CPPP Center *for* Public Policy Priorities | **Comments**

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COMMENTS ON PROPOSED RULES RELATING TO TAX CODE, CHAPTER 313; 34 TAC §§9.1051 - 9.1058

Senior Fiscal Analyst Dick Lavine submitted comments to the comptroller's draft rules implementing new reporting requirements for school property tax abatements given under Tax Code, Chapter 313, the Texas Economic Development Act (commonly known as HB 1200). The new requirements were contained in HB 2994, HB 1470, HB 3732, HB 3430, and HB 3693 (80th Legislature). The rules were posted in the Texas Register on November 9, http://www.sos.state.tx.us/texreg/pdf/backview/1109/1109prop.pdf, pages 32 TexReg 8102 through 32 TexReg 8106.

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§9.1054 – Contents of application: In several subsections an application is required to contain information on wages and employment. The definition of "qualifying job," Tax Code, sec. 313.021(3), includes other specific requirements, including coverage by a group health benefit plan. References to information regarding wages and employment (§9.1054(b)(1), (g), and (k)) should be amended to specifically include information on health benefits.

§9.1055(c)(1) – Contents of agreement: The proposed rule requires the agreement to contain a requirement that the recipient meet minimum eligibility requirements that "meet or exceed the Tax Code, Chapter 313 requirements for qualified investment and employment." "Qualified investment" is well defined by Tax Code, sec. 313.021(1), but "employment" is not similarly defined in statute. The rules should specify that the agreement require continuing compliance with the statutory mandates for "qualifying job," sec. 313.021(3), including coverage by a group health benefit plan and wages equal to at least 110 percent of the county average weekly wage for manufacturing jobs in the county.

§9.1055(d) – A*mendment to include new property*: The proposed rule requires only that the company report to the comptroller all relevant information related to the additional property. There is no provision for an evaluation by the comptroller of the economic impact of the addition of new property, as required by Tax Code, secs. 313.025(b), 313.025(d), and 313.026 for the original agreement. Additional property, which must qualify under all other provisions applicable to property included in the original application, should be subject to the same requirement for an evaluation by the comptroller. The clear legislative intent that "school districts should … strictly interpret the criteria and selection guidelines provided by this chapter" (Tax Code, sec. 313.004(3)) can be fulfilled only if the comptroller evaluates additional property by the same procedure applied to the original application.

§9.1057(a) – *Information for comptroller's biennial report:* Because the form on which the required information will be submitted has not been promulgated, it is not possible to comment on its appropriateness or completeness. When promulgated, the form should require submission of sufficiently detailed information to enable evaluation of continuing compliance with all statutory mandates of Chapter 313, explicitly including information concerning qualifying investment, property, and jobs as defined by sec. 313.021, eligible property as defined by sec. 313.024, and minimum qualified investments as defined by secs. 313.023 and 313.053.

§9.1058(d) – *Definition of "owner"* This section would allow a lessee of land to be considered an owner by purposes of the chapter. This definition is contrary to the clear language of Chapter 313, contrary to an Attorney General's opinion of similar language, and exceeds the comptroller's rule-making authority. This subsection should therefore be deleted.

Sec. 313.021(2)(A) clearly provides that it is only the owner of the land who may apply for a limitation on appraised value and who must make the investment and create jobs. "'Qualified property' means: (A) land: ….(iv) on which … the owner of the land proposes to: (a) make a qualified investment….; and (b) create at least 25 new jobs;" Sec. 313.025(a) similarly specifies that "the owner of qualified property may apply… for a limitation on the appraised value…."

The Attorney General examined the definition of "owner" under Tax Code, Chapter 312, in Opinion JC-300 (October 27, 2000). The Code permitted a commissioners court to enter into a tax abatement agreement only with the "owner of taxable real property." The opinion concluded that "the owner of a leasehold interest in tax-exempt real property is not such an 'owner of taxable real property'." The opinion's discussion of the meaning of "owner" was quite straightforward:

> First, a lessee, by definition, is not the "owner" of the real property… Second, and more important, the legislature clearly does not believe or intend "owner of real property" to encompass a lessee of that property because when the legislature wishes to provide tax abatement to a lessee of real property, it has done so expressly….. If the legislature intended lessees of real property to be eligible for tax abatement…, it would have expressly so provided as it did in another section of the same statute. (Attorney General Opinion No. JC-0300, at 6).

In response to this opinion, the applicable sections of Chapter 312 were amended by the 77th Legislature to explicitly allow eligible taxing units to enter into tax abatement agreements with the owner or "the owner of a leasehold interest" in real property. (secs. 312.204(a) and 312.402(a)). Unless and until the legislature decides in the future to make a similar change to Chapter 313. the plain language of the statute – permitting only "the owner of the land" to apply for a limitation on appraised value – must be followed.

The statutory definition of "eligible property," sec. 313.024(c)(2) allows capitalized leases to be considered as "qualified investments." However, "qualified investment," sec. 313.021(1), includes only tangible personal property, a building, or a permanent, non-removable component of a building – not land. Sec. 313.024(c)(1) also clearly states that the land itself cannot be considered part of a "qualified investment." Therefore, an applicant that leases land under a capitalized lease is not eligible for a limitation under Chapter 313.

Application for Appraised Value Limitation: Page 3, Step 4. Question 4 asks, "Will you own the property or lease the property under a capitalized lease?" This question is not sufficiently specific to ensure compliance with the statutory mandates of Chapter 313. Sec. 313.021(2)(A) indicates that it is only the owner of the land who may apply for the limitation and must make the investment and create jobs. "'Qualified property' means: (A) land: ….(iv) on which … the owner of the land proposes to: (a) make a qualified investment….; and (b) create at least 25 new jobs;" There must therefore be a question that asks, "Do you own the land on which the qualified investment will be made?" If the applicant does not own the land, the application should be rejected. See further discussion above, in comments to §9.1058(d) – *Definition of "owner."*

Application for Appraised Value Limitation: Page 3, Step 5. Question 6 asks about the number of new jobs with "wages greater than the county average weekly wage for manufacturing jobs." The requirement of sec. 313.021(3)(E) is for jobs that pay "at least 110 percent of the county average weekly wage for manufacturing jobs in the county where the job is located," not for jobs that are merely greater than the average wage. Question 6 should be amended to reflect the statutory requirement.

Question 8 asks for a description of each type of benefit to be offered to qualifying jobholders. Although this information might be useful, Question 8 should also specifically ask for details necessary to verify compliance with the requirement of sec. 313.021(3)(D) that a qualifying job must "be covered by a group health benefit plan… for which the business offers to pay at least 80 percent of the premiums…"

Application for Appraised Value Limitation and Application for Tax Credit: Schedules A, B, and C. These schedules should explicitly state that a revised schedule must be submitted with any reporting of an amendment to an agreement to include qualified property that was not specified in the original agreement (§9.1055(d)).

Application for Appraised Value Limitation and Application for Tax Credit: Schedule C. The information requested should reflect the statutory definition of "qualifying job" in sec. 313.021(3) and other requirements of Chapter 313.

Rather than "total number of new jobs created," the schedule should request "total number of permanent full-time new jobs created by the applicant."

The "average wage rate for all new jobs" and "number of new jobs with wages greater than the county average weekly wage…" are irrelevant to Chapter 313. Sec. 313.008(3) requires a report on the median wage, which is distinctly different from the average wage. Sec. 313.021(3)(E) requires jobs that pay "at least 110 percent of the county average weekly wage …," not for jobs that are merely greater than the county average weekly wage.

The "average benefits amount per qualifying job" similarly misses the specific requirement of sec. 313.021(3)(D) that that a qualifying job must "be covered by a group health benefit plan… for which the business offers to pay at least 80 percent of the premiums…" The schedule should therefore ask for the number of jobs that provide this statutorily required benefit. In addition, "average benefits amount" is not defined in Chapter 313 and could conceivably include such benefits as employer matching payments for Social Security and Medicare or sick and vacation leave, which are irrelevant to the mandates of Chapter 313.

Additional information: Sec. 313.003(1) states that a purpose of Chapter 313 is to encourage investments "especially in school districts that have an ad valorem tax base that is less than the statewide average…" Information should be gathered from each school district concerning its taxable property value per weighted student in average daily attendance so that compliance with this legislative statement of the purposes of Chapter 313 can be monitored.

Sec. 313.004(3)(B)(ii) requires school districts to approve only applications that "improve the local public education system." It has been publicly reported that many agreements include financial arrangements that increase revenue to school districts, including payments in lieu of taxes, donations to educational foundations that support local public education activities, and other forms of "revenue protection." Information should be gathered from each school district concerning any financial arrangements that provide revenue or in-kind contributions benefiting local public education so that compliance with this statement of legislative intent can be monitored.

Thank you for soliciting these comments.