(d), Tax Code, to make a conforming change.

SECTION 89. Amends Section 201.057(i), Tax Code, to amend provisions regarding credit for taxes paid on certain gasoline.

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SECTION 90. Amends Section 201.101, Tax Code, to modify provisions regarding the value of gas and marketing costs for gas.

SECTION 91. Amends Section 201.102, Tax Code, to provide that payments from a purchaser of gas to a producer for the purpose of reimbursing the producer for taxes due are part of the gross cash receipts, unless the reimbursement amount for taxes due under this chapter is separately stated in a sales contract.

SECTION 92. Amends Section 313.021(2), Tax Code, to redefine Aqualified property.@

SECTION 93. Amends Section 321.003, Tax Code, to include a reference to Chapter 142 (Simplified Sales and Use Tax Administration Act).

SECTION 94. Amends Section 321.203, Tax Code, by amending Subsections (b), (c), (d), (e), and (g), and adding Subsections (g-1), (g-2), (g-3), and (I), to include references to tangible personal property instead of a taxable item. Deletes text regarding sale of telecommunications services. Includes new provisions regarding the sale of telecommunications services and post-paid calling services.

SECTION 95. Amends Section 321.3022, Tax Code, by amending Subsection (a) and adding Subsection (i), to amend a provision regarding local sales tax payments and to provide that the governing body of a municipality is not required to perform certain acts relating to open meetings.

SECTION 96. Amends Section 322.107, Tax Code, to remove a reference to a customs broker.

SECTION 97. Amends Section 323.003, Tax Code, to make a conforming change.

SECTION 98. Amends Section 323.203, Tax Code, by amending Subsections (b), (c), (d), (e), and (g), and adding Subsections (g-1), (g-2), (g-3), and (I), to make conforming changes. Amends and adds provisions regarding the sale of telecommunications services and post-paid calling services.

SECTION 99. Amends Section 256.009, Transportation Code, to set forth requirements regarding a county auditor=s report to the comptroller.

SECTION 100. Sets forth requirements for the comptroller to perform a certain study.

SECTION 101. Sets forth a list of statutes repealed by this Act.

SECTION 102. Sets forth prospective clauses and implementation directions.

SECTION 103. Requires the comptroller to adopt rules and forms as necessary for implementation of this Act no later than the 90th day after the effective date of this Act.

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SECTION 104. Sets forth effective dates for the provisions of this Act. Provides that, except as otherwise provided in this section, this Act takes effect upon passage or September 1, 2003.

LIST OF COMMITTEE AMENDMENTS

COMMITTEE AMENDMENT NO. _____

Amend ___B. No. _____ by inserting the following new SECTIONS in the bill and renumbering the subsequent sections appropriately:

SECTION _____. Section 171.001, Tax Code, is amended by amending Subsections (a) and (b) and adding Subsection (d) to read as follows:

(a) A franchise tax is imposed on:

(1) each corporation that does business in this state or that is organized under the laws of [~~chartered or authorized to do business in~~] this state, and

(2) each limited liability company that does business in this state or that is organized under the laws of this state [~~or is authorized to do business in this state~~].

(b) In this chapter:

(1) "Banking corporation" means each state, national, domestic, or foreign bank, whether organized under the laws of this state, another state, or another country, or under federal law, including a limited banking association organized under Subtitle A, Title 3, Finance Code, and each bank organized under Section 25(a), Federal Reserve Act (12 U.S.C. Secs. 611-631) (edge corporations), but does not include a bank holding company as that term is defined by Section 2, Bank Holding Company Act of 1956 (12 U.S.C. Sec. 1841).

(2) "Beginning date" means:

(A) for a corporation chartered in this state, the date on which the corporation's charter takes effect; and

(B) for a foreign corporation, the earlier of the date on which:

(I) the corporation's certificate of authority takes effect; or

(ii) the corporation begins doing business in this state.

(3) "Corporation" includes:

(A) a limited liability company, as defined under the Texas Limited Liability Company Act;

(B) a savings and loan association; and

(C) a banking corporation.

(4) "Charter" includes a limited liability company's certificate of organization.

(5) "Internal Revenue Code" means, except as otherwise provided in this chapter, the Internal Revenue Code of 1986 in effect for the federal tax year beginning on or after January 1, 1996, and before January 1, 1997, and any regulations adopted under that code applicable to that period.

(6) (A) "Investment partnership":

(I) means a partnership in which:

(a) not less than 90 percent of either the original federal income tax basis under the Internal Revenue Code or the current fair market value of the partnership's total assets consist of qualified investment securities and operating assets reasonably necessary to carry on the partnership's investment activities and not less than 90 percent of the partnership's gross income is passive investment income; or

(b) not less than 90 percent of the partnership interests are owned directly or indirectly by an Employee Stock Ownership Plan that has received a favorable determination letter from the Internal Revenue Service; and

(ii) does not include a partnership that is a dealer in securities, as defined by Section 475(c)(1), Internal Revenue Code.

(B) For purposes of Paragraph (A)(i)(a), a partnership shall exclude the basis in or value of an interest in a limited liability company and the gross income from an interest in a limited liability company unless the limited liability company would qualify as an investment partnership if the limited liability company were organized as a partnership.

(7) "Investment partnership interest" means a limited partnership interest in an investment partnership or a beneficial interest in a trust or business trust that is an investment partnership.

(8) "Officer" and "director" include a limited liability company's directors and managers and a limited banking association's directors and managers and participants if there are no directors or managers.

(9) "Partnership" includes:

(A) a joint venture;

(B) a general partnership;

(C) a limited partnership, except an Exempt Wholesale Generator, as defined by the Energy Policy Act of 1992 (15 U.S.C. Sec. 79z-5A) and the Utilities Code, if that entity entered into contracts prior to December 31, 2002, for the sale of electricity that do not provide for modification to pricing by reason of amendments to this chapter; and

(D) a trust or business trust.

(10) "Partner" includes a beneficiary in a trust or business trust.

(11) "Partnership interest" includes a beneficial

interest in a trust or business trust.

(12) "Passive investment income" means dividends, interest, or other gross income attributable to the ownership or disposition of qualified investment securities.

(13) "Public partnership" means a partnership that is:

(A) a publicly traded partnership as defined by Section 7704(b), Internal Revenue Code of 1986, as effective January 1, 2003, and was formed on or before January 1, 2003, without regard to whether such partnership qualifies under any exceptions to Section 7704(a), Internal Revenue Code of 1986, as effective January 1, 2003;

(B) a limited partnership to the extent the limited partnership interests are owned directly or indirectly by an entity described by Paragraph (A) or a trust or business trust to the extent the beneficial interests are owned directly or indirectly by an entity described by Paragraph (A);

(c) a limited partnership to the extent the limited partnership interests are owned directly or indirectly by an entity qualifying as a financial asset securitization investment trust as defined by Section 860L, Internal Revenue Code of 1986, as effective January 1, 2003; a real estate investment trust as defined by Section 856, Internal Revenue Code of 1986, as effective January 1, 2003; a qualified REIT subsidiary as defined by Section 856(i), Internal Revenue Code of 1986, as effective January 1, 2003; a real estate mortgage investment conduit as defined by Section 860D, Internal Revenue Code of 1986, as effective January 1, 2003; or a regulated investment company as defined by Section 851, Internal Revenue Code of 1986, as effective January 1, 2003; or

(D) a trust or business trust that qualifies as an entity described in paragraph (c).

(14) "Public partnership interest" means:

(A) a limited partnership interest in a publicly traded partnership as defined by Section 7704(b), Internal Revenue Code of 1986, as effective January 1, 2003, and was formed on or before January 1, 2003, without regard to whether such partnership qualifies under any exceptions to Section 7704(a), Internal Revenue Code of 1986, as effective January 1, 2003;

(B) a limited partnership interest owned directly or indirectly by an entity described by Paragraph (A) or a beneficial interest in a trust or business trust owned directly or indirectly by an entity described by paragraph (A);

(C) a limited partnership interest owned directly or indirectly by an entity qualifying as a financial asset securitization investment trust as defined by Section 860L, Internal Revenue Code of 1986, as effective January 1, 2003; a real estate investment trust as defined by Section 856, Internal Revenue Code of 1986, as effective January 1, 2003; a qualified REIT

subsidiary as defined by Section 856(i), Internal Revenue Code of 1986, as effective January 1, 2003; a real estate mortgage investment conduit as defined by Section 860D, Internal Revenue Code of 1986, as effective January 1, 2003; or a regulated investment company as defined by Section 851, Internal Revenue Code of 1986, as effective January 1, 2003; or

(D) a beneficial interest in a trust or business trust that qualifies as an entity described in paragraph (C).

(15) "Qualified investment securities":

(A) means:

(i) common stock, including preferred or debt securities convertible into common stock, and preferred stock;

(ii) bonds, debentures, and other debt securities;

(iii) deposits and any other obligations of banks and other financial institutions;

(iv) stock and bond index securities, futures contracts, options on securities, and other similar financial securities and instruments;

(v) an investment partnership interest or a public partnership interest; and

(vi) an interest in a limited liability company that would qualify as an investment partnership if the limited liability company were organized as a partnership; and

(B) does not include an interest in a partnership unless that partnership is an investment partnership or a public partnership.

(16) [~~+7~~] "Savings and loan association" means a savings and loan association or savings bank, whether organized under the laws of this state, another state, or another country, or under federal law.

(17) [~~+8~~] "Shareholder" includes a limited liability company's member and a limited banking association's participant.

(18) "Temporary amortization" means the amortization of the Texas asset basis using the straight-line method over 30 privilege periods, beginning with the privilege period covered by the report which corresponds to the first period a limited partner became subject to the franchise tax under Subsection (d).

(19) "Texas asset basis" means a limited partner=s total net asset basis for financial accounting purposes computed in accordance with generally accepted accounting principles less the adjusted tax basis of the partner=s total net assets for federal income tax purposes as of the first day of the tax year covered by the report which corresponds to the first period a limited partner became subject to the franchise tax under Subsection (d).

(20) "Tiered partnership arrangement" means an ownership structure in which some or all of the interests in one partnership (a "lower tier partnership") are owned by a second partnership (an

"upper tier partnership"). A tiered partnership arrangement may have two or more tiers.

(d)(1) Except as otherwise provided in this subsection, a corporation does business in this state if the corporation is a general or limited partner in a partnership whose activities, if conducted directly by the corporation, would cause that corporation to be subject to the franchise tax.

(2) Notwithstanding any other provision in this subsection, a corporation is not doing business in this state solely by reason of owning an investment partnership interest or a public partnership interest.

(3) A corporation is not doing business in this state solely by reason of owning a beneficial interest in a trust or business trust that does business in this state, unless the corporation and its related entities, as defined in Section 171.1101(b)(2)(A), have the power or authority to:

(A) remove and/or replace the trustee of the trust or business trust or, if more than one trustee, a majority of the trustees of the trust or business trust; or

(B) compel the trustee or trustees of the trust or business trust to take actions, or refrain from taking actions, relating to the management, activities or policies of the trust or business trust.

(4) Partners owning interests in upper tier partnerships are considered to be partners in lower tier partnerships for purposes of this subsection, except that partners owning upper tier public partnership interests are not considered to be partners in lower tier partnerships.

(5) If this subsection is found by any court of competent jurisdiction to be invalid as extending the Texas franchise tax beyond the limits of the United States Constitution and federal law adopted under the United States Constitution, then the franchise tax will be imposed on the partnership and the franchise tax liability of the partnership shall be calculated under Tax Code Section 171.006(b) as if the partnership were a corporation.

SECTION ____. Subchapter A, Chapter 171, Tax Code, is amended by adding Section 171.006 to read as follows:

Sec. 171.006. WITHHOLDING TAX OBLIGATION IMPOSED ON PARTNERSHIPS WITH RESPECT TO NONREPORTING CORPORATE PARTNERS. (a) Each partnership that does business in this state other than a public partnership or an investment partnership is subject to a franchise tax withholding obligation as described by this section.

(b) The withholding tax payable by a partnership shall be equal to the amount of tax computed under Section 171.002 as if such partnership were a corporation, multiplied by the nonreporting corporate partners' percentage share of the partnership's federal taxable income determined as if such partnership were a corporation. If a lower tier partnership is subject to this

section, an upper tier partnership's income attributable to the interest in the lower tier partnership shall be deducted for purposes of computing the upper tier partnership's withholding tax payable under this section.

(c) In determining whether a partner is a nonreporting corporate partner, a partnership may rely on the statement of a person owning an interest in the partnership, on a form prescribed by the comptroller, that the person is not a corporate partner. An upper tier partnership submitting a statement under this subsection to a lower tier partnership must disclose any direct partner or indirect partner in the upper tier partnership or any tiered partnership arrangement that is a corporate partner. Public partnerships and investment partnerships are not required to identify or disclose interests directly or indirectly owned by corporations or limited liability companies.

(d) Each nonreporting corporate partner shall be allowed a credit against its franchise tax liability under this chapter for any withholding tax paid by a partnership in connection with the nonreporting corporate partner's interest in the partnership.

(e) A partnership shall not be liable for failing to withhold tax as required by this section with respect to the interest of a nonreporting corporate partner to the extent the nonreporting corporate partner pays the tax against which the withholding tax may be credited.

(f) A partnership is subject to the application of Subchapters D and E, other than Section 171.203, with regard to any withholding tax imposed by this section as if the partnership were a corporation. A partnership that does not owe any withholding tax for a period specified by Subchapter D because it does not have any nonreporting corporate partners shall not be required to file a report under Section 171.201 or 171.202 for that period, but shall file an information report for that period stating that the partnership has no nonreporting corporate partners and including such other information as the comptroller may require. The reports required by this subsection shall include copies of all partner reporting agreements received by the partnership during any partnership reporting period. If a partnership fails to timely file a copy of a partner reporting agreement, the partnership shall treat the corporate partner submitting the agreement as a nonreporting corporate partner.

(g) A partner reporting agreement filed with a partnership is effective until revoked in writing by a corporate partner or until the comptroller notifies the partnership in writing to treat the interest of a corporate partner as an interest of a nonreporting corporate partner because of the corporate partner's failure to comply with the terms of the partner reporting agreement.

(h) Every partnership that withholds tax under this section shall furnish to each nonreporting corporate partner a written

statement, as prescribed by the comptroller, showing the amount of withheld tax under this section allocable to such corporate partner's interest in the partnership and such other information as the comptroller may require.

(i) In this section:

(1) "Corporate partner" means a direct partner or an indirect partner that is a corporation or limited liability company that is not exempted from the franchise tax. The term does not include:

(A) an interest directly or indirectly owned by a corporation or limited liability company in or through an investment partnership interest or a public partnership interest;
or

(B) a beneficial interest directly or indirectly held or owned by a corporation or limited liability company in a trust or business trust that is not deemed to be doing business in this State pursuant to sections 171.001(d)(2) or 171.001(d)(3).

(2) "Direct partner" means a person that directly owns an interest in a partnership.

(3) "Indirect partner" means, with respect to a lower tier partnership, a person that owns an interest in an upper tier partnership.

(4) "Nonreporting corporate partner" means a corporate partner that does not file a partner reporting agreement with a partnership. The term does not include:

(A) an interest directly or indirectly owned by a corporation or limited liability company in or through an investment partnership interest or a public partnership interest;
or

(B) a beneficial interest directly or indirectly held or owned by a corporation or limited liability company in a trust or business trust that is not deemed to be doing business in this State pursuant to sections 171.001(d)(2) or 171.001(d)(3).

(5) "Partner reporting agreement" means a form prescribed by the comptroller in which a corporate partner consents to the imposition of the franchise tax under this chapter on such corporate partner, agrees to file returns and make timely payment of all taxes imposed by this chapter, and agrees to be subject to personal jurisdiction in this state for purposes of the collection of any unpaid franchise tax under this chapter, together with related interest and penalties.

SECTION ____ . Subsection (c), Section 171.1032, Tax Code, is amended to read as follows:

(c) A corporation shall include in its gross receipts computed under Subsection (a) the corporation's share of the gross receipts of each partnership and joint venture in which the corporation owns an interest directly or indirectly [~~of which the corporation is a part~~] apportioned to this state as though the corporation directly

earned the receipts [~~including receipts from business done with the corporation~~]. A corporation owning an interest in an upper tier partnership is considered to be a partner in each lower tier partnership, and the corporation's share of the gross receipts of each partnership shall be computed and apportioned to this state as though the corporation directly earned the receipts at the partnership tier at which the receipts were originally earned.

SECTION _____. Subsection (d), Section 171.1051, Tax Code, is amended to read as follows:

(d) A corporation shall include in its gross receipts computed under Subsection (a) the corporation's share of the gross receipts of each partnership and joint venture in which the corporation owns an interest directly or indirectly [~~of which the corporation is a part~~]. A corporation owning an interest in an upper tier partnership is considered to be a partner in each lower tier partnership, and the corporation's share of the gross receipts of each partnership shall be computed as though the corporation directly earned the receipts at the partnership tier at which the receipts were originally earned.

SECTION _____. Subsection (d), Section 171.110, Tax Code, is amended to read as follows:

(d) A corporation's reportable federal taxable income is the corporation's federal taxable income after Schedule C special deductions and before net operating loss deductions as computed under the Internal Revenue Code, except that an S corporation's reportable federal taxable income is the amount of the income reportable to the Internal Revenue Service as taxable to the corporation's shareholders. A corporation shall include in its earned surplus and gross receipts for earned surplus its share of a partnership's items of income or loss, regardless if the partnership is taxed as a corporation for federal income tax purposes.

SECTION _____. Subchapter C, Chapter 171, Tax Code, is amended by adding Section 171.1101 to read as follows:

Sec. 171.1101. RELATED ENTITY EXPENSE ADD-BACK. (a) For the purpose of determining net taxable earned surplus under Section 171.110, a corporation must add back to reportable federal taxable income any excess management fees, excess royalty payments, and excess interest payments made to a related entity during the taxable year to the extent deducted in calculating reportable federal taxable income.

(b) For purposes of this section:

(1) "Excess management fees" means the amount by which a corporation's total management fee expenses exceed an arms length charge for those fees in a transaction between unrelated parties. The term includes all management fee expenses made for the purpose of tax avoidance and not for legitimate business purposes.

(2) "Excess royalty payments" means the amount by which

a corporation's total royalty payments exceed an arms length charge for those payments in a transaction between unrelated parties. The term includes all royalty payments made for the purpose of tax avoidance and not for legitimate business purposes.

(3) "Excess interest payments" means the amount by which an interest payment exceeds the amount implied by the rate as set forth in Tax Code Section 111.060(b), as determined when the loan transaction was entered into or during the term of the loan.

(4) "Interest payments" means expenses allowed as deductions under Section 163, Internal Revenue Code, for purposes of determining reportable federal taxable income.

(5) "Management fee" means a payment made directly or indirectly to a parent from a subsidiary for supervision and oversight of its business affairs.

(6) (A) "Related entity" means a person that, with respect to the corporation during all or any portion of a privilege period, is:

(i) a component member as defined by Section 1563(b), Internal Revenue Code;

(ii) a person to or from whom there is attribution of stock ownership in accordance with Section 1563(e), Internal Revenue Code;

(iii) a person that, notwithstanding its form of organization, bears the same relationship to the corporation as a person described by Subparagraphs (i) and (ii);

(iv) a stockholder who is an individual, or a member of the stockholder's family enumerated in Section 318, Internal Revenue Code, if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the value of the corporation's outstanding stock;

(v) a stockholder, or a stockholder's partnership, limited liability company, estate, trust, or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts, and corporations own, directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the value of the corporation's outstanding stock; or

(vi) a corporation, or a party related to such corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Internal Revenue Code, if such corporation owns, directly, indirectly, beneficially, or constructively, at least 50 percent of the value of the corporation's outstanding stock.

(B) The attribution rules of Section 318, Internal Revenue Code, shall apply for purposes of determining whether the ownership requirements under this subdivision have been met.

(7) "Royalty payments" means payments, including royalty and copyright fees, for the use of trademarks, copyrights, trade names, trade dress, service marks, mask works, trade secrets, and other similar types of intangible assets.

(c) For the purpose of computing its net taxable earned surplus, a corporation must subtract management fees, royalty payments and interest payments directly or indirectly received from a related entity during the taxable year to the extent included in calculating reportable federal taxable income unless such royalty or interest payments would not be required to be added back under this section.

(d) The comptroller shall have exclusive jurisdiction to interpret this section.

SECTION _____. Subchapter C, Chapter 171, Tax Code, is amended by adding Section 171.1102 to read as follows:

Sec. 171.1102. TEMPORARY AMORTIZATION OF TEXAS ASSET BASIS. For the purpose of determining net taxable earned surplus under Section 171.110, a corporate limited partner may deduct the temporary amortization of the Texas asset basis from reportable federal taxable income.

SECTION _____. Subchapter C, Chapter 171, Tax Code, is amended by adding Section 171.1103 to read as follows:

Sec. 171.1102. PREEXISTING ELECTRIC RELIABILITY COUNCIL CONTRACTS.

For purposes of determining net taxable earned surplus under Section 171.110 for report years ending on or before December 31, 2007, an entity formed on or after October 1, 2000, and on or before September 30, 2002, that derives income predominantly from the sale of electricity must subtract from reportable taxable income any income (and add any loss) derived directly or indirectly from contracts that:

(a) are for the sale of electricity at wholesale within the Electric Reliability Council of Texas, Inc (or its successor) market,

(b) were entered into prior to December 31, 2002, and

(c) do not provide for modification of pricing by reason of amendments to this chapter that are effective on or after May 31, 2003.

SECTION _____. Subsection (e), Section 171.1121, Tax Code, is amended to read as follows:

(e) A corporation shall include in its earned surplus and gross receipts for earned surplus its share of a partnership's items of income or loss, regardless if the partnership is taxed as a corporation for federal income tax purposes. [A corporation's share of a partnership's gross receipts that is included in the corporation's federal taxable income must be used in computing the corporation's gross receipts under this section.] Unless otherwise provided by this chapter, a corporation may not deduct costs

incurred from the corporation's share of a partnership's gross receipts. The gross receipts must be apportioned as though the corporation directly earned them. A corporation owning an interest in an upper tier partnership is considered to be a partner in each lower tier partnership, and the corporation's share of the gross receipts of each partnership shall be computed and apportioned as though the corporation directly earned the receipts at the partnership tier at which the receipts were originally earned.

SECTION ____ . Section 171.151, Tax Code, is amended by amending Subsection (3) and adding Subsections (4) and (5) to read as follows:

(3) after the initial and second periods have expired, a regular annual period beginning each year on January 1 and ending the following December 31-;

(4) for a corporation that becomes subject to the tax imposed under this chapter by the enactment of Section 171.001(d)(1), an initial period beginning on September 1, 2003 and ending on December 31, 2003; and

(5) for a corporation that becomes subject to the tax imposed under this chapter by the enactment of Section 171.001(d)(1), a regular annual period beginning on January 1, 2004 and ending on December 31, 2004.

SECTION ____ . Section 171.152, Tax Code, is amended by adding Subsection (d) to read as follows:

(d) Payment of the tax covering the initial period provided by Section 171.151(4) is due on April 1, 2004.

SECTION ____ . Section 171.153, Tax Code, is amended by adding Subsection (d) to read as follows:

(d) The tax covering the initial period provided by Section 171.151(4) is based on the business done by the corporation during the period beginning on September 1, 2003 and ending on December 31, 2003.

SECTION ____ . Section 171.1532, Tax Code, is amended by adding Subsection (c) to read as follows:

(c) The tax covering the initial period provided by Section 171.151(4) is based on the business done by the corporation during the period beginning on September 1, 2003 and ending on December 31, 2003.

SECTION ____ . Subchapter F, Chapter 171, Tax Code, is amended by adding Section 171.2515 to read as follows:

Section. 171.2515. FORFEITURE OF RIGHT OF PARTNERSHIP TO TRANSMIT BUSINESS IN THIS STATE. (a) The comptroller may, for the same reasons and using the same procedure the comptroller uses in relation to the forfeiture of the corporate privileges of a corporation, forfeit the right of a partnership subject to a tax imposed by this subchapter to transact business in this state.

(b) The provisions of this subchapter, including Section 171.255, that apply to the forfeiture of corporate privileges apply

to forfeiture of a partnership's right to transact business in this state.

SECTION _____. Subchapter G, Chapter 171, Tax Code, is amended by adding Section 171.3015 to read as follows:

Section. 171.3015. FORFEITURE OF CERTIFICATE OR REGISTRATION OF PARTNERSHIP. (a) A partnership's certificate or registration may be forfeited for the same reasons and using the same procedure that are used in relation to the forfeiture of a corporation's charter or certificate of authority.

(b) The provisions of this subchapter that apply to the forfeiture of a corporation's charter or certificate of authority apply to the forfeiture of a partnership's certificate or registration.

SECTION _____. The change in law made by Sections ____ through ____ of this Act does not affect taxes or fees imposed before the effective date of this Act, and the former law is continued in effect for purposes of the liability for and collection of those taxes and fees.