



# This Week in State Tax (TWIST)

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## Texas: Comptroller Proposes Post-*Sirius* Updates to Apportionment Rule

On January 20, 2023, the Texas Comptroller proposed amendments to 34 TAC §3.591 in the Texas Register. Recall, 34 TAC §3.591 is the rule addressing apportionment for purposes of the Margin (Franchise) Tax. Importantly, the revised rule removes the “receipts-producing, end-product act” test that was invalidated by the Texas Supreme Court in the *Sirius XM* decision. In its place, language is added providing that a service is performed at the location or locations where the taxable entity’s personnel or property are doing the work that the customer hired the taxable entity to perform. This language was added to incorporate the court’s determination that the most natural reading of “service performed in this state” supports locating the performance of the service at the place where the taxpayer’s personnel or equipment is physically doing useful work for the customer.

The rule then provides that “activities that are not directly used to provide a service are not relevant when determining the location where a taxable entity performs a service.” Scant guidance is offered on how taxpayers should determine the fair value of services performed in Texas if services are performed both within and without Texas. However, the amended regulation notes that if costs are considered, costs should be limited to the direct costs of doing the work that the customer hired the taxable entity to perform and should not include costs that are not directly used to provide a service to the customer. There are no changes to other parts of 34 TAC §3.591, including the section adopting customer-based sourcing provisions for Internet hosting services. Internet hosting services are broadly defined to include video gaming, data processing, streaming, and marketplace provider services. The rule also retains the audience-based rules for advertising services. The Comptroller will accept comments on the proposed changes for 30 days following the date of publication. Please contact [Jeff Benson](#) or [Karey Barton](#) with questions.



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