CAUSE NO. _____

CITY OF COPPELL, TEXAS; CITY OF HUMBLE, TEXAS; CITY OF DESOTO, TEXAS	§	**IN THE DISTRICT COURT OF**
Plaintiffs,	§	
VS.	§	**TRAVIS COUNTY, TEXAS**
GLENN HEGAR, IN HIS OFFICIAL CAPACITY AS TEXAS COMPTROLLER OF PUBLIC ACCOUNTS,	§	
Defendant.	§	**_____ JUDICIAL DISTRICT**

Plaintiffs' Original Petition for Declaratory Judgment

The City of Coppell, Texas, the City of Humble, Texas, and the City of DeSoto, Texas (hereinafter referred to as Coppell or Humble or DeSoto or collectively, Plaintiffs), file this petition for a declaratory judgment, as authorized by the Texas Administrative Procedure Act ("APA"), Texas Government Code § 2001.038, to determine the validity and applicability of a recent overhaul by the Comptroller of a rule, 34 TAC § 3.334 ("§3.334"),[1] governing the collection and distribution of local sales tax, and in support of this action would show the Court the following:

INTRODUCTION

1. Section 321.203 of the Texas Tax Code requires that the municipality entitled to receive local sales tax (that is, a sales tax imposed by a municipality after a vote of its citizens approving that tax) is the municipality where the sale occurs, which by statute is the established location that receives an order for taxable items (a

[1] There are two statutes and one rule that are central to Plaintiffs' claims. For the purpose of clarity, all references to § 2001.038 refer to Texas Government Code § 2001.038, all references to § 321.203 refer to

broad term that as defined in §151.010 of the Tax Code includes goods and services) and from which the items are shipped. And the sale occurs at that location even if a transfer title or possession does not occur at that location. For the past 51 years, the Comptroller has followed the law, including by applying the law to taxable sales made using the Internet.

2. Recent amendments by the Comptroller to §3.334, specifically new subsections (a)(9), (a)(16), (b)(1)(A), and (b)(5) (effective October 1, 2021) fundamentally change the law. When those sections are read together, they mandate that, for sales tax purposes certain sales made using the Internet are treated as having occurred where the taxable item is delivered, not where an order is received and from where the item is shipped. As a result, sales involving taxable items ordered through a shopping website or shopping website application using a computer server, Internet protocol address, domain name, website, or software application ("Website Orders") (and only such orders) no longer result in a taxable sale at the location receiving the order and providing the taxable item to the purchaser. Instead, under the new subsections in §3.334, which conflict with §321.203 of the Tax Code, if a location processes only Website Orders, the taxable sale of items leaving that location occurs at the delivery destination.

3. For political subdivisions such as Coppell, Humble, and DeSoto, which are home to locations operated by sellers solely to receive Website Orders and to send the items to the buyer, this change means those cities will no longer receive the local sales tax on those orders. In the case of Coppell, the change will result in an

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Texas Tax Code §321.203, and all references to §3.334 refer to the administrative rule found at 34 Texas Administrative Code § 3.334.

annual loss of as much as $26.7 million in local sales tax revenue beginning in October 2021, which is 18.6% of its total annual revenue. In the case of Humble, the change will result in an annual loss of as much as $6 million in local sales tax revenue beginning in October 2021, which is about 46% of its total annual revenue. In the case of DeSoto, the change will result in an annual loss of as much as $5.8 million in local sales tax revenue beginning in October 2021, which is about 6% of its total annual revenue.

4. The Comptroller has acted as a one-person legislature in effectively amending §321.203 of the Tax Code to undo a well-established approach to allocating local sales tax that has been in §3.334 since it was first adopted. While he may believe the Legislature needs to change §321.203, that is for the Legislature to decide, not the Comptroller. In his office's rush to change §321.303 of the Tax Code, the Comptroller adopted §3.334 in a procedurally defective manner, acted contrary to the intent of the Legislature as manifested in the statutory text of §321.203 of the Tax Code, established an irrational rule, violated the Texas Constitution's ban on impairing contracts, and violated the federal Internet Tax Freedom Act ("ITFA"). 47 U.S.C. § 157 note §1101(a).

DISCOVERY CONTROL PLAN

5. Discovery in this case should be conducted under Texas Rule of Civil Procedure 190.3 as a Level 2 case.

6. Pursuant to Texas Rule of Civil Procedure 47, Plaintiffs seek only non-monetary relief.

PARTIES

7. Coppell is a Texas home-rule city located in Dallas and Denton Counties, Texas.

8. Humble is a Texas home-rule city located in Harris County, Texas.

9. DeSoto is a Texas home-rule city located in Dallas County, Texas.

10. Defendant Glenn Hegar is sued in his official capacity as the Texas Comptroller of Public Accounts. He may be served at the Lyndon B. Johnson State Office Building, 111 East 17th Street, 9th Floor, Austin, Texas 78774 or wherever he may be found within the State of Texas.

JURISDICTION AND VENUE

11. Section 2001.038(a) of the Government Code provides district courts with jurisdiction to determine the validity or applicability of a rule in an action for declaratory judgment. This grant of jurisdiction represents a waiver of sovereign immunity where the validity or applicability of an administrative rule is in issue, as it is here.

12. Section 2001.038(b) of the Government Code requires this action to be brought in Travis County.

BACKGROUND FACTS

13. In 1967 the Legislature adopted the Local Sales and Use Tax Act authorizing municipalities, by a majority vote of their citizens, to impose a local sales and use tax for the benefit of the municipality. 60th Leg., R.S., ch. 36. This local tax was additive to the existing state sales and use tax.

14. An immediate issue associated with the creation of a local sales tax is defining *where* a sale is completed for sales tax purposes—first, to determine if the

tax must be collected at all, and second, to determine, if it is collected, which municipality receives it. The Comptroller collects and then distributes the local sales tax based on reports filed by sellers who remit all sales tax (state and local) to the Comptroller.

15. The 1967 act addressed the issue of where a sale is completed for sales tax purposes in a straight-forward fashion. If a seller (by definition, according to Tax Code §151.008(b)(2), one who for consideration on two occasions in a 12 month period transfers title or possession or exchanges an item) operated out of just one location in Texas (referred to in the act as "one place of business") all sales were completed there. If a seller operates out of multiple locations (referred to in the act as "multiple places of business"), the taxable sale is completed at the place of business (a) where the buyer took possession *and* removed the goods *or* (b) from where the goods were sent to the buyer. *Id*. §6(B)(1).

16. This approach is referred to in sales-tax speak as "origin sourcing," meaning that the "source" of any local sales tax to be collected is the location where the taxable sale is considered to have occurred (usually where items are picked up or sent from). This is distinguishable from what is referred to in sales-tax speak as "destination sourcing," meaning that the "source" of any local sales tax to be collected is the destination (where the items are delivered).

17. The 1967 act did not define what would be the seller's "place of business" for local sales tax purposes to determine when and where a taxable sale was completed for allocation of local sales tax. The absence of a definition led to disagreements about what municipality should receive local sales tax when a seller

had more than one place of business, making administration of the local sales tax problematic for the Comptroller.

18. To provide clarity and improve the administration of local sales tax, the Legislature in 1979 modified the act to define "place of business." The new definition made clear that, for local sales tax purposes, a "place of business" is an *established* location *operated by* the seller for the *purpose* of *receiving orders* regardless of where transfer of title or possession occurred. 66th Leg., R.S., ch. 624. The Legislature also provided that one way to show that the purpose of a location is to receive orders was to demonstrate that three or more "orders are received" at the location in a calendar year. *Id.* The Legislature, however, cabined a seller's ability to treat a warehouse, storage yard, or manufacturing facility as a place of business by requiring that to qualify those facilities *had* to receive at least three orders in a calendar year. *Id.* These statutory requirements have remained unchanged for 41 years.

19. Importantly, with one exception that does not apply to Website Orders, the statute does not provide that a sale occurs when an order is *first* received or *initially* received. Nor does it require that an order be received directly from the buyer. In other words, for 41 years a seller could, without affecting where the order was received for sales tax purposes, decide as a matter of operational efficiency or expediency to pass on all but in-person orders for items from one location to another until fulfillment occurred.

20. At the end of the day, by statute, when a seller has multiple places of business in Texas, a taxable sale for local sales tax purposes is completed at one of two places: (1) the location where an order is placed in person or, (2) if the order is

not placed in person, the location that otherwise receives an order and from which the items are either (a) picked up by the buyer or (b) sent by the seller to the buyer. Moreover, by statute, for items not ordered in person—and when the seller has multiple Texas places of business—the location where the sale is considered to have occurred is the *last* location to receive and fulfill the order. Finally, by statute, in all other situations, the taxable sale is completed for local sales tax purposes where the purchaser receives the item.

21. The Comptroller has consistently followed the rules described in the preceding paragraph since the advent of the Internet. In other words, whether items were ordered by telephone, mail, telegram, fax, in-person or through the Internet, the same rules applied.

22. On May 31, 2020, the status quo changed by regulatory fiat, not a legislative change. On that date, amendments to §3.334 became effective and provided that, as of October 1, 2021, Website Orders are deemed, for local sales tax purposes, as not being received by personnel or at a location established by a seller to receive orders. In other words, they are never received. As a result, a seller's location—established to receive only orders from websites and to distribute those ordered items to a buyer no longer qualify as a place of business. Essentially overnight, what the Comptroller and the Legislature had long agreed were places of business, were no longer places of business.

ADVERSE IMPACTS ON COPPELL, HUMBLE, AND DESOTO FROM AMENDMENT OF §3.334

23. Between 1981 and 2007, as allowed by §§321.101-.104, the citizens of Coppell voted on a series of measures that resulted in a 2.0 % local sales tax on items

sold in their community. In 1972, the citizens of Humble voted to impose a 1.0% sales tax on items sold in their community. In 1994, the citizens of DeSoto voted to impose a 2.0% sales tax on items sold in their community, effective as of 1995. Those taxes remain in effect today. The Comptroller is responsible, under §321.301 of the Tax Code, for administering, collecting, and enforcing the Coppell, Humble, and DeSoto local sales and use tax and is required to do so in accordance with the mandates of Chapter 321 of the Tax Code.

24. As a result, under §321.203 of the Tax Code, Coppell, Humble, and DeSoto have been entitled to receive and have received local sales tax on sales completed (consummated) in Coppell, Humble, and DeSoto and the Comptroller has been required to collect and administer that local sales tax to ensure that Coppell, Humble, and DeSoto receive the local sales tax they are entitled to under Chapter 321 of the Tax Code. In the past, the Comptroller has collected local sales tax associated with Website Orders received in Coppell, Humble, and DeSoto. Under the amended §3.334, the Comptroller will no longer collect and remit to Coppell, Humble, and DeSoto local sales tax on items delivered from locations in Coppell, Humble, and DeSoto that rely exclusively on websites to receive orders.

25. Coppell borders DFW International Airport. Humble is located near the George Bush International Airport. DeSoto is near a large distribution center in south Dallas County. All are at or near interstate highways and close to important railroad lines. Their locations make them well suited to serve as regional, if not national, distribution centers. Beginning in 1969, Coppell chose to make the most of its situation and adopted policies to encourage warehouses and distribution centers to locate in Coppell. Humble has more recently embarked on that course as has

DeSoto. These policies were not without costs. Distribution centers and warehouses require city-supplied infrastructure and services that are more expensive than the cost of infrastructure and services provided to residential and retail development. Coppell, Humble, and DeSoto made these policy decisions in reliance on the statute and the Comptroller's longstanding interpretations of it, that the costs would be more than covered by the local sales tax generated from those operations.

26. Encouraging the development of distribution centers and warehouses has been successful, notwithstanding the costs. For instance, Coppell's annual local sales tax revenue from the sale of items associated with those distribution centers and warehouses is now $26.7 million. Annual local sales taxes from those sources now accounts for 18.6% of Coppell's total revenue.

27. Under the recently adopted amendments to §3.334, it is anticipated that all of the annual local sales revenue from warehouses and distribution centers will be lost because taxable sales of items purchased through Website Orders will no longer be considered as having occurred in Coppell, Humble, and DeSoto (as well as all other municipalities in Texas) resulting in a loss of sales tax revenue for Coppell, Humble, and DeSoto (and many other municipalities in Texas). Yet, Coppell, Humble, and DeSoto will still be responsible for maintaining the additional infrastructure associated with these warehouses and distribution centers conducting business in Coppell, Humble, and DeSoto.

28. That loss will begin on October 1, 2021, when the amendments to §3.334 relating to Website Orders become effective and the Comptroller no longer collects and remits those local sales taxes to Coppell, Humble, and DeSoto. But for those amendments, that loss of local sales tax would not occur because §321.203 of

the Tax Code requires that the Comptroller treat Website Orders as received at a location established for receiving such orders, thereby creating a place of business where sales may be consummated for local sales tax purposes. Because the amendments to §3.334 will deny Coppell, Humble, and DeSoto local sales tax they would otherwise be legally entitled to under §321.203 of the Tax Code, the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of Coppell, Humble, and DeSoto.

29. Coppell, Humble, and DeSoto will suffer a concrete injury from the Comptroller's adoption of §3.334, namely the economic harm due to a loss of local sales tax that would have otherwise been remitted to Coppell, Humble, and DeSoto by the Comptroller. Moreover, §321.203 of the Tax Code grants Coppell, Humble, and DeSoto the right or privilege to receive local sales tax on taxable items considered sold in Coppell, Humble, and DeSoto. The amended §3.334 will impair or at least threatens to impair that right or privilege. The injury to Coppell, Humble, and DeSoto is directly traceable to the Comptroller's rule-making and would be redressed here by judicial invalidation of the challenged rule.

CAUSES OF ACTION

Amended §3.334 was not adopted in accordance with §§2001.030 and 2001.033 of the APA.

30. Plaintiffs incorporate by reference the allegations in paragraphs 1-4, and 13 - 29 of this Petition.

31. On January 3, 2020, the Comptroller proposed amendments to §3.334. 45 Tex.Reg. 98. Among the amendments was a new definition of "Internet order" and a modification to the definition of where a taxable sale is completed or is

"consummated" (in the language of the statute) to provide that Website Orders are never received at "place of business of the seller." Proposed §3.334(c)(6).

32. The Comptroller explicitly recognized that this amendment was contrary to the current §3.334, which allowed Website Orders to be received by a seller at an established location in Texas that had as a purpose receiving orders.

33. On April 3, 2020, Plaintiffs filed detailed comments opposing the Comptroller's proposal to no longer allow Website Orders to be considered as received at a place of business; that is, at an established location of the seller the purpose of which is to receive orders.

34. Among Plaintiffs comments were the following concerns:

a. There must be a change in law either by statute or by judicial interpretation to justify amending a long-standing rule, yet none exists to justify proposed §3.334's: (1) dictate that Internet orders can never be received in Texas; (2) definition of place of business; and (3) description of when a sale is consummated.

b. Treating Internet orders for taxable items differently from non-Internet orders violates §321.002(a)(3) and §321.203 of the Tax Code.

c. Treating Internet orders as received nowhere is contrary to longstanding Comptroller policy and no reason has been advanced for a change.

d. Treating Internet orders differently than phone orders, mail orders, faxed orders and emailed orders would be irrational.

e. The proposed definition of "place of business" is contrary to law because it deviates in material respects from the statutory definition.

f. The sections of proposed §3.334 describing when a sale is consummated must be withdrawn because they deviate materially from the language of §321.203.

g. Proposed §3.334 raises more questions than it answers.

35. The Comptroller did not address these concerns, and others, in the order adopting the final amendments to §3.334.

36. In adopting the Website Order Rule in amended §3.334, the Comptroller was required by §2001.033 of the APA to provide, among other requirements, a reasoned justification for the rule by accurately, adequately, and sufficiently summarizing the comments received regarding the rule, to have considered and found facts to support the relevant factors required by statute to support the rule, providing a legitimate factual basis for the rule, demonstrating a rational connection between the legitimate factual basis advanced for the rule and the rule as adopted, stating a reasoned justification for his decision based on the evidence before him, explaining how and why he reached the conclusion he did in light of the comments received, providing a justification that is clear, precise, and logical, and discussing and explaining why the Comptroller disagreed with comments by Plaintiffs and others opposing the Website Order Rule. He failed to do so.

37. The Comptroller was also required by §2001.030 of the APA to provide in the order adopting new §3.334 a concise statement of the reasons for and against adoption of the Website Order Rule, and the reasons for overruling the considerations urged by Plaintiffs and others against adoption. In the order adopting amended §3.334, however, the Comptroller provided neither the concise for and against statement nor the required reasons for overruling any considerations advanced against adoption.

38. The Comptroller's complete failure to comply with these statutory requirements, or even substantially comply, requires that the Court declare amended

§3.334 invalid and, therefore, void insofar as it effectively says that Website Orders cannot be received at locations in Texas.

In proposing amendments to §3.334, the Comptroller failed to satisfy the cost-benefit review required by the APA.

39. Plaintiffs incorporate by reference the allegations in paragraphs 1-4, and 13– 38 of this Petition.

40. Section 2001.024(4)(C) of the APA requires in the notice of a proposed rule "that the agency provide the estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the rule." In the context of proposed §3.334, that directive required that the Comptroller estimate the loss of or increase in local sales tax revenue for (1) every local government in Texas with a local sales tax and (2) the aggregate loss of local sales tax revenue that will result from the fact that a destination-based approach to determining where a sale is concluded will prevent the collection of local sales tax for items delivered to areas in Texas with no local sales tax, taxes that otherwise could have been collected under the previous version of §3.334.

41. Section 2001.024(5) of the APA requires in the notice of a proposed rule: "a note about public benefits and costs showing the name and title of the officer or employee responsible for preparing or approving the note and stating for each year of the first five years that the rule will be in effect: (A) the public benefits expected as a result of adoption of the proposed rule; and (B) the probable economic cost to persons required to comply with the rule."

42. The Comptroller's notice of the proposed amendments to §3.334 contained none of these estimates or evaluations.

43. The Comptroller's failure to substantially comply with §§2001.024(4)(C) and 2001.024(5) of the APA requires that the Court declare amended §3.334 void insofar as it treats Website Orders for local sales tax purposes as if they are not received at what is a statutory place of business.

Amended §3.334 is in conflict with state law and void.

44. Plaintiffs incorporate by reference the allegations in paragraphs 1-4, and 13– 43 of this Petition.

45. Section 111.002 of the Tax Code prohibits the Comptroller from adopting rules that are in conflict with state law. A rule is in conflict with state law when it (1) contravenes specific statutory language; (2) runs counter to the general objectives of the statute; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions. Amended §3.334 does all three.

46. Section 321.203 of the Tax Code requires that, for a sale to be completed ("consummated") and trigger the collection of local sales tax, an order must be received at a place of business. Because it also recognizes that an order may move for business operational reasons from one place of business to another, section 321.203 establishes a hierarchy for deciding which of several places of business of a seller receiving an order will be treated as the location where the sale was completed in order to determine if local sales tax is owed and what local government receives that sales tax. Because §321.203 has specific statutory language requiring that an order be received for a sale to be completed, any rule of the Comptroller that provides that a sale has occurred without an order first being received contravenes the specific language of §321.203 of the Tax Code.

47. Newly amended §3.334 provides that a business location devoted to holding and sending items ordered by buyers through a Website Order (that is, through a shopping website or a shopping software application that is designed or selected, operated, maintained, and interacted with by agents and employees of the business) cannot, by Comptroller *ipse dixit*, establish a "place of business" for local sales tax purposes. In the Comptroller's construct, because Website Orders can never be received by sales personnel, they can never be received at a place of business. As a result, even though a seller's agents or employees interact with Website Orders at an established location—and therefore that location meets the statutory definition of place of business—they are not places of business under amended §3.334, so sales are deemed as not completed at such locations, and if no sales are completed, no local sales tax is attributable to that location. As a result, amended §3.334 effectively provides that Website Orders can never be received at a place of business, yet allows the collection of local sales tax on such orders. But Section 321.203 of the Tax Code mandates specifically that, if no order is received, there can be no sale. An order must be received somewhere for a sale to occur and local sales tax to be collected. The Comptroller's contrary provision is in conflict with state law and thus void.

48. Section 321.203 of the Tax Code treats an order as an order no matter how it is transmitted or received. Any rule of the Comptroller that conditions receipt of an order on how it is transmitted runs counter to the general objectives of §321.203 of the Tax Code.

49. The Website Order Rule found in amended §3.334 deems Website Orders as not being received at a business location of the seller, even though they are in fact received and even though orders transmitted by mail, phone, email or fax are

considered received at a business location of the seller. The Website Order Rule imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions.

50. Section 321.203 of the Tax Code does not require that a place of business "sell" taxable items or that they be received by "sales personnel." It plainly only requires that a location be "established," that it be "operated by the retailer or the retailer's agent or employee," and that it have the "purpose of receiving orders for taxable items."

51. Any rule of the Comptroller that requires a location "sell" taxable items and that "sales personnel" receive orders at that location to be a place of business conflicts with §321.203 and §321.002(a)(3)(A) of the Tax Code. Newly adopted §3.334 provides that only locations that "sell" taxable items and where "sales personnel" receive orders can be considered places of business. Those requirements (1) contravene specific language of §321.203 and §321.002(a)(3)(A); (2) run counter to the general objectives of §321.203 and §321.002(a)(3)(A); and (3) impose additional burdens, conditions, or restrictions in excess of or inconsistent with §321.203 and §321.002(a)(3)(A).

52. Section 321.203(b) of the Tax Code directs "[i]f a retailer has only one place of business in this state, all of the retailer's retail sales of taxable items are consummated at that place of business…" Amended §3.334 conflicts with this specific statutory command and runs counter to the statute's general objectives by providing that Website Orders delivered in Texas from a seller with a single Texas place of business are not completed at that place of business. Because this provision of amended §3.334 conflicts with §321.203(b), it is invalid and therefore void.

In adopting amended §3.334 the Comptroller failed to consider the factors the Legislature directed be taken into account in developing rules to enforce chapter 321 of the Tax Code.

53. Plaintiffs incorporate by reference the allegations in paragraphs 1-4, and 13 - 52 of this Petition.

54. A rule is invalid if it is adopted without considering the factors the Legislature intended be taken into account in developing rules to enforce the statute in question.

55. In connection with enforcing the statutory provisions of §321.203 of the Tax Code defining where a sale is completed (is consummated), the Legislature has directed that the following factors inform what rules to adopt: (1) whether it streamlines for the seller issuing permits and reporting taxes collected; (2) whether the rule for tax collection is consistent with the transfer of title under the law on sale of goods; (3) avoiding disruption to the revenue of local governments: (4) ensuring that local governments that provide necessary services for the seller supplying the good are fairly reimbursed for those services; (5) avoiding the need to re-educate regulated parties; and (6) providing rules that are easy to follow.

56. Whether these factors have been properly considered is determined from the four corners of the order adopting the rule.

57. The order adopting §3.334 makes clear that the Comptroller failed to consider all of the factors identified by the Legislature, even though many of these factors were addressed in comments shared with the Comptroller.

58. If the factors had been considered, the Website Order Rule would have been found to produce a result contrary to the objective of each factor.

59. Because the factors the Legislature directed the Comptroller to consider in adopting rules enforcing §321.203 of the Tax Code were ignored, and because the amended §3.334 does not further those factors, but instead is contrary to the objective of each factor, the rule runs counter to the general objectives of the statute and is invalid.

In adopted amended §3.334 the Comptroller fundamentally changed his enforcement of §321.203 of the Tax Code without providing the necessary explanation.

60. Plaintiffs incorporate by reference the allegations in paragraphs 1-4, and 13 – 59 of this Petition.

61. State agencies, like the office of the Comptroller, may reconsider existing rules implementing ambiguous statutes so long as the new rule is not inconsistent with the intent of the Legislature and there is an adequately detailed and appropriate justification for the departure.

62. The Comptroller's decision to jettison his long-held position that Website Orders may be received at locations that have a purpose of receiving orders is subject to that standard.

63. In the order adopting amended §3.334, the Comptroller is gaslighting when he claims that the provision directing that Website Orders cannot be received at a business location in Texas is a "clarification" needed to deal with confusion. The change is not a clarification—it is a complete reversal. There was nothing confusing about the Comptroller's prior enforcement of §321.203 of the Tax Code as applied to Website Orders. And that conduct had been relied on by local governments for many years when making policy decisions and setting budgets. Businesses also relied on his longstanding application of the statute when establishing compliance procedures.

64. Because the Comptroller provides no adequately detailed and appropriate justification in the order adopting amended §3.334 for his abandoning an easily understood and applied rule regarding where items obtained through Website Orders are sold (where the sale is consummated), a rule both mandated by §321.203 of the Tax Code and the basis for substantial reasonable reliance by local governments and businesses, his decision to reverse course and now effectively treat Website Orders as not being received by a person is insufficiently justified, making it void and requiring that the rule be declared invalid.

Amended §3.334 is arbitrary and capricious, and, therefore, void.

65. Plaintiffs incorporate by reference the allegations in paragraphs 1-4, and 13 - 64 of this Petition.

66. In amended §3.334 the Comptroller provides that in-person orders, emailed orders, orders sent by post, faxed orders, and telephoned orders (whether landline or mobile and regardless of how transmitted—copper wire, fiber-optic cable, microwave, or use of Voice over Internet protocol)—all can be received at a location established for the purpose of receiving orders. It is only Website Orders that are considered not capable of being similarly received.

67. The Comptroller provides no rational explanation for why one method of ordering—a method not functionally different from all other methods—can never be received at a location established to receive orders and staffed by the seller's agents or employees when the others are received at such locations. The absence of an explanation is predictable. There can be none.

68. When a rule lacks a legitimate reason to support itself, it is arbitrary and capricious. The provision of amended §3.334 that effectively provides Website

Orders cannot be received by persons lacks a legitimate reason to support it and the Comptroller has failed to establish that the rule is a reasonable means to a legitimate objective as required by §2001.035(c) of the APA . The provision is thus void.

Amended §3.334 violates the federal Internet Tax Freedom Act ("ITFA") 47 U.S.C. § 151 note §1101(a), and, is therefore, void.

69. Plaintiffs incorporate by reference the allegations in paragraphs 1-4, and 13 - 68 of this Petition.

70. In 1998, Congress enacted the federal Internet Tax Freedom Act (the "ITFA"), which bars federal, state, and local governments from imposing "multiple or discriminatory taxes on electronic commerce." 47 U.S.C. § 151, note at ITFA § 1101 (a)(2) originally enacted by Pub. L. No. 105-277, Title XI, 112 Stat. 2681 (1998).

71. A "discriminatory tax" means "any tax imposed by a state or political subdivision thereof on electronic commerce [i.e. transactions conducted through the Internet] that is not generally imposed or legally collectible … on transactions involving similar property, goods, services, or information *accomplished through other means*." ITFA § 1105(2)(A)(emphasis added).

72. The ITFA was adopted specifically to foster the sale of goods through the use of the Internet and to protect such transactions from taxation different or more burdensome than the taxation imposed on goods sold through a process other than the Internet.

73. Because amended §3.334 effectively provides that Website Orders cannot be received at a location intended to receive orders and staffed by the seller's agents or employees, the sale of goods through the use of the Internet can be subject

to different and, depending on the buyer's location, higher local taxes than identical goods sold using communications methods other than websites.

74. Because amended §3.334 causes local sales tax to be discriminatorily imposed on Website transactions, it violates the "multiple or discriminatory taxes on electronic commerce" prong of the ITFA.

75. The Supremacy Clause of the United States Constitution is violated when, as here, a state law, amended §3.334, conflicts with federal law, here the ITFA. Therefore, the state law, amended §3.334, is preempted by federal law, the ITFA, and must be declared void and unenforceable.

Amended §3.334 improperly interferes with contractual rights thereby violating the Texas Constitution, and, is therefore, void.

76. Coppell and DeSoto incorporate by reference the allegations in paragraphs 1-4, and 13 – 75 of this Petition.

77. The Legislature has authorized municipalities to enter into economic development agreements with private parties engaged in the sale of items to encourage economic development. One form of such agreements allows the municipality to share with the private party selling items the local sales tax generated by the private parties activities. Those agreements generally are a long term arrangement.

78. Coppell and DeSoto have entered into such agreements and currently have four in effect, all of which were agreed to prior to the effective date of amended §3.334.

79. Before that time, the Comptroller considered Website Orders as being received at locations in Texas established for the purpose of receiving orders and

staffed by the seller's agents or employees. The parties to those agreements relied on and had a reasonable expectation that local sales tax would be collected and remitted to municipalities on the basis of §321.203 of the Tax Code and the version of §3.334 then enforcing that statutory provision.

80. Additionally, municipalities have issued bonds based on the Comptroller considering Website Orders as being received at places of business and the buyers of those bonds purchased with the expectation that local sales tax would be collected and remitted to municipalities on the basis of that rule. Coppell and DeSoto have issued such bonds.

81. The Comptroller's change in position is the functional equivalent of removing a municipality's ability to levy the local sales tax authorized by state law and adopted by a vote of the citizens of that municipality.

82. Article 1, section 16 of the Texas Constitution provides: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." New §3.334 impairs both existing economic development agreements and existing bond obligations of Coppell and DeSoto in violation of art. 1, sec. 16. Because it violates the Texas Constitution, it must be declared void and unenforceable with respect to economic development agreements and bond obligations existing as the date the amendments become effective.

In the alternative, if amended §3.334 is not void, the Court must determine its applicability.

83. Plaintiffs incorporate by reference the allegations in paragraphs 1-4, and 13 - 82 of this Petition.

84. Section 2001.038(a) of the Government Code authorizes a court to determine whether a rule is intended to apply in a given circumstance.

85. Amended §3.334 does not explicitly describe where a sale of items ordered through a Website is completed. In the absence of a rule specific to Website Orders, the applicability of new §3.334 to such sales is uncertain.

86. If upheld as worded, amended §3.334 could be read as requiring that local sales tax for items sold through a Website is collected at and remitted to a location that is a place of business because the location receives, during a calendar year, three of more other types of orders, such as phone, email, mail or faxed orders, which can happen at some distribution centers in Coppell, Humble, and DeSoto.

87. The Comptroller has suggested that he reads amended §3.334 as described in paragraph 86 but has refused to adopt a binding statement to that effect.

88. Plaintiffs request that if amended §3.334 is enforceable, the Court, pursuant to its authority under the APA, find that amended §3.334 applies the rules on consummation of sales, as set forth in amended §3.334(c), to Website Orders fulfilled by pick-up or shipment from a location that is a place of business because it receives three or more orders in a calendar year as a result of (1) an in-person visit from the buyer or (2) a phone, fax, email or mail order.

CONDITIONS PRECEDENT

89. All conditions precedent to the filing of this action have been satisfied.

PRAYER

Plaintiffs seek judgment and relief against the Comptroller including:

1. upon final hearing or trial, this Court issue a final judgment declaring that the amendments to §3.334 were adopted in a procedurally defective manner, declaring those amendments invalid, void, and of no force and effect, and remanding the amendments to the Comptroller for further consideration;

2. upon final trial, this Court issue a final judgment declaring that the amendments to §3.334 are contrary to the intent of the Legislature as manifested in the statutory text of §321.203 of the Tax Code and finding that in whole or in pertinent part they are invalid, void, and of no force and effect;

3. upon final trial, this Court issue a final judgment declaring that the amendments to §3.334 are in whole or in pertinent part irrational and finding that in whole or in pertinent part they are invalid, void, and of no force and effect;

4. upon final trial, this Court issue a final judgment declaring that the amendments to §3.334 in whole or in pertinent part violate the Texas Constitution's ban on impairing contracts, and finding that in whole or in pertinent part they are invalid, void, and of no force and effect to the extent they invalidate contracts existing as of the date amendments to §3.334 become effective;

5. upon final trial, this Court issue a final judgment declaring that the amendments to §3.334 in whole or in pertinent part violate the federal Internet Tax Freedom Act ("ITFA") 47 U.S.C. § 157 note §1101(a), and finding that in whole or in pertinent part they are invalid, void, and of no force and effect;

6. strictly in the alternative, if the Court finds that the amendments to §3.334 are not void and of no force and effect, in whole or in pertinent part, this Court determine the applicability of those amendments to Website orders fulfilled at locations that qualify as places of business independently of any Website Orders

fulfilled at such locations by declaring that the fulfillment of Website Orders at such places of business results in a consummated sale at such locations; and

7. for such other and further relief to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

THOMPSON & KNIGHT LLP

By: */s/ James B. Harris*

James B. Harris
State Bar No. 09065400
Reed C. Randel
State Bar No. 24075780

1722 Routh Street, Suite 1500
Dallas, Texas 75201
Telephone: 214.969.1700
Fax: 214.969.1751
E-mail: james.harris@tklaw.com
E-mail: reed.randel@tklaw.com

Brandon L. King
State Bar No. 24100613

98 San Jacinto Boulevard, Suite 1900
Austin, Texas 78701
Telephone: 512.469.6126
Fax: 512.482.5009
E-mail: brandon.king@tklaw.com