

PROPOSED REGULATION OF THE NEVADA TAX COMMISSION

LCB File No. R137-15

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

AUTHORITY:

A REGULATION relating to taxation, providing implementation of the bill relating to the imposition, collection and remittance of sales and use taxes by retailers located outside this State.

Section 1. Chapter 372 of the NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 6, inclusive, of this regulation.

Sec. 2. *Statement of Intent.*

1. *The purpose of these regulations regarding specific presumptions of nexus is to reduce the disparate impact of tax collection responsibility between brick-and-mortar retailers with a physical presence in this State, and online retailers who utilize residents of this State and domestic commercial entities to establish a presence by proxy.*
2. *The policy of the Department is: to ensure that the activities considered establish a substantial nexus with this State; to fairly apportion the tax burden amongst all retailers availing themselves of the markets in this State; to not discriminate against interstate commerce; and to collect taxes that fairly relate to the services of this State.*

Sec. 3. *Definitions.*

1. *For purposes of this chapter:*
 - a. *“Advertisement” means a written, verbal, pictorial, graphic, etc. announcement of goods or services for sale, employing purchased space or time in print or electronic media, which is given to communicate such information to the general public. Online advertising generated as a result of generic algorithmic functions that is anonymous and passive in nature, such as ads tied to Internet search engines, banner ads, click-through ads, Cost Per Action ads, links to retailers’ website, and similar online advertising services, are advertisements and not solicitations.*
 - b. *“Solicit” means to communicate directly or indirectly to a specific person or specific persons in this State in a manner that is intended to and calculated to incite the person or persons to purchase tangible personal property from a specific retailer or retailers; and are intended to establish or maintain a market in this State for the retailer’s products or services. This may include but is not limited to: distributing flyers, coupons, newsletters and other printed*

promotional materials, or electronic equivalents; verbal solicitation; initiating phone calls; and sending e-mails.

- c. "Solicit," "solicitation," "refer," and "referral" do not mean or include online advertising generated as a result of generic algorithmic functions that is anonymous and passive in nature, such as ads tied to Internet search engines, banner ads, click-through ads, Cost Per Action ads, links to retailers' website, and similar online advertising services.*

Sec. 4. *Collection of Use Tax by Retailers Located Outside of this State.*

- 1. Retailers located outside of this State who are making sales of tangible personal property, whether at retail or for storage, use or other consumption in this State, must register with the Department at the time of making the sales.*
- 2. Registration requires the Retailer located outside of this State to indicate the existence of any contracts with residents of this State under which the resident, for a commission or other consideration based upon the sale of tangible personal property by the retailer, makes referrals of potential customers; and if such contracts exist, the Retailer located outside of this State must also state the gross receipts from sales to customers in this State who are referred to the retailer by all residents with this type of agreement over the four quarters immediately preceding it's registration.*
- 3. If a Retailer located outside of this State is unable to determine which sales to customers in this State were the result of referral agreements with residents of this State, then all gross receipts from sales to customers of this State will be considered for purposes of establishing the presumption that the Retailer located outside of this State must collect and remit sales and use tax.*
- 4. For purposes of this chapter, "commission or other consideration based upon the sale of tangible personal property," includes but is not limited to: an agreement to pay some amount of money based on the level of sales completed; a flat fee per referral; cost-per-mille; fixed-price for providing the referral link; or any other item of value given in exchange for the referral.*

Sec. 5. *Rebutting the Presumption of Nexus (Controlled Group).*

- 1. A retailer may rebut the presumption of AB 380 Sec 2(1) by providing proof to the Department in the form of an annual written statement (certification) stating that the activities of the component member with physical presence in this State 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.*
 - a. This certification may be in paper or electronic form and must be signed (either manually or electronically) by the component member in this State. If the component member in this State is an organization, the certification must be*

signed by a person who has the authority to execute binding contracts on behalf of the organization.

- b. The certification must also show 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.*
 - c. A retailer will be considered to have satisfied this condition if it receives the completed certifications from its component member and the retailer accepts the certifications in good faith (that is, the retailer does not know or have reason to know that any of the certifications are false or fraudulent).*
 - d. The retailer must retain copies of the certifications that are signed by and received from component members, in either hard-copy or electronic format, as part of the retailer's record keeping requirements. In addition, the retailer must make the copies available to the Department upon request.*
 - e. There is no specific form required for this certification process. The retailer may choose the form of the certification as long as it contains the information prescribed above.*
- 2. The activities listed in AB 380 Sec 2(1)(b)(1)-(5) are a non-exhaustive list of activities that may be evidence of component member activities intended to establish and maintain a market in this State for the retailer's sales of tangible personal property to customers in this State.*

Sec. 6. *Rebutting the Presumption of Nexus (Click-through).*

- 1. A retailer may rebut the presumption of AB 380 Sec 3(1) by:*
 - a. Prohibiting resident representatives under the agreement from engaging in any solicitation activities in Nevada that refer potential customers to the retailer, and if the resident representative is an organization such as a club or non-profit group, the contract or agreement must provide that the organization will maintain on its website information alerting its members to the prohibition against each of the solicitation activities; and*
 - b. Providing proof to the Department in the form of an annual written statement (certification) stating that the resident did not engage in solicitation activities on behalf of the retailer, and if the resident representative is an organization, the annual certification must also include a statement from the resident organization certifying that its website includes information directed at its members alerting them to the prohibition against solicitation activities.*
- 2. The certification may be in paper or electronic form and must be signed (either manually or electronically) by the resident representative. If the resident representative is an organization, the certification must be signed by a person who has the authority to execute binding contracts on behalf of the organization.*

3. *The certification must also show the name and address of the resident representative, and, if the resident representative is an organization, the name and address of the person signing the certification.*
4. *A retailer will be considered to have satisfied this condition if it receives the completed certifications from its resident representatives and the retailer accepts the certifications in good faith (that is, the retailer does not know or have reason to know that any of the certifications are false or fraudulent).*
5. *The retailer must retain copies of the certifications that are signed by and received from resident representatives, in either hard-copy or electronic format, as part of the retailer's record keeping requirements. In addition, the retailer must make the copies available to the Department upon request.*
6. *The retailer may return the certification on a form prescribed by the Department. Any certification that the retailer provides must contain the information required in this section.*

Sec. 7. Chapter 374 of the NAC is hereby amended by adding thereto the provisions set forth as sections 8 to 12, inclusive, of this regulation.

Sec. 8. *Statement of Intent.*

1. *The purpose of these regulations regarding specific presumptions of nexus is to reduce the disparate impact of tax collection responsibility between brick-and-mortar retailers with a physical presence in this State, and online retailers who utilize residents of this State and domestic commercial entities to establish a presence by proxy.*
2. *The policy of the Department is: to ensure that the activities considered establish a substantial nexus with this State; to fairly apportion the tax burden amongst all retailers availing themselves of the markets in this State; to not discriminate against interstate commerce; and to collect taxes that fairly relate to the services of this State.*

Sec. 9. *Definitions.*

1. *For purposes of this chapter:*
 - a. *“Advertisement” means a written, verbal, pictorial, graphic, etc. announcement of goods or services for sale, employing purchased space or time in print or electronic media, which is given to communicate such information to the general public. Online advertising generated as a result of generic algorithmic functions that is anonymous and passive in nature, such as ads tied to Internet search engines, banner ads, click-through ads, Cost Per Action ads, links to retailers' website, and similar online advertising services, are advertisements and not solicitations.*
 - b. *“Solicit” means to communicate directly or indirectly to a specific person or specific persons in this State in a manner that is intended to and calculated to*

incite the person or persons to purchase tangible personal property from a specific retailer or retailers; and are intended to establish or maintain a market in this State for the retailer's products or services. This may include but is not limited to: distributing flyers, coupons, newsletters and other printed promotional materials, or electronic equivalents; verbal solicitation; initiating phone calls; and sending e-mails.

- c. "Solicit," "solicitation," "refer," and "referral" do not mean or include online advertising generated as a result of generic algorithmic functions that is anonymous and passive in nature, such as ads tied to Internet search engines, banner ads, click-through ads, Cost Per Action ads, links to retailers' website, and similar online advertising services.*

Sec. 10. *Collection of Use Tax by Retailers Located Outside of this State.*

- 1. Retailers located outside of this State who are making sales of tangible personal property, whether at retail or for storage, use or other consumption in this State, must register with the Department at the time of making the sales.*
- 2. Registration requires the Retailer located outside of this State to indicate the existence of any contracts with residents of this State under which the resident, for a commission or other consideration based upon the sale of tangible personal property by the retailer, makes referrals of potential customers; and if such contracts exist, the Retailer located outside of this State must also state the gross receipts from sales to customers in this State who are referred to the retailer by all residents with this type of agreement over the four quarters immediately preceding its registration.*
- 3. If a Retailer located outside of this State is unable to determine which sales to customers in this State were the result of referral agreements with residents of this State, then all gross receipts from sales to customers of this State will be considered for purposes of establishing the presumption that the Retailer located outside of this State must collect and remit sales and use tax.*
- 4. For purposes of this chapter, "commission or other consideration based upon the sale of tangible personal property," includes but is not limited to: an agreement to pay some amount of money based on the level of sales completed; a flat fee per referral; cost-per-mille; fixed-price for providing the referral link; or any other item of value given in exchange for the referral.*

Sec. 11. *Rebutting the Presumption of Nexus (Controlled Group).*

- 1. A retailer may rebut the presumption of AB 380 Sec 2(1) by providing proof to the Department in the form of an annual written statement (certification) stating that the activities of the component member with physical presence in this State 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.*

- a. *This certification may be in paper or electronic form and must be signed (either manually or electronically) by the component member in this State. If the component member in this State is an organization, the certification must be signed by a person who has the authority to execute binding contracts on behalf of the organization.*
 - b. *The certification must also show 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.*
 - c. *A retailer will be considered to have satisfied this condition if it receives the completed certifications from its component member and the retailer accepts the certifications in good faith (that is, the retailer does not know or have reason to know that any of the certifications are false or fraudulent).*
 - d. *The retailer must retain copies of the certifications that are signed by and received from component members, in either hard-copy or electronic format, as part of the retailer's record keeping requirements. In addition, the retailer must make the copies available to the Department upon request.*
 - e. *There is no specific form required for this certification process. The retailer may choose the form of the certification as long as it contains the information prescribed above.*
2. *The activities listed in AB 380 Sec 2(1)(b)(1)-(5) are a non-exhaustive list of activities that may be evidence of component member activities intended to establish and maintain a market in this State for the retailer's sales of tangible personal property to customers in this State.*

Sec. 12. *Rebutting the Presumption of Nexus (Click-through).*

1. *A retailer may rebut the presumption of AB 380 Sec 3(1) by:*
 - a. *Prohibiting resident representatives under the agreement from engaging in any solicitation activities in Nevada that refer potential customers to the retailer, and if the resident representative is an organization such as a club or non-profit group, the contract or agreement must provide that the organization will maintain on its website information alerting its members to the prohibition against each of the solicitation activities; and*
 - b. *Providing proof to the Department in the form of an annual written statement (certification) stating that the resident did not engage in solicitation activities on behalf of the retailer, and if the resident representative is an organization, the annual certification must also include a statement from the resident organization certifying that its website includes information directed at its members alerting them to the prohibition against solicitation activities.*
2. *The certification may be in paper or electronic form and must be signed (either manually or electronically) by the resident representative. If the resident representative*

is an organization, the certification must be signed by a person who has the authority to execute binding contracts on behalf of the organization.

- 3. The certification must also show the name and address of the resident representative, and, if the resident representative is an organization, the name and address of the person signing the certification.*
- 4. A retailer will be considered to have satisfied this condition if it receives the completed certifications from its resident representatives and the retailer accepts the certifications in good faith (that is, the retailer does not know or have reason to know that any of the certifications are false or fraudulent).*
- 5. The retailer must retain copies of the certifications that are signed by and received from resident representatives, in either hard-copy or electronic format, as part of the retailer's record keeping requirements. In addition, the retailer must make the copies available to the Department upon request.*
- 6. The retailer may return the certification on a form prescribed by the Department. Any certification that the retailer provides must contain the information required in this section.*