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Reply to: Reno

October 1, 2019

Jim Devolld, Chairman
Nevada Tax Commission
115 E. College Parkway, Suite 115
Carson City, NV 89706

Dear Chairman Devolld,

On behalf of the Retail Association of Nevada (“RAN”), our office hereby submits the following comments with respect to the proposed adoption of Regulation R002-17 (the “Proposed Regulation”). The Proposed Regulation pertains to the sales tax treatment of various delivery-related charges.

Procedural Concerns

The Proposed Regulation was first submitted to the Legislative Counsel Bureau (“LCB”), pursuant to NRS 233B.063 (1), in the early part of 2017. The Proposed Regulation went through the workshop process, but was also delayed because of pending cases before the Nevada Supreme Court. Ultimately, consideration, and potential adoption, of the Proposed Regulation was placed on the agenda for the Tax Commission meeting to be held on March 4, 2019.

However, NRS 233B.040 requires that an agency adopt regulations within 2 years from the date the regulation was first submitted to the LCB. After concerns were raised that the Tax Commission hearing would occur more than two years after the Proposed Regulation was first submitted to the LCB, consideration of the Proposed Regulation was pulled from the agenda for the meeting on March 4, 2019.

The Proposed Regulation has now been placed on the agenda for the Tax Commission’s meeting on October 7, 2019, which again violates the mandate of NRS 233B.040.

NRS 233B.040(4) sets forth two mandates. First, an agency “shall adopt a proposed regulation not later than 2 years after the date on which the proposed regulation is submitted to the [LCB] . . .” Notably, the title of the statute refers to this section as a “deadline for adoption of proposed regulation.” **Exhibit 1.** Second, if an agency misses the 2 year deadline, the agency head must appear before the Legislative Commission and provide an explanation. There is nothing in the statute that allows the 2 year period to be extended.

NRS 233B.040(4) was enacted in 2013 as a result of Assembly Bill 252. The original version of that bill included the following phrase: “If an agency does not adopt a proposed regulation within the time prescribed by this subsection, the regulation shall be deemed withdrawn unless, before the expiration of 2 years, the agency petitions the Legislative Commission for and receives an extension of time by which

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to adopt the proposed regulation.” See **Exhibit 2**. However, AB 252 was subsequently amended to remove the ability of the Legislative Commission to grant an extension to the 2-year rule. *Id.* Accordingly, the Legislature expressly rejected the concept of extensions to the 2-year rule and instead implemented a requirement that 2 years is a hard stop, and the process must be restarted if a regulation is not adopted in the appropriate time frame.

There is no question that the scheduled adoption of the Proposed Regulation is well-beyond the 2 year period set forth in NRS 233B.040(4). We respectfully request that the Commission refrain from adopting the Proposed Regulation and instead direct the Department to restart the process to adopt a regulation as required by NRS 233B.040(4).

Substantive Concerns

Aside from the procedural concerns stated above, there remain several substantive concerns with the Proposed Regulation that further supports restarting the process and holding workshops to address concerns.

Under current law, delivery charges unconnected to a sale of tangible personal property are considered a service which is not subject to sales and use tax. NRS 360B.480(1)(c); NAC 372.101(2). Similarly, charges for delivery of tangible personal property are not subject to sales tax when those charges are stated separately on an invoice. NRS 360B.480(2)(a).

Also under current law, the term “delivery charges” includes both charges for the “preparation and delivery of the property to a location designated by the purchaser” and charges for “transportation, shipping, postage, handling, crating and packing.” NRS 360B.425. However, the current regulation is inconsistent when it states that charges for “handling, crating and packing” are subject to tax, regardless of whether such charges are separately stated on an invoice. NAC 372.101(1)(b). Instead of resolving this inconsistency the Proposed Regulation perpetuates it.

The Proposed Regulation provides that separately stated “transportation, shipping or postage” charges are non-taxable, but then makes such charges taxable if any “manufacturing, assembling or preparing of tangible personal property” occurs either during the transportation or shipping or during the time when the property is “off-loaded to a location designated by the purchaser.” Proposed Regulation Sec. 1(1)(a). Those same charges can become non-taxable again if they are segregated to differentiate between taxable “handling” charges and non-taxable “transportation or shipping” charges. *Id.* The sum effect of this section appears to be that separately stated “transportation or shipping” charges are non-taxable, and continue to be non-taxable, even if there is activity that is considered “manufacturing, assembling or preparing,” as long as there is also a separately stated charge for “handling.” It is unclear why there needs to be a separate charge for “handling” when there is “manufacturing, assembling or preparing.”

Section 1(1)(a) of the Proposed Regulation introduces the concept of “manufacturing, assembling, or preparing” that occurs during shipment or at the time of delivery, but is silent on the treatment of charges for that type of activity. Presumably, these charges would be taxable, but are these charges considered a type of “handling” charge? What happens if the retailer includes the charge for “manufacturing, assembling or preparing” in the sales price of the product? Do charges for “manufacturing, assembling, or preparing” need to be separately stated?

Notwithstanding the prior section, the Proposed Regulation then creates a new section providing that any separately stated “delivery charges, including, without limitation, charges for postage or the transportation or shipping of tangible personal property” incurred to ship the property to the “retailer’s place of business or any other location from which the... property will subsequently be delivered to a location designated by the purchaser” are taxable unless there is documentation that the purchaser designated the “retailer’s location” for the shipment. Proposed Regulation Sec. 1(2). The sum effect of this section appears to be that separately stated “delivery charges,” including “transportation or shipping” charges which were non-taxable under the prior section, are now taxable if they are shipped to the “retailer’s place of business” or “any other location” from where the goods will ultimately be sent to a location designated by the purchaser. However, these same charges are not taxable if the goods are designated by the purchaser for delivery to the “retailer’s location.” There is no definition of the “retailer’s place of business” (taxable) or the “retailer’s location” (non-taxable). This section also appears to make transportation or shipping charges taxable anytime goods are shipped to an intermediate location before being delivered to the final destination designated by the purchaser.

Finally, section 1(1)(a) draws a distinction between charges for transportation, shipping or postage, which if separately stated are not subject to sales tax, and charges for handling, crating or packing, which even if separately stated are subject to sales tax. This distinction is abandoned in section 2(a) which refers to “delivery charges, including, without limitation, charges for postage or transportation or shipping.” In section 1(2), transportation, shipping and postage are mentioned, but the type of charges which could be non-taxable under this subsection are not limited to these examples. This creates an internal inconsistency: under section 1(1)(a) charges for handling, crating or packing are taxable regardless of whether they are separately stated, but under section 1(2) a delivery charge, which includes charges for handling, crating or packing, may become non-taxable if the purchaser designates the retailer’s location as the destination.

At this point, the confusion and inconsistency of the Proposed Regulation is self-evident. We respectfully request that the Commission refrain from adopting the Proposed Regulation as currently drafted.

Conclusion

For all of the above stated procedural and substantive reasons, the Commission should refrain from adopting the Proposed Regulation on October 7, 2019 and instead direct the Department to restart the process to adopt a regulation pertaining to the sales tax treatment of delivery charges.

Sincerely,



Joshua J. Hicks
McDonald Carano

NRS 233B.040 Regulations: Authority to adopt; enforcement; inclusion of citation of authority and agency contact information; adoption of material by reference; deadline for adoption of proposed regulations; agency to explain failure to adopt.

1. To the extent authorized by the statutes applicable to it, each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as are necessary to the proper execution of those functions. If adopted and filed in accordance with the provisions of this chapter, the following regulations have the force of law and must be enforced by all peace officers:

- (a) The Nevada Administrative Code; and
- (b) Temporary and emergency regulations.

↪ In every instance, the power to adopt regulations to carry out a particular function is limited by the terms of the grant of authority pursuant to which the function was assigned.

2. Every regulation adopted by an agency must include:

- (a) A citation of the authority pursuant to which it, or any part of it, was adopted; and
- (b) The address of the agency and, to the extent not elsewhere provided in the regulation, a brief explanation of the procedures for obtaining clarification of the regulation or relief from the strict application of any of its terms, if the agency is authorized by a specific statute to grant such relief, or otherwise dealing with the agency in connection with the regulation.

3. An agency may adopt by reference in a regulation material published by another authority in book or pamphlet form if:

- (a) It files one copy of the publication with the Secretary of State and one copy with the State Library, Archives and Public Records Administrator, and makes at least one copy available for public inspection with its regulations; and
- (b) The reference discloses the source and price for purchase of the publication.

↪ An agency shall not attempt to incorporate any other material in a regulation by reference.

4. An agency shall adopt a proposed regulation not later than 2 years after the date on which the proposed regulation is submitted to the Legislative Counsel pursuant to subsection 1 of [NRS 233B.063](#). If an agency does not adopt a proposed regulation within the time prescribed by this subsection, the executive head of the agency shall appear personally before the Legislative Commission and explain why the proposed regulation has not been adopted.

(Added to NRS by [1965, 963](#); A [1971, 804](#); [1977, 1385](#); [1985, 366, 1488](#); [1997, 3151](#); [2013, 77](#))

Amendment No. 111

Assembly Amendment to Assembly Bill No. 252	(BDR 18-539)
Proposed by: Assembly Committee on Government Affairs	
Amends: Summary: No Title: No Preamble: No Joint Sponsorship: No Digest: Yes	

ASSEMBLY ACTION			Initial and Date	SENATE ACTION			Initial and Date		
Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____	Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____
Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____
Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____

EXPLANATION: Matter in (1) *blue bold italics* is new language in the original bill; (2) *green bold italic underlining* is new language proposed in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill that is proposed to be retained in this amendment; and (6) *green bold underlining* is newly added transitory language.

JWP/MSN



Date: 4/8/2013

A.B. No. 252—Makes various changes to the Nevada Administrative Procedure Act. (BDR 18-539)



Exhibit 2

ASSEMBLY BILL NO. 252—ASSEMBLYMEN HANSEN, KIRKPATRICK, HARDY, FIORE, HAMBRICK; PAUL ANDERSON, BENITEZ-THOMPSON, DUNCAN, FRIERSON, GRADY, HICKEY, KIRNER, LIVERMORE, OSCARSON AND WHEELER

MARCH 13, 2013

JOINT SPONSORS: SENATORS GUSTAVSON, GOICOECHEA; AND SETTELMAYER

Referred to Committee on Government Affairs

SUMMARY—Makes various changes to the Nevada Administrative Procedure Act. (BDR 18-539)

FISCAL NOTE: Effect on Local Government: No. Effect on the State: Yes.

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

AN ACT relating to administrative regulations; revising provisions governing the posting of certain notices concerning regulations by agencies; requiring regulations to be adopted within a certain period; requiring certain information to be included on the informational statement submitted with an adopted regulation; making various other changes to the Nevada Administrative Procedure Act; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

1 The Nevada Administrative Procedure Act is set forth in existing law to establish the
2 procedures for agencies of the Executive Branch of the State Government to promulgate
3 administrative regulations. (Chapter 233B of NRS) **Section 1** of this bill requires an agency to
4 submit a notice of any meeting or workshop relating to the adoption of a regulation to the
5 Director of the Legislative Counsel Bureau at the same time that the agency posts notice of the
6 meeting or workshop for posting on the Internet website maintained by the Legislative
7 Counsel Bureau. **Section 2** of this bill ~~provides that~~ **requires an agency to adopt a**
8 **regulation** ~~will be deemed withdrawn if the agency has not adopted the regulation~~ within 2
9 years after submitting the regulation to the Legislative Counsel ~~, unless the agency has~~
10 ~~petitioned and received approval for an extension from the Legislative Commission.~~ **If the**
11 **regulation is not adopted within that time, section 2 requires that the executive head of**
12 **the agency appear personally before the Legislative Commission to explain the reason**
13 **for the failure.** **Section 3** of this bill revises the requirements for the informational statement
14 which is submitted under existing law with the adopted regulation by requiring the agency to
15 include an explanation of the need for the regulation.

16 Existing law provides that the Legislative Commission or the Subcommittee to Review
17 Regulations may object to a regulation: (1) if it is determined that the regulation is not
18 required by federal law if it is adopted for that purpose; (2) if the regulation does not conform
19 to statutory authority; or (3) if the regulation does not carry out legislative intent. **Section 4** of

20 this bill further allows an objection to be made to a regulation if the agency did not provide a
 21 satisfactory explanation of the need for the regulation or if the informational statement is
 22 insufficient or incomplete. If an objection is raised, under existing law, the regulation is
 23 returned to the agency. (NRS 233B.067)
 24 **Section 5** of this bill makes the provisions of this bill applicable retroactively to any
 25 regulation which has been proposed but not adopted before July 1, 2013, and to any regulation
 26 adopted on or after July 1, 2013.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
 SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** Chapter 233B of NRS is hereby amended by adding thereto a new
 2 section to read as follows:
 3 *At the same time that an agency provides notice of any meeting or workshop*
 4 *relating to the adoption of a proposed regulation pursuant to this chapter or NRS*
 5 *241.020, the agency shall submit an electronic copy of the notice to the Director*
 6 *of the Legislative Counsel Bureau. The Director shall cause the notice to be*
 7 *posted on the same day on the Internet website maintained by the Legislative*
 8 *Counsel Bureau.*
 9 **Sec. 2.** NRS 233B.040 is hereby amended to read as follows:
 10 233B.040 1. To the extent authorized by the statutes applicable to it, each
 11 agency may adopt reasonable regulations to aid it in carrying out the functions
 12 assigned to it by law and shall adopt such regulations as are necessary to the proper
 13 execution of those functions. If adopted and filed in accordance with the provisions
 14 of this chapter, the following regulations have the force of law and must be
 15 enforced by all peace officers:
 16 (a) The Nevada Administrative Code; and
 17 (b) Temporary and emergency regulations.
 18 ↪ In every instance, the power to adopt regulations to carry out a particular
 19 function is limited by the terms of the grant of authority pursuant to which the
 20 function was assigned.
 21 2. Every regulation adopted by an agency must include:
 22 (a) A citation of the authority pursuant to which it, or any part of it, was
 23 adopted; and
 24 (b) The address of the agency and, to the extent not elsewhere provided in the
 25 regulation, a brief explanation of the procedures for obtaining clarification of the
 26 regulation or relief from the strict application of any of its terms, if the agency is
 27 authorized by a specific statute to grant such relief, or otherwise dealing with the
 28 agency in connection with the regulation.
 29 3. An agency may adopt by reference in a regulation material published by
 30 another authority in book or pamphlet form if:
 31 (a) It files one copy of the publication with the Secretary of State and one copy
 32 with the State Library and Archives Administrator, and makes at least one copy
 33 available for public inspection with its regulations; and
 34 (b) The reference discloses the source and price for purchase of the
 35 publication.
 36 ↪ An agency shall not attempt to incorporate any other material in a regulation by
 37 reference.
 38 4. ~~Except as otherwise provided in this subsection, an~~ *An agency shall*
 39 *adopt a proposed regulation not later than 2 years after the date on which the*
 40 *proposed regulation is submitted to the Legislative Counsel pursuant to*
 41 *subsection 1 of NRS 233B.063. If an agency does not adopt a proposed regulation*

1 ~~within the time prescribed by this subsection, the regulation shall be deemed~~
 2 ~~withdrawn unless, before the expiration of 2 years, the agency petitions the~~
 3 ~~Legislative Commission for and receives an extension of time by which to adopt~~
 4 ~~the proposed regulation, the executive head of the agency shall appear~~
 5 ~~personally before the Legislative Commission and explain why the proposed~~
 6 ~~regulation has not been adopted.~~

7 **Sec. 3.** NRS 233B.066 is hereby amended to read as follows:

8 233B.066 1. Except as otherwise provided in subsection 2, each adopted
 9 regulation which is submitted to the Legislative Counsel pursuant to NRS 233B.067
 10 or filed with the Secretary of State pursuant to subsection 2 or 3 of NRS 233B.070
 11 must be accompanied by a statement concerning the regulation which contains the
 12 following information:

13 (a) *A clear and concise explanation of the need for the adopted regulation.*

14 (b) A description of how public comment was solicited, a summary of the
 15 public response and an explanation of how other interested persons may obtain a
 16 copy of the summary.

17 ~~((b))~~ (c) The number of persons who:

- 18 (1) Attended each hearing;
- 19 (2) Testified at each hearing; and
- 20 (3) Submitted to the agency written statements.

21 ~~((e))~~ (d) For each person identified in subparagraphs (2) and (3) of paragraph
 22 ~~((b))~~ (c), the following information if provided to the agency conducting the
 23 hearing:

- 24 (1) Name;
- 25 (2) Telephone number;
- 26 (3) Business address;
- 27 (4) Business telephone number;
- 28 (5) Electronic mail address; and
- 29 (6) Name of entity or organization represented.

30 ~~((d))~~ (e) A description of how comment was solicited from affected
 31 businesses, a summary of their response and an explanation of how other interested
 32 persons may obtain a copy of the summary.

33 ~~((e))~~ (f) If the regulation was adopted without changing any part of the
 34 proposed regulation, a summary of the reasons for adopting the regulation without
 35 change.

36 ~~((f))~~ (g) The estimated economic effect of the regulation on the business which
 37 it is to regulate and on the public. These must be stated separately, and in each case
 38 must include:

- 39 (1) Both adverse and beneficial effects; and
- 40 (2) Both immediate and long-term effects.

41 ~~((g))~~ (h) The estimated cost to the agency for enforcement of the proposed
 42 regulation.

43 ~~((h))~~ (i) A description of any regulations of other state or government agencies
 44 which the proposed regulation overlaps or duplicates and a statement explaining
 45 why the duplication or overlapping is necessary. If the regulation overlaps or
 46 duplicates a federal regulation, the name of the regulating federal agency.

47 ~~((i))~~ (j) If the regulation includes provisions which are more stringent than a
 48 federal regulation which regulates the same activity, a summary of such provisions.

49 ~~((j))~~ (k) If the regulation provides a new fee or increases an existing fee, the
 50 total annual amount the agency expects to collect and the manner in which the
 51 money will be used.

52 2. The requirements of paragraphs ~~((a))~~ (b) to ~~((e))~~ (f), inclusive, of
 53 subsection 1 do not apply to emergency regulations.

- 1 **Sec. 4.** NRS 233B.067 is hereby amended to read as follows:
2 233B.067 1. After adopting a permanent regulation, the agency shall submit
3 the informational statement prepared pursuant to NRS 233B.066 and one copy of
4 each regulation adopted to the Legislative Counsel for review by the Legislative
5 Commission to determine whether *to approve* the regulation, ~~conforms to the~~
6 ~~statutory authority pursuant to which it was adopted and whether the regulation~~
7 ~~carries out the intent of the Legislature in granting that authority.~~ The Legislative
8 Counsel shall endorse on the original and the copy of each adopted regulation the
9 date of their receipt. The Legislative Counsel shall maintain the copy of the
10 regulation in a file and make the copy available for public inspection for 2 years.
11 2. If an agency submits an adopted regulation to the Legislative Counsel
12 pursuant to subsection 1 that:
13 (a) The agency is required to adopt pursuant to a federal statute or regulation;
14 and
15 (b) Exceeds the specific statutory authority of the agency or sets forth
16 requirements that are more stringent than a statute of this State,
17 ↪ it shall include a statement that adoption of the regulation is required by a federal
18 statute or regulation. The statement must include the specific citation of the federal
19 statute or regulation requiring such adoption.
20 3. Except as otherwise provided in subsection 4, the Legislative Commission
21 shall:
22 (a) Review the regulation at its next regularly scheduled meeting if the
23 regulation is received more than 10 working days before the meeting; or
24 (b) Refer the regulation for review to the Subcommittee to Review Regulations
25 appointed pursuant to subsection 6.
26 4. If an agency determines that an emergency exists which requires a
27 regulation of the agency submitted pursuant to subsection 1 to become effective
28 before the next meeting of the Legislative Commission is scheduled to be held, the
29 agency may notify the Legislative Counsel in writing of the emergency. Upon
30 receipt of such a notice, the Legislative Counsel shall refer the regulation for review
31 by the Subcommittee to Review Regulations. The Subcommittee shall meet to
32 review the regulation as soon as practicable.
33 5. If the Legislative Commission, or the Subcommittee to Review
34 Regulations if the regulation was referred, approves the regulation, the Legislative
35 Counsel shall promptly file the regulation with the Secretary of State and notify the
36 agency of the filing. If the Commission or Subcommittee objects to the regulation
37 after determining that:
38 (a) If subsection 2 is applicable, the regulation is not required pursuant to a
39 federal statute or regulation;
40 (b) The regulation does not conform to statutory authority; ~~or~~
41 (c) The regulation does not carry out legislative intent ~~or~~; or
42 (d) *The agency has not provided a satisfactory explanation of the need for*
43 *the regulation in its informational statement as required pursuant to NRS*
44 *233B.066, or the informational statement is insufficient or incomplete,*
45 ↪ the Legislative Counsel shall attach to the regulation a written notice of the
46 objection, including, if practicable, a statement of the reasons for the objection, and
47 shall promptly return the regulation to the agency.
48 6. As soon as practicable after each regular legislative session, the Legislative
49 Commission shall appoint a Subcommittee to Review Regulations consisting of at
50 least three members or alternate members of the Legislative Commission.
51 **Sec. 5.** The provisions of this act apply to:

- 1 1. Any proposed regulation of an agency which was submitted to the
- 2 Legislative Counsel pursuant to subsection 1 of NRS 233B.063 before, on or after
- 3 July 1, 2013, and which has not been adopted as of July 1, 2013; and
- 4 2. Any regulation adopted on or after July 1, 2013.
- 5 **Sec. 6.** This act becomes effective on July 1, 2013.