



This Week in State Tax (TWIST)

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Texas: Comptroller Amends Local Sales Tax Sourcing Rule

In the Texas Register issued on January 27, 2023, the Comptroller formally adopted revised 34 TAC § 3.334, which governs Local Sales and Use Taxes. The process of amending this rule has been a lengthy and somewhat controversial endeavor. Recall, amendments to the rule were previously adopted in May 2020, but several cities subsequently challenged the Comptroller's interpretation of the statute. Ultimately a district court concluded that the Comptroller had not complied with the procedural notice requirements necessary to amend the rule. As such, the Comptroller once again published notice of his intent to amend the rule and a public hearing was held on October 17, 2022. The adopted rule, which is somewhat different than the May 2020 adopted version, is effective January 30, 2023. It should be noted that the litigation over whether the amended rule aligns with the statute is ongoing and will now move forward on the merits.

There are over ten pages of text in the Texas Register explaining the procedural background, summarizing the comments received on the proposed amendments, and responding to those comments and requests for changes to the rule. Many of the comments relate to a change in the definition of "place of business," which is relevant in determining where a local sale is consummated. Historically, 34 TAC § 3.334(h)(3)(C), provided that when an order was placed over the internet and the seller fulfilled that order at a location that was a "place of business in Texas," the sale was considered to be consummated at that place of business where the order was fulfilled. Accordingly, local sales tax was sourced to the fulfillment location. As revised, 34 TAC § 3.334(b)(5), provides that "a facility without sales personnel is not usually a place of business of the seller." Further, "a computer that operates an automated shopping cart software program is not an established outlet, office, or location," and does not constitute a "place of business of the seller." When an order is received at a location that is not a place of business of the seller in Texas and is fulfilled from a location in Texas that is not a place of business of the seller, the sale is consummated at the location in Texas to which the order is shipped or delivered, or at which the purchaser of the item takes possession. What this means is that local sales taxes from Internet orders fulfilled at warehouses or distribution centers in Texas (assuming those locations are not places of business of a seller) will be sourced to the delivery location. Many localities have economic development agreement with retailers that have established fulfillment centers and localities are concerned about local sales tax revenue loss due to this change. Previously, under an agreed to temporary injunction, the Comptroller agreed not to enforce the provision relating to orders not received by sales personnel while the rule's validity was being challenged in district court. Thus, although the rule has been formally adopted, it appears the Comptroller will not enforce it pending the outcome of the litigation. Please contact [Karey Barton](#) with questions on the revised rule.



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