

**PROPOSED REGULATION OF THE
NEVADA TAX COMMISSION**

LCB FILE NO. R056-18I

**The following document is the initial draft regulation proposed
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LCB File No. XXX
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EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §1, NRS 360.090 and 360B.110; §2, NRS 360.090, 360B.110 and 372.284.

A REGULATION relating to taxation; revising provisions governing the exemption from the sales and use tax for food for human consumption; and providing other matters properly relating thereto.

Existing law requires the Nevada Tax Commission to enter into the Streamlined Sales and Use Tax Agreement and take any other actions reasonably required to implement the provisions of the Agreement, including, without limitation, adopting regulations to carry out the provisions of existing law and the Agreement. (NRS 360B.110) This regulation adopts provisions to carry out certain requirements of the Agreement.

Existing law generally exempts food for human consumption from the sales and use tax in this State. However, existing law excludes from this exemption prepared food intended for immediate consumption. (Nev. Const. Art. 10, § 3[A]; NRS 372.284, 374.289) Existing law adopts a provision of the Agreements definition of prepared food which provides that food sold with eating utensils provided by the seller is prepared food. (NRS 360B.460) Existing regulations contain provisions specifying that prepared food as defined in NRS 360B.460 means prepared food which is intended for immediate consumption for the purposes of determining whether the food is exempt from the sales and use tax. (NAC 372.605) The Agreement provides for a Threshold Test which was created to add consistency to the meaning of the term “provided by the seller.” The Department is required to use this test in making determinations of the taxability of prepared food and beverage sales. **Section 1** of this regulation adopts a provision of the Agreement which provides rules to determine how utensils are treated and their impact on the sale of various food items.

Sec. 1. NAC 372.605 is hereby amended to read as follows:

372.605 1. As used in [NRS 372.284](#), the Department will interpret the term “prepared food intended for immediate consumption” to:

(a) Mean prepared food, as defined in [NRS 360B.460](#), which is ~~intended~~ *deemed to be* for immediate consumption. *NRS 360B.460 subsections 1 through 3 each separately meet the definition of prepared food.*

(b) Exclude, if sold without eating utensils provided by the seller:

(1) Two or more food ingredients mixed or combined by the seller for sale as a single item and sold:

(I) By a seller whose primary NAICS classification is within Subsector 311, Food Manufacturing; or

(II) In an unheated state by weight or volume as a single item.

(2) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish pastries, cakes, tortes, pies, tarts, muffins, bars, cookies and tortillas.

(3) Food ordinarily requiring cooking, as opposed to reheating, by the consumer before consumption.

2. For the purposes of this section, “NAICS classification” means classification under the *North American Industry Classification System*, 2007 Edition, which is hereby adopted by reference. A copy of that publication is available from the National Technical Information Service, Alexandria, Virginia 22312, or by telephone at (703) 605-6000 or (800) 553-6847, for the price of \$59. A copy of that publication is also available, free of charge, from the U.S. Census Bureau at the Internet address <http://www.census.gov/eos/www/naics/index.html>.

3. Whether eating utensils are deemed to be “provided by the seller” pursuant to NRS 360B.460 subsection (3) depends on whether the seller’s annual sales of certain types of prepared food make up more than 75% of its total sales (excluding alcoholic beverages.)

(a) A threshold test will be used by sellers to determine their percentage of prepared food sales and will be calculated as follows:

(1) Determine the numerator, which is made up of the total dollar value of sales of prepared food as defined in NRS 360B.460 that is either sold in a heated state or heated by the seller; plus sales of prepared food made up of two or more food ingredients mixed or combined by the seller for sale as a single item; plus sales of food that cannot be transferred to the purchaser without plates, bowls, glasses, cups or other utensils (e.g., fountain beverages, salad bar); and

(2) Divide the numerator determined above by the total dollar value of all sales of food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks, but not including alcoholic beverages.

(I) For sellers with a prepared food sales percentage of 75% or less, utensils are considered to be “provided by the seller” if the seller’s practice (as represented by the seller) is to actually give or hand the utensil(s) to the purchaser to use to consume the prepared food item being sold, except that plates, bowls, glasses, or cups necessary for the purchaser to

receive the food (e.g., dispensed beverage, salad bar) need only be made available for the purchaser.

(II) For sellers with a prepared food sales percentage greater than 75%, utensils are considered to be “provided by the seller” if the seller merely makes the utensils available for purchasers. Thus, utensils at a kiosk or common area are considered to be utensils “provided by the seller.”

(III) Even if more than 75% of the sales of food by the retailer are sales of prepared food, sales of food or food ingredients are not taxable if the transaction is for four or more servings as described in the "Nutrition Facts" box on the labels as required by 21 C.F.R. § 101.9, and the retailer maintains adequate records of each sale. If the transaction is for less than four servings, or the retailer does not maintain adequate records of these sales, sales tax must be collected on these food sales.

(b) The seller must calculate the percentage of prepared food sales annually to determine whether it is above or below the 75% threshold.

(1) This calculation must be performed by the seller for each tax year or business fiscal year, using the seller’s data from the prior tax year or business fiscal year, as soon as possible after accounting records are available, but not later than 90 days after the beginning of the tax or business fiscal year.

(2) A new business will calculate a percentage based on a good faith estimate for the first year. A new business should adjust its good faith estimate prospectively after the first three months of operation if its actual sales materially affect the calculation.

(3) If a seller has multiple locations in this State, the seller must use the average of the percentage of prepared food sales for all their similar establishments.

(4) Sellers are required to maintain records to support the calculation of the threshold test.