

New Mexico Revenue Stabilization
and Tax Policy Committee
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**Tax Administration: Best Practices for Working with
Businesses and Practitioners to Develop Clear Rules,
Reduce Conflict, and Improve Collection/Compliance**

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Testimony Overview

- CPA and Speaker Background
- Legislative & Legal Context for Rule Writing in Texas
- Why Agency Rules are Important
- CPA Rule Process, Stats, and Staff
- Internal Procedures for Rule Writing at CPA
 - Keeping the Process Moving
 - Stakeholder Involvement
- Important External Resources
- Conclusions & Questions

Comptroller Background

- Statewide Elected Official
- Tax Administration
 - 1 Associate Deputy Comptroller
 - 1 Special Counsel and 1 Special Assistant
 - 8 divisions (including Tax Policy; Hearings & Tax Litigation)
 - About half of 3,000 employees

My Background

- 25+ years as a State and Local Tax Attorney – public & private
- 15 years with CPA; 7 positions
- Represent CPA at the Multistate Tax Commission and Federation of Tax Administration
- Worked on many rules (drafter and reviewer)
- Deposed in one CPA lawsuit over a rule
- Led rule-writing projects
- Overseen major rule process improvement
- Developed and taught training classes on rules

Why Agency Rules are Important

- Rules serve a number of important purposes:
 - giving guidance to taxpayers and their representatives
 - informing the legislature, public, and other governmental agencies of legal requirements and agency policies
 - establishing agency policy in hearings and court cases
 - training staff both inside and at other state agencies
- Well-written rules:
 - minimize disputes and litigation
 - allow for better use of staff time and agency resources (i.e., poorly written rules tend to cost time and money)
 - promote better customer service

Legislative Authority for Rules

- Administrative Procedure Act
 - General principles for all Texas agencies
 - Tex. Gov't Code Ch. 2001 (Subchapter B. Rulemaking)
 - 1 Tex. Admin. Code Ch. 91 (*Texas Register*)
- Tex. Tax Code Ann. § 111.002
 - Specific authority for Comptroller rules

Legal Context – Court Cases

1. What is a rule: Agencies cannot make policy announcements of general applicability through letters or other written communications without following the APA. *See Combs v. Entertainment Publ'ns Inc.*, 292 S.W.3d 712 (Tex. App.—Austin 2009, no pet.)
2. Rules have the force of law: Valid rules have the same force and effect as statutes. *See BFI Waste Sys. of N. Am., Inc. v. Martinez Env'tl. Group*, 93 S.W.3d 570, 575 (Tex. App.—Austin 2002, pet. denied)
3. Agencies have to follow their rules: "If an agency does not follow the unambiguous language of its own rules, we must consider its actions arbitrary and capricious." *Myers v. State*, 169 S.W.3d 731, 734 (Tex. App.—Austin 2005, no pet.)
4. Deference to agency rules: When the language of a statute or agency rule is ambiguous and when there is room for policy determinations, courts generally defer to the agency's construction of its own statutory authority or rules as long as the construction is reasonable and does not contradict applicable statutes. *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011)

CPA Rule Process – Basic Steps

1. Draft rule (preamble and body)
2. Review and comment by stakeholders
(not legally required)
3. File rule proposal with Secretary of State (SOS) for publication
4. 30-day public comment period
5. Review and address public comments
6. File rule adoption with SOS for publication
7. Rule effective no less than 20 days from filing date

CPA Rule Process – Other Considerations

- No Formal Legislative Oversight
- No Required Public Hearings
 - Hearing can be requested in certain circumstances
- No Governor Review for Comptroller Rules
 - Statewide Official = Autonomy, Flexibility

CPA Tax Policy Rule Staff

- 33 staff, including division managers
 - Attorneys and non-attorneys
- 2 rules liaisons (rule formatting gurus)
- 1 editor
- Ad hoc involvement from other staff as needed (e.g., Audit, Enforcement, Tax Litigation, Executive Administration)

Staff Training

- Rule writing is hard work
- Technically legal writing, but wide audience (mom & pop stores to judges on courts)
- Challenge to match technical and legal terms with plain language
- What format (prose, examples, Q&A, charts)?
- What length (include an index)?
- Ask your stakeholders

CPA Rule Stats Since 12/15

- 24 Tax Policy Rules from start to finish
- Average: 350 days
- Median: 294 days
- Longest: 994 days
- Shortest: 180 days
- The road ahead: 30+ Tax Policy rules need updates due to 2019 Legislative Session

Keeping the Process Moving

- Goal: Provide clear guidance as quickly as possible
- Competing priorities – dedicated rule staff?
- Rule planning memo
 - Set scope and priorities
 - Identify internal stakeholders for input
 - Team approach with SME and attorneys
 - Assign project leaders
- Approvals – who is essential?

Technology

- 2015 Launch of SharePoint Tracking System
 - Our “moon shot”
 - From hardcopy “Blue Files” to automated system
 - Workflow and approval mapping with prompts
 - Repository for historic and related materials
- State Tax Automated Research System (STAR)
 - Searchable database for rules and other policy documents (current and historic)
 - <https://star.comptroller.texas.gov/>

Stakeholder Involvement: Philosophy

- If we:
 - Recognize our knowledge is limited and stakeholders are our partners for success
 - Incorporate input whenever possible
 - Be deliberative
 - Be transparent
 - Be inclusive
 - Be reasonable
- Then: we build trust (and things move faster)

Stakeholder Involvement: Who and How

- Taxpayer Advisory Group: Attorneys, CPAs, Tax Consultants
- Business Advisory Group: In-house Tax Professionals, Business Reps, Associations
- Roundtables
- Webinars
- Tax Policy News (monthly publication)
- Website (dedicated rule page for public review and comment)

Important External Resources

- Organizations can help Departments of Revenue develop “best practices” in rule writing
 - State Bar, CPAs, Consulting Firms, Advisory Groups
 - Multistate Tax Commission
 - Federation of Tax Administrators
 - Streamlined Sales & Use Tax Agreement States
 - Counsel On State Taxation
 - NCSL State and Local Tax Committee

Case Study: Practice & Procedure Administrative Hearing Rules

- 11/15 start date; 1/19 effective date
- Update all 29 P&P Rules
 - Adopted in 2007 (many never updated)
 - New laws over time
 - New internal policies and procedures over time
- New agency leadership in 2015
 - Extreme internal silos eliminated
 - TAG & BAG Members invited to be drafting partners
 - SharePoint used to map process and reduce approvals



Conclusions & Questions

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Appendix 1

Texas Administrative Code Tax Administration Subchapters Index



Texas Administrative Code

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- SUBCHAPTER C CRUDE OIL PRODUCTION TAX
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Appendix 2

Texas Administrative Code Subchapter O State and Local Sales and Use Taxes Rules Index



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Appendix 3

Texas Administrative Code
Rule 3.1

Private Letter Rulings
and
General Information Letters

Texas Administrative Code

TITLE 34

PUBLIC FINANCE

PART 1

COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3

TAX ADMINISTRATION

SUBCHAPTER A

GENERAL RULES

RULE §3.1

Private Letter Rulings and General Information Letters

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

(1) General information letter--Information provided by the comptroller in response to any written inquiry about the taxability of an item or transaction, including a request for a private letter ruling that does not comply with the requirements necessary to request a private letter ruling.

(2) Private letter ruling--The comptroller's written determination on the application of relevant tax laws, rules, and policies to a specific set of facts submitted in a properly completed private letter ruling request.

(3) Related person--A person, corporation, or other legal entity, including an entity that is treated as a pass-through or disregarded entity for purposes of federal taxation, in which one person, corporation, or entity, or set of related persons, corporations, or entities, directly or indirectly owns or controls a greater than 50% interest in another entity.

(b) General information letters.

(1) General information letters are advisory in nature and are not binding on the comptroller for purposes of detrimental reliance under §3.10 of this title (relating to Taxpayer Bill of Rights).

(2) The comptroller will respond to a request for a general information letter by issuing a general information letter, by requesting additional information necessary to complete the general information letter, by directing the requestor to the relevant authorities such as agency rules, or by communicating that the comptroller declines to issue a response.

(c) Private letter rulings.

(1) A request for a private letter ruling must be in writing, must be clearly identified as such, and must contain:

(A) identifying information for the person or entity to which the ruling request relates, to include the name, address, Texas taxpayer and federal employer identification numbers, and state of formation, as applicable. The reporting entity of a combined group may request a private letter ruling related to franchise tax reporting on behalf of a combined group by including identification information for each member of the combined group that seeks to rely on the ruling and including identifying information for each member of the combined group that is a party to any transactions described in the ruling request. The signature of the person making the request; the signature of an authorized representative of the person making the request; or the signature of any third party authorized to represent the person before the comptroller, accompanied by a power of attorney, must also be included. If a private letter ruling request does not contain the required identifying information, signature of the person making the request, signature of an authorized representative of the person making the request or a power of attorney if the request is submitted by a third party authorized to represent the taxpayer, the comptroller will still consider the request for a possible ruling; however, no detrimental reliance will be provided under §3.10 of this title unless the identity of the person or entity to which the ruling request relates is

revealed. If the identity of the person or entity is revealed during the comptroller's review of the request, the comptroller may take any actions necessary to ensure that accurate taxability information is provided;

(B) a detailed statement of all relevant facts relating to the request;

(C) a true and correct copy of all relevant documents relating to the request. Relevant facts in documents should be detailed in the request and not merely incorporated by reference in the detailed statement;

(D) a statement disclosing whether or not the issue is under consideration by the comptroller in connection with an audit examination of any type, a refund request, a voluntary disclosure agreement, an administrative hearing, or litigation for the person or entity to which the ruling request relates or for a related person;

(E) a statement disclosing whether or not a request on the same or a similar issue has been or will be submitted to a taxing jurisdiction of another state;

(F) a statement of the private letter ruling requested from the comptroller;

(G) a statement of authorities supporting the requested ruling, an explanation of the grounds for the ruling and the relevant authorities to support the ruling; and

(H) a statement of authorities contrary to the requested ruling. Each person is under an affirmative duty to identify any and all authorities contrary to the requested ruling. If the requestor determines that there are no contrary authorities, or is unable to locate such authority, the request must include a statement that the requestor has identified all relevant authorities to the best of the requestor's knowledge.

(2) The comptroller may request any additional information needed to issue a private letter ruling, including required information that was not provided in the original request. The comptroller will not issue a private letter ruling if the requested information is not provided.

(3) The comptroller will not issue a private letter ruling if the request relates to the same or similar issue that is before the comptroller in the following actions or proceedings for the same person or a related person and for the same or any prior tax period:

(A) an audit examination of any type;

(B) a refund request;

(C) a voluntary disclosure agreement;

(D) an administrative hearing; or

(E) litigation.

(4) The comptroller will promptly acknowledge receipt of all private letter rulings. Subject to paragraph (3) of this subsection, the comptroller will respond in writing to a request for a private letter ruling by issuing a private letter ruling, by issuing a request for additional information, by issuing a letter that declines the request for private letter ruling, or by issuing a general information letter. As part of the process of evaluating the ruling request and determining whether to issue a private letter ruling, the comptroller will consider the extent to which the ruling will promote voluntary compliance by the greatest number of taxpayers and provide information to other persons who have an interest in the subject matter.

(d) Binding effect of private letter rulings.

(1) A person who receives a private letter ruling may rely on it prospectively from the date that the private letter ruling is issued and with respect only to the particular issue and the person identified in the request for the private letter ruling, subject to the exception that, for purposes of the franchise tax, a member of a combined

group may rely on a private letter ruling that is issued to the reporting entity of a combined group to the extent that the private letter ruling relates to that member. Detrimental reliance applies to private letter rulings as provided by §3.10 of this title and subsection (c)(1)(A) of this section.

(2) Notwithstanding paragraph (1) of this subsection, a private letter ruling is not binding on the comptroller with respect to the person who requested the private letter ruling if:

(A) there has been a misstatement or omission of material facts in the request; or

(B) the facts subsequently developed are materially different from the facts on which the private letter ruling was based.

(3) Notwithstanding paragraph (1) of this subsection, a private letter ruling is not binding on the comptroller on a prospective basis if:

(A) there has been a change in the applicable laws, rules, or comptroller hearing decisions that the comptroller determines affects the validity of the ruling;

(B) there has been a final, non-appealable decision issued in a contested case or by a Texas or federal court that the comptroller determines affects the validity of the ruling; or

(C) the comptroller has modified or revoked the private letter ruling.

(e) Modification or revocation of a private letter ruling.

(1) The comptroller may modify or revoke a private letter ruling if the ruling is found to be in error or not in accordance with laws or current comptroller policy or guidelines. The revocation or modification of a private letter ruling shall not be applied retroactively to a person identified in subsection (d) of this section, concerning private letter rulings that are binding on the comptroller.

(2) The comptroller will provide written notice by mail, and service by mail will be complete when the notice is deposited in a U.S. Post Office. The comptroller will address the notice to the taxpayer or other person at the taxpayer's address as it appears in the records of the comptroller. If there are no records of the comptroller for the person making the request or on whose behalf the request has been made, the comptroller will rely on the contact information provided in the private letter ruling request. The comptroller is under no duty to otherwise notify the requestor of the modification or revocation.

(3) A ruling that is modified or revoked due to a change in federal or state law, a final decision of a court of law, or a change in agency rule is effective on the date of the event requiring the modification or revocation. If a ruling is modified or revoked due to a change in comptroller policy that is not reflected in an agency rule, the ruling is effective until the date of the written notice sent to the requestor or person for which the request was made.

(f) Confidentiality. Information provided to the comptroller when requesting a general information letter or private letter ruling, and any general information letter or private letter ruling issued by the comptroller, remain confidential to the extent provided by the Public Information Act, Texas Government Code Ann., Chapter 552, and controlling interpretations as applied to the comptroller by the Attorney General's office and court decisions.

Source Note: The provisions of this §3.1 adopted to be effective January 28, 2013, 38 TexReg 384

Appendix 4

Nancy Prosser Biography

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As General Counsel at the Texas Comptroller of Public Accounts, Nancy provides legal advice and counsel to the Comptroller, Deputy Comptroller, and other members of Executive Administration, and participates in a variety of program activities that support the agency's key missions, including tax administration and fiscal matters. She serves as alternate for Comptroller Glenn Hegar on the Multistate Tax Commission Executive Committee and participates in various activities of the MTC, the Federation of Tax Administrators, and the National Association of State Treasurers. Nancy also monitors and reports on federal and multistate matters affecting state and local taxation and serves as the agency's anti-fraud coordinator.

Nancy joined the Comptroller's Tax Policy Division in July 2004 and initially served as a Research Analyst and then Supervisor of the Sales Tax Section of the Tax Policy Area. Between July 2006 and June 2008, Nancy was the Tax Policy Area Manager, responsible for the day-to-day management of over 40 tax policy analysts covering more than 30 different taxes and fees, including franchise, sales and use, insurance, and oil and gas. Between August 2008 and August 2013, Nancy served as Special Assistant for Tax Policy. She was based in Washington, DC where she handled a variety of tax policy matters, primarily related to sales and use taxes, including drafting agency rules, responding to letter ruling requests, assisting with court cases, and monitoring federal legislation. Nancy returned to Austin in September 2013 to serve as the Assistant Director of Tax Administration, where she helped manage the Audit, Enforcement, Taxpayer Services, and Tax Policy Divisions, and also supervised the Independent Audit Reviewer program. When Comptroller Glenn Hegar assumed office in 2015, Nancy was appointed Special Counsel to the Deputy Comptroller. In February 2018, she was promoted to General Counsel.

Prior to joining the Comptroller's office, Nancy was an Assistant Attorney General in the Taxation Division of the Texas Attorney General's Office where she defended tax statutes and Comptroller rules before state district and appellate courts. Nancy also spent over four years in the Austin law office of Vinson & Elkins L.L.P. representing primarily corporate clients in all facets of state and local tax matters.

Nancy earned a Bachelor's Degree in Psychology, *summa cum laude*, from St. Andrews Presbyterian College, a Master's Degree in Business Administration from Southwest Texas State University, and a Law Degree from the University of Texas School of Law. She is a licensed attorney in the State of Texas.