



Testimony
Comptroller of Public Accounts Public Hearing
Proposed Amended 34 TAC §3.334. Local Sales and Use Taxes.
February 4, 2020

On behalf of our members, TTARA submits for your consideration the following comments regarding the proposed amendments to §3.334 Local Sales and Use Taxes.

We are concerned with the possible confusion caused by the definition of what constitutes an Internet order in Subsection (a)(10) and the lack of a definition of when an Internet order is received. Further, the rule does not provide a basic definition of the word “order,” itself, on which so much hinges.

The rule appears to presume that sales today are simple, one-contact transactions between a seller and an end consumer, with the provisions of the product and the sale fully understood by both – something akin to my ordering a bath towel from an online seller. That may work well for a consumer buying a specific finished product, but our concern is that today’s business-to-business transactions to which the rule also applies may well be much more complex, involving a substantial back and forth communication between the purchaser and the seller using a variety of modes of communication, some of which may even occur after the product has actually been shipped.

An Internet order is stated to be one placed by using “a computer or mobile device that does not belong to the seller” but that it “does not include an order placed by phone call using Voice over Internet Protocol or a mobile device.” If I place an order using my mobile phone, is it considered an Internet order or is it not because of the exclusionary provision? Even though both orders are transmitted over the Internet, the rule seems to say that an order placed orally from my mobile phone is not an Internet order, but it is if I connect using an app on my phone. How are email orders to be treated? If a transcription service turns a voicemail order into text, is it an Internet order or not when received? Is a laptop or an electronic tablet considered a mobile device? These and other possible complexities indicate that expanding the definition of Internet order to more precisely delineate what it is and how it can be placed is needed to provide clear compliance guidance for taxpayers.

The rule does not define “order,” nor does it specify when an order is considered received. Given the multiple ways of finalizing an order, some clarification is required. For example: A customer places an order with a sales representative, either in person, by phone or via the Internet. The sales rep then prepares it and forwards it to the business office for customer negotiations or follow-up with respect to the specifications which the sought-after item or items must meet; following the conclusion of negotiations, a purchase agreement is emailed to the customer for an electronic signature. Is the order received when placed with the company sales rep or when the purchase agreement is finalized? Or for

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instance, when a long-time customer with an immediate need for an item calls a sales rep who expedites its shipment and the final sale documents are completed over the Internet post shipment, it is unclear at which point the “order” should be considered received.

The proposed rule seems to be providing a uniform system for sourcing Internet orders; however, even that system reaches a different result depending on where fulfillment takes place. Further, the rule will create substantial confusion for purchasers, as an in-state Internet order may incur a different rate of local sales tax than that applied to the sale of an identical item ordered by phone. No doubt this will likely cause customer confusion and sellers will have to explain why the use of a particular method of ordering an item can impact its final cost.

The disparate treatment of Internet orders as opposed to those placed by other means will place a significant additional administrative compliance burden, with its associated increased costs, on sellers. Many of our members inform us that their existing software that processes sales does not capture how an order is received – via the Internet or not. Consequently, at considerable expense software modifications will have to be made to identify in what manner the order was received. The growing use of cloud computing services to house such software further complicates matters. Sellers that maintain sales software programs in-house will be able, not without considerable difficulty however, to make needed modifications but that task will be even more difficult for sellers, especially smaller ones, that use a standard Cloud-based system.

Compliance becomes even more complicated for sellers that fulfill orders from different locations. The proposed rule states in Subsection (c)(6) that in general “Internet orders are not received at a place of business in Texas.” Hence, the following would result for a seller that receives all orders, regardless of how placed, at a place of business (POB) in Dallas:

- Phone order received at Dallas POB, fulfilled at non-POB in Houston and item shipped to Austin – sale consummated in Dallas. (no change)
- Internet order comes to a Dallas POB, fulfilled at same non-POB in Houston and item shipped to Austin – sale consummated in Austin. (currently consummated as above in Dallas)
- Internet order comes to a Dallas POB, fulfilled at a POB in San Antonio and item shipped to Austin – sale consummated in San Antonio. (no change)

The provisions relating to an “Internet order” are scheduled to take effect April 1, which does not provide sufficient time for many sellers to effectively implement the programming changes necessary. Consequently, the prospect of errors will be high despite the best efforts of sellers, likely resulting in substantial confusion and audit issues.

We recognize the benefits of a uniform system of sourcing Internet sales and do have some members who support the rules as proposed; however, we also have a substantial number of members for which the Internet is but one of several methods used to conduct sales. The rules do not provide general uniformity for all sales. In its current form, the rule will create additional confusion and compliance cost for taxpayers. We ask the agency to re-evaluate the rules in light of these issues. At a minimum, however, the rules should address the issues of clarity.

We commend the Comptroller for holding this public hearing to hear stakeholder concerns and appreciate the opportunity to offer our comments.
