

**ADOPTED REGULATION OF
THE NEVADA TAX COMMISSION**

LCB File No. R137-15

Effective November 2, 2016

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §§1-7, NRS 360.090, 372.725 and 374.725.

A REGULATION relating to taxation; establishing provisions relating to the imposition, collection and remittance of sales and use taxes by retailers located outside this State; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Existing law requires the Nevada Tax Commission to prescribe regulations for carrying on the business of the Commission and of the Department of Taxation. (NRS 360.090)

Existing law requires every retailer whose activities have a sufficient nexus with this State to impose, collect and remit the sales and use taxes imposed in this State. (NRS 372.724, 374.724) Existing law also requires a retailer who engages in certain specified activities to collect and remit the sales and use taxes imposed in this State. (NRS 372.7243, 372.7247, 374.7243, 374.7247)

Existing law creates a presumption that a retailer is required to impose, collect and remit sales and use taxes if: (1) the retailer is part of a controlled group of business entities that has a component member who has physical presence in this State; and (2) the component member with such physical presence engages in certain activities in this State that relate to the ability of the retailer to make retail sales to residents of this State. A retailer may rebut this presumption by providing proof to the Department that the component member with physical presence in this State did not engage in any activity in this State that was significantly associated with the retailer’s ability to establish or maintain a market in this State for the retailer’s products or services. (NRS 372.7243, 374.7243) **Section 5** of this regulation authorizes a retailer, in providing such proof, to provide to the Department a written certification obtained from each component member. **Section 5** also establishes the requirements for such a written certification.

Existing law also creates a presumption that a retailer is required to impose, collect and remit sales and use taxes if: (1) the retailer enters into an agreement with a resident of this State under which the resident receives certain consideration for referring potential customers to the retailer through a link on the resident’s Internet website or otherwise; and (2) the cumulative gross receipts from sales by the retailer to customers in this State through all such referrals exceeds \$10,000 during the preceding four quarterly periods. A retailer may rebut this

presumption by providing proof to the Department that each resident with whom the retailer has an agreement did not engage in any activity that was significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services during the preceding four quarterly periods. Such proof may consist of the sworn written statements of each resident with whom the retailer has an agreement stating that the resident did not engage in any solicitation in this State on behalf of the retailer during the preceding four quarterly periods if the statements were obtained from each resident and provided to the Department in good faith. (NRS 372.7247, 374.7247)

Section 6 of this regulation authorizes a retailer, in providing such proof, to: (1) provide to the Department a written certification obtained from each resident on a form provided by the Department; or (2) show that the agreement between the retailer and each resident prohibits the resident from engaging in any solicitation activities in this State that refer potential customers to the retailer and, if the resident is an organization, requires the organization to maintain on its Internet website information alerting its members to the prohibition on such solicitation. **Section 6** also establishes the requirements for the written certification.

Section 7 of this regulation sets forth the circumstances in which the activities of a retailer located outside this State are presumed to have a sufficient nexus with this State. **Section 7** also requires such a retailer whose activities have a sufficient nexus with this State to: (1) impose, collect or remit the sales or use tax; and (2) register with the Department before, or at the time of, making a sale of tangible personal property.

The United States Supreme Court has interpreted local activities necessary for the maintenance of an out-of-state retailer's market for sales and the protection of its interests that are performed by in-state sales representatives as being significantly associated with the retailer's ability to establish and maintain a market in the state. (*Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 250 (1987)) In accordance with this interpretation, **section 3** of this regulation provides examples of activities that are significantly associated with a retailer's ability to establish or maintain a market in this State for the retailer's products or services.

Section 1. Chapter 372 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 7, inclusive, of this regulation.

Sec. 2. *As used in sections 2 to 7, inclusive, of this regulation, unless the context otherwise requires, "component member" has the meaning ascribed to it in NRS 372.7243 and 374.7243.*

Sec. 3. *For the purpose of sections 2 to 7, inclusive, of this regulation, the Commission interprets an "activity that is significantly associated with a retailer's ability to establish or maintain a market in this State for the retailer's products or services" to mean any activity in*

this State that is necessary for the establishment or maintenance of the retailer's market for sales of tangible personal property and the protection of the retailer's interests in this State.

Such an activity includes, without limitation:

- 1. Soliciting sales of goods in this State.*
- 2. Installing, assembling or repairing goods in this State.*
- 3. Constructing, installing, repairing or maintaining real property or tangible personal property in this State.*
- 4. Delivering products into this State other than by mail or common carrier.*
- 5. Having an exhibit at a trade show to maintain or establish a market for products in this State. This subsection must not be construed to include merely attending a trade show.*
- 6. Selling products online and having a brick and mortar store in this State that accepts returns of such online sales.*
- 7. Performing activities designed to establish or maintain customer relationships, including, without limitation:*
 - (a) Meeting with customers in this State to gather or provide product or marketing information, evaluate customer needs or generate goodwill; or*
 - (b) Being available to provide services associated with a product sold, including, without limitation, warranty repairs, installation assistance or guidance, and training on the use of a product, if the availability of any such service is referenced in the retailer's marketing materials, communications or other information accessible to customers.*

Sec. 4. The purpose of sections 2 to 7, inclusive, of this regulation is to reduce the disparate impact of the responsibility to collect taxes on retailers located in this State and

remote retailers located outside this State who utilize residents of this State and businesses with a physical presence in this State to establish presence in this State by proxy.

Sec. 5. 1. *For the purpose of rebutting the presumption set forth in subsection 1 of NRS 372.7243 and subsection 1 of NRS 374.7243 and, pursuant to subsection 2 of NRS 372.7243 and subsection 2 of NRS 374.7243, providing proof satisfactory to the Department that, during the calendar year in question, the activities of a component member with physical presence in this State are not significantly associated with a retailer's ability to establish or maintain a market in this State for the retailer's products or services, a retailer may provide to the Department a written certification obtained from each component member if the written certification is obtained from the component member and provided to the Department in good faith.*

2. The written certification described in subsection 1:

(a) May be submitted in paper or electronic form;

(b) Must contain a statement that the activities of the component member were not significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services;

(c) Must be signed, either manually or electronically, as applicable, by the component member or, if the component member is an organization, by a person who has the authority to execute binding contracts on behalf of the organization; and

(d) Must include the name and address of the component member and, if the component member is an organization, the name and address of the person signing the certification.

3. A retailer shall retain physical or electronic copies of all written certifications obtained from a component member and make such copies available to the Department upon request.

Sec. 6. 1. For the purpose of rebutting the presumption set forth in subsection 1 of NRS 372.7247 and subsection 1 of NRS 374.7247 and, pursuant to subsection 2 of NRS 372.7247 and subsection 2 of NRS 374.7247, providing proof satisfactory to the Department that each resident with whom a retailer has an agreement did not engage in any activity in this State that was significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services during the preceding four quarterly periods ending on the last day of March, June, September and December, a retailer may:

(a) Provide to the Department a written certification obtained from each resident, on a form provided by the Department, if the written certification is obtained from the resident and provided to the Department in good faith; or

(b) Show that the agreement between the retailer and each resident prohibits the resident from engaging in any solicitation activities in this State that refer potential customers to the retailer and, if the resident is an organization, requires the organization to maintain on its Internet website information alerting its members to the prohibition.

2. The written certification described in paragraph (a) of subsection 1:

(a) May be in paper or electronic form;

(b) Must contain a statement that the resident did not engage in any solicitation activities in this State on behalf of the retailer during the preceding four quarterly periods ending on the last day of March, June, September and December and, if the resident is an organization, a statement certifying that the organization's Internet website includes information alerting its members to the prohibition against engaging in solicitation activities in this State that refer potential customers to the retailer;

(c) Must be signed, either manually or electronically, as applicable, by the resident or, if the resident is an organization, by a person who has the authority to execute binding contracts on behalf of the organization; and

(d) Must include the name and address of the resident and, if the resident is an organization, the name and address of the person signing the certification.

3. A retailer shall retain physical or electronic copies of all written certifications obtained from a resident and make such copies available to the Department upon request.

4. As used in this section:

(a) "Advertisement" means any announcement of goods for sale through the use of purchased space or time in print or electronic media for the purpose of communicating information to the general public. The term includes online advertising generated as the result of a generic algorithmic function that is anonymous and passive in nature, including, without limitation, advertisements associated with Internet search engines, banner advertisements, click-through advertisements, cost-per-action advertisements and links to a retailer's website.

(b) "Solicitation activities" means direct or indirect communication with a specific person in this State in a manner that is intended to incite the person to purchase tangible personal property from a specific retailer and establish or maintain a market in this State for the products or services offered by the retailer. The term includes, without limitation, distributing flyers, coupons, newsletters or other printed promotional materials or the electronic equivalents thereof, initiating telephone calls and sending emails. The term does not include an advertisement.

Sec. 7. 1. For the purpose of determining whether the activities of a retailer located outside this State have a sufficient nexus with this State to satisfy the requirements of the

United States Constitution, the activities of a retailer are presumed to have a sufficient nexus with this State if the retailer is making a sale of tangible personal property, whether at retail or for storage, use or other consumption in this State, and the retailer:

(a) Is part of a controlled group of corporations that has a component member with physical presence in this State and the activities performed in this State by the component member are:

(1) Listed in paragraph (b) of subsection 1 of NRS 372.7243 or paragraph (b) of subsection 1 of NRS 374.7243; or

(2) Significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services; or

(b) Enters into an agreement with a resident of this State under which the resident, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers to the retailer, and the cumulative gross receipts from sales by the retailer to customers in this State who are referred to the retailer by all residents with such an agreement with the retailer is in excess of \$10,000 during the preceding four quarterly periods ending on the last day of March, June, September and December.

2. If a retailer is unable to determine which sales to customers in this State were the result of an agreement with a resident of this State as described in paragraph (b) of subsection 1, all gross receipts from sales by the retailer to customers in this State will be considered for purposes of establishing the presumption that the activities of a retailer have a sufficient nexus with this State.

3. If the activities of a retailer located outside this State are presumed to have a sufficient nexus with this State, the retailer shall:

(a) Impose, collect or remit the sales or use tax pursuant to NRS 372.7243, 372.7247, 374.7243 or 374.7247; and

(b) Register with the Department pursuant to NRS 360B.200 before, or at the time of, making the sale.

4. As used in this section, “commission or other consideration based upon the sale of tangible personal property” includes, without limitation, an agreement to pay an amount of money based on the level of sales completed, cost per mille advertising, the payment of a flat fee in exchange for a referral, the payment of a fixed price in exchange for providing a referral link, or any other item of value given in exchange for a referral.

LEGISLATIVE REVIEW OF ADOPTED REGULATIONS--NRS 233B.066
Informational Statement
LCB File No. R137-15

1. A clear and concise explanation of the need for the adopted regulation.

The need and purpose of the proposed regulations is to establish provisions relating to the imposition, collection and remittance of sales and use taxes by retailers located outside this State; and providing other matters properly relating thereto.

2. Description of how public comment was solicited, a summary of public response, and an explanation of how other interested persons may obtain a copy of the summary.

The Department of Taxation, as staff to the Nevada Tax Commission, solicited comment from the public by sending notice of workshops and hearings by electronic and regular mail as follows:

<u>Date of Notice</u>	<u>Workshop/ Hearing</u>	<u>Date of Workshop</u>	<u>Number Notified</u>
05/05/2016	Workshop	05/20/2016	208
07/13/2016	Workshop	08/08/2016	217
08/23/2016	Adoption Hearing	10/03/2016	195

The mailing list included the interested parties list maintained by the Department. Notices were also posted at the Nevada State Library; various Department of Taxation locations throughout the state; and at the Main Public Libraries in counties where an office of the Department of Taxation is not located. Comments were also solicited by direct email to other interested parties lists maintained by the Department.

See response to #5 for a summary of the public responses to the Regulation

A copy of the audio taped comments or the record of proceedings may be obtained by calling the Nevada Department of Taxation at (775) 684-2030 or by writing to the Department of Taxation, 1550 East College Parkway, Carson City, Nevada 89706, or by e-mailing the Department at hfettic@tax.state.nv.us

3. The number of persons who:

- (a) Attended the hearing:** 48 people attended the adoption hearing.
- (b) Testified at the hearing:** 0 person testified at the adoption hearing.
- (c) Submitted written comments:** None of the attendees that attended the adoption hearing submitted written comments.

4. **For each person identified in paragraphs (b) and (c) of number 3 above, the following information if provided to the agency conducting the hearing:**

Testified at the adoption hearing:

No one testified at the adoption hearing.

5. **A description of how comment was solicited from affected businesses, a summary of their response and an explanation of how other interested persons may obtain a copy of the summary.**

See response to #2 for description of how comments were solicited from affected businesses and an explanation on how interested persons may obtain a copy of the summary.

Summary of public responses:

The following general responses were received by email and mail.

1. One taxpayer made several recommendations which consisted of: 1. Remove the terms brick and mortar retailers, online retailers and domestic commercial entities since the terms are not defined and suggested that the Department use terms like “retailer located inside/outside this State”. 2. It was recommended to remove Section 2.2 for the reason that it is addressed in Statute. It was also recommend clarifying the meaning “significantly associated. It was stated that “any solicitation activities” seems inconsistent with “significantly associated” standard. 3. It was suggested to move section 5 to the beginning of the regulation and clarify the need for a retailer who is selling in to the state of Nevada and not rebutting it, have them register with the Department.
 2. One taxpayer suggested that section 5, subsections 2 and 3 be deleted from the draft for the reason that the bill uses the Gross Receipts from the past 4 quarters as a qualifier for an entity to recognize the need to register with the Department.
 3. At the May 20, 2016 workshop, the above public comment was received. The Department revised the regulation taking into account the public comment. The revision of the regulation was sent back to LCB for review. On June 29, 2016 the Department received the LCB Draft of Revised Proposed Regulation. On July 13, 2016 the Small Business Impact Questionnaire was sent out and a second workshop was scheduled for August 8, 2016 and adopted by the NTC on October 3, 2016 without any additional questions or concerns.
6. **If the regulation was adopted without changing any part of the proposed regulation, a summary of the reasons for adopting the regulation without change.**

The LCB Draft of Revised Proposed Regulation was adopted without changes.

7. The estimated economic effect of the regulation on the business which it is to regulate and on the public.

(a) The adverse and beneficial:

The proposed permanent regulation presents no reasonably foreseeable or anticipated adverse or beneficial economic effects to businesses or to the general public. The benefit of this regulation is for industry and the Department to be provided additional clarity regarding Senate Bill 412.

(b) The immediate and long-term effect:

The proposed permanent regulation presents no reasonably foreseeable or anticipated immediate or long-term economic effects to business or to the general public. The benefit of this regulation is for industry and the Department to be provided additional clarity regarding Senate Bill 412.

8. The estimated cost to the agency for enforcement of the proposed regulation:

The proposed permanent regulation presents no significant foreseeable or anticipated cost or decrease in costs for enforcement other than the costs to implement the statutory provision.

9. A description of any regulations of other State or governmental agencies which the regulation overlaps or duplicates and a statement explaining why the duplication or overlap is necessary. If the regulation overlaps or duplicates a federal regulation, the name of the regulating federal agency.

The proposed regulations do not overlap or duplicate any regulation of other state or local governmental entities.

10. If the regulation includes provisions that are more stringent than a federal regulation that regulates the same activity, a summary of such provisions.

The Department is not aware of any similar federal regulations of the same activity in which the state regulations are more stringent.

11. If the regulation provides a new fee or increases an existing fee, the total annual amount the agency expects to collect and the manner in which the money will be used.

The proposed regulations do not include any new or increases in existing fees.