

**PROPOSED REGULATION OF THE
NEVADA TAX COMMISSION**

LCB File No. R056-18

October 18, 2019

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

AUTHORITY: §§1 and 2, NRS 360.090, 360B.110, 372.284 and 372.725.

A REGULATION relating to taxation; revising provisions governing the determination of whether food sold by a retailer is prepared food intended for immediate consumption for the purposes of the imposition of sales and uses taxes on the retail sale of the food; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Existing law generally exempts food for human consumption from sales and use taxes in this State. However, existing law excludes from this exemption, and imposes sales and use taxes on, prepared food intended for immediate consumption. (Nev. Const. Art. 10, § 3[A]; NRS 372.284, 374.289) Existing law and regulations define prepared food to include food sold with eating utensils provided by the seller. (NRS 360B.460; NAC 372.605) **Section 1** of this regulation describes the circumstances under which food is deemed to be sold with eating utensils provided by the seller, a determination which is made based on the percentage of food sold by the seller that is prepared food. **Section 1** also establishes the method for calculating the percentage of prepared food sold by the seller and requires a seller who sells or intends to sell prepared food from multiple establishments to calculate the percentage of prepared food for every such establishment and use the average of those calculations as the percentage of prepared food that the seller has sold or will sell. **Section 2** of this regulation excludes certain items containing four or more servings per container from the definition of “prepared food intended for immediate consumption,” as that term is interpreted by the Department of Taxation.

Section 1. Chapter 372 of NAC is hereby amended by adding thereto a new section to read as follows:

For the purpose of determining whether food sold at retail by a seller is a food sold with eating utensils provided by the seller pursuant to subsection 3 of NRS 360B.460 and NAC 372.605:

1. Except as otherwise provided in subsection 2, a seller who made retail sales of prepared food during a tax year or business fiscal year, whichever is selected by the seller, as soon as practicable after accounting records for that tax year or business fiscal year, as applicable, are available to the seller but not later than 90 days after the beginning of the seller's next tax year or business fiscal year, as applicable, shall calculate a percentage by:

(a) Calculating the sum of:

(1) The total dollar value of all retail sales of food which is described in subsection 1 of NRS 360B.460 and which was sold at retail by the seller during the immediately preceding tax year or business fiscal year, as applicable;

(2) The total dollar value of all retail sales of food which is described in subsection 2 of NRS 360B.460 and which was sold at retail by the seller during the immediately preceding tax year or business fiscal year, as applicable; and

(3) The total dollar value of all retail sales of food which is incapable of being transferred to the purchaser without the use of a plate, bowl, glass or cup, including, without limitation, soft drinks dispensed from a fountain and food dispensed at a salad bar, and which was sold at retail by the seller during the immediately preceding tax year or business fiscal year, as applicable; and

(b) Dividing the amount calculated pursuant to paragraph (a) by the total dollar value of all retail sales of food by the seller, including, without limitation, prepared food, candy, soft drinks and dietary supplements.

↪ If, during a tax year or business fiscal year, as applicable, a seller made retail sales of any type of food described in paragraph (a) at more than one establishment, the seller must perform the calculation required by this subsection for each establishment and, for the

purposes of this section, use the average of those calculations as the percentage of the seller's sales of food that were sales of prepared food.

2. If a seller did not make any retail sales of prepared food during the immediately preceding tax year or business fiscal year, whichever is selected by the seller, or is a new business and the seller intends to make retail sales of prepared food during the seller's current tax year or business fiscal year, the seller must calculate a percentage by:

(a) Calculating the sum of:

(1) An estimate of the total dollar value of all retail sales of food which is described in subsection 1 of NRS 360B.460 and which the seller expects to sell at retail during the current tax year or business fiscal year, as applicable;

(2) An estimate of the total dollar value of all retail sales of food which is described in subsection 2 of NRS 360B.460 and which the seller expects to sell at retail during the current tax year or business fiscal year, as applicable; and

(3) An estimate of the total dollar value of all retail sales of food which is incapable of being transferred to the purchaser without the use of a plate, bowl, glass or cup, including, without limitation, soft drinks dispensed from a fountain and food dispensed at a salad bar, and which the seller expects to sell during the current tax year or business fiscal year, as applicable; and

(b) Dividing the amount calculated pursuant to paragraph (a) by an estimate of the total dollar value of all retail sales of food, including, without limitation, prepared food, candy, soft drinks and dietary supplements, which the seller expects to make during the current tax year or business fiscal year, as applicable.

↪ If a seller described in this subsection intends to make retail sales of any type of food described in paragraph (a) at more than one establishment, the seller must perform the calculation required by this subsection for each such establishment and, for the purposes of this section, use the average of those calculations as the percentage of the seller's sales of food that will be sales of prepared food. If the actual retail sales of prepared food by a seller described in this subsection during the first three months of such sales materially affect the calculation required by this subsection, the seller must perform the calculation required by this subsection using reasonable revised estimates and, for the purposes of this section, use that calculation as the percentage of the seller's sales of food that will be sales of prepared food.

3. If the percentage calculated by a seller pursuant to subsection 1 or 2, as applicable, is 75 percent or less, food sold at retail by the seller is deemed to be food sold with eating utensils provided by the seller:

(a) If the practice of the seller for sales of that food, as represented by the seller, is to directly give or hand a utensil to the purchaser to use to consume the food being sold; or

(b) If the food being sold is incapable of being transferred without the use of a plate, bowl, glass or cup and the practice of the seller, as represented by the seller, is to make plates, bowls, glasses or cups available to the purchaser of such food, including, without limitation, by permitting a purchaser to obtain such plates, bowls, glasses or cups at a kiosk or common area.

4. If the percentage calculated by a seller pursuant to subsection 1 or 2, as applicable, is more than 75 percent, food sold at retail by the seller is deemed to be food sold with eating utensils provided by the seller if the seller:

(a) Directly gives or hands a utensil to the purchaser to use to consume the food being sold; or

(b) Makes utensils available to the purchaser, including, without limitation, by permitting the purchaser to obtain utensils at a kiosk or common area.

5. A seller who makes retail sales of prepared food shall maintain records as required in NRS 372.735 which are adequate to substantiate the calculations made by the seller pursuant to this section.

Sec. 2. 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 **deemed to be** intended for immediate consumption. **Subsections 1, 2 and 3 of NRS 360B.460 each describe a separate type 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.

*(c) **Exclude food sold as a single item which, according to the nutrition labeling information required by 21 C.F.R. § 101.9, contains four or more servings per container, if the seller maintains records of each such sale as ~~are~~ required by the Department pursuant***

[to NRS 372.735.](#)

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>.

Sec. 3. This regulation, LCB File No. R056-18, is hereby amended by adding thereto the following transitory language which has the force and effect of law but which will not be codified in the Nevada Administrative Code:

1. Notwithstanding the provisions of section 1 of this regulation, a seller who made retail sales of prepared food during the tax year or business fiscal year, whichever is selected by the seller, that immediately precedes the tax year or business fiscal year, as applicable, during which this regulation becomes effective shall, not later than 90 days after the effective date of this regulation, make the calculation required by subsection 1 of section 1 of this regulation.

2. Notwithstanding the provisions of section 1 of this regulation, the Department shall not enforce the provisions of subsection 3 or 4 of section 1 of this regulation, as applicable, until 90 days after the effective date of this regulation.

3. The Department shall post notice of:

(a) The date by which a seller who made retail sales of prepared food during the tax year or business fiscal year, whichever is selected by the retailer is required to make the initial calculation required by subsection 1 of section 1 of this regulation; and

(b) The date on which the Department is required to begin enforcing the provision of subsection 3 or 4 of this regulation, as applicable.

↪The Department shall post notice of the date described in this subsection on the Internet website of the Department and make such other efforts to notify taxpayers of the date as the Executive Director of the Department deems appropriate. The failure of a taxpayer to receive notice of this date pursuant to this subsection does not excuse the taxpayer from compliance with any requirement relating to the percentage calculation.



STEVE SISOLAK
Governor
JAMES DEVOLLD
Chair, Nevada Tax Commission
MELANIE YOUNG
Executive Director

STATE OF NEVADA
DEPARTMENT OF TAXATION

Web Site: <http://tax.nv.gov>

1550 College Parkway, Suite 115
Carson City, Nevada 89706-7937
Phone: (775) 684-2000 Fax: (775) 684-2020

LAS VEGAS OFFICE
Grant Sawyer Office Building, Suite 1300
555 E. Washington Avenue
Las Vegas, Nevada 89101
Phone: (702) 486-2300 Fax: (702) 486-2373

RENO OFFICE
4600 Kietzke Lane
Building L, Suite 235
Reno, Nevada 89502
Phone: (775) 687-9999
Fax: (775) 686-1303

HENDERSON OFFICE
2550 Paseo Verde Parkway, Suite 180
Henderson, Nevada 89074
Phone: (702) 488-2300
Fax: (702) 486-3377

Posted 02/06/2020

NOTICE OF INTENT TO ACT UPON A REGULATION

Notice of Hearing for the Adoption of

LCB File No. R056-18

Nevada Tax Commission

The Nevada Tax Commission will hold a Public Hearing at **9:00 a.m. on Monday, March 9, 2020** at the Nevada Legislative Building 401 S. Carson Street, Room 2135, Carson City, NV & Video Conferenced at Legislative Counsel Bureau Grant Sawyer State Office Building 555 E. Washington Ave., Room 4412, Las Vegas, NV. The purpose of the hearing is to receive comments from all interested parties regarding the adoption of a regulation that pertains to LCB File No. R056-18

The following information is provided pursuant to the requirements of NRS 233B.0603:

1. Need and purpose of the proposed regulations or amendments

The need and purpose of the proposed regulation is to provide clarification for what it means to be “sold with eating utensils provided by the seller.” Section 1 describes the circumstances under which food is deemed to be sold with eating utensils provided by the seller; a determination which is made based on the percentages of food sold by the seller that is prepared food. Section 1 also establishes the method for calculating the percentage of prepared food sold by the seller and requires a seller who sells or intends to sell prepared food from multiple establishments to calculate the percentage of prepared food for every such establishment and use the average of those calculations as the percentage of prepared food that the seller has sold or will sell. Section 2 excludes certain items containing four or more servings per container from the definition of “prepared food intended for immediate consumption”.

2. How to obtain the approved or revised text of regulations prepared by LCB

You may obtain a copy of the proposed regulation by writing to the Nevada Department of Taxation, 1550 College Parkway, Carson City, Nevada, 89706; or by calling their office at (775) 684-2059. The Revised Proposed Regulation is also available for review and down load on the Department of Taxation website: <https://tax.nv.gov/> and at the Nevada Legislature website: <https://www.leg.state.nv.us/Register/2018Register/R056-18P.pdf>

3. Methods used in determining the impact on a small business

The Department used informed, reasonable judgment in determining that there will not be a negative impact on small businesses due to the nature of the regulation changes.

4. Estimated economic effect of regulations on business and the public

a. Adverse and beneficial effects

The proposed permanent regulation presents no reasonably foreseeable or anticipated adverse economic effects to businesses or to the general public.

b. Immediate and long-term effects

The proposed permanent regulation presents no reasonably foreseeable or anticipated immediate or long-term effects to businesses or to the general public.

5. Cost for enforcement of the regulations

There is no anticipated cost for enforcement is to be determined.

6. Overlap or duplication of other state or local governmental agencies

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

7. Regulation required by federal law

Not applicable.

8. More stringent than federal regulations

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

9. New or increases in existing fees

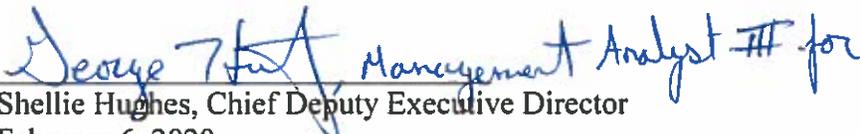
The proposed regulations do not include new or increase in existing fees.

Persons wishing to comment on the proposed action of the Nevada Tax Commission may appear at the above scheduled public hearing or may address their comments, data, views, or arguments, in written form, to the Nevada Tax Commission, 1550 E. College Parkway, Suite 115, Carson City, Nevada 89706. Written submissions must be received at least two weeks prior to the above scheduled public hearing.

A copy of this notice and the proposed permanent regulations to be adopted and amended will be on file at the Nevada State Library, 100 Stewart Street, Carson City, Nevada, for inspection by members of the public during business hours. Additional copies of the notice and the proposed permanent regulations to be adopted and amended will be available at the Department of Taxation, 1550 College

Parkway, Carson City, Nevada; Department of Taxation, 4600 Kietzke Lane, Building L, Suite 235, Reno, Nevada; Department of Taxation, 555 East Washington Avenue, Las Vegas, Nevada; Department of Taxation- 2550 Paseo Verde Parkway, Suite 180, Henderson, Nevada; and in all counties in which an office of the Department of Taxation is not maintained, at the main public library, for inspection and copying by members of the public during business hours. The text of the proposed permanent regulations will include the entire text of any section of the Nevada Administrative Code, which is proposed for amendment or repeal. Copies will be mailed to members of the public upon request. A reasonable fee may be charged for copies if deemed necessary.

Under NRS 233B.064(2), when adopting any regulation, the Agency, if requested to do so by an interested person, either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption and incorporation, and its reason for overruling the consideration urged against its adoption.


Management Analyst #1 for
Shellie Hughes, Chief Deputy Executive Director
February 6, 2020

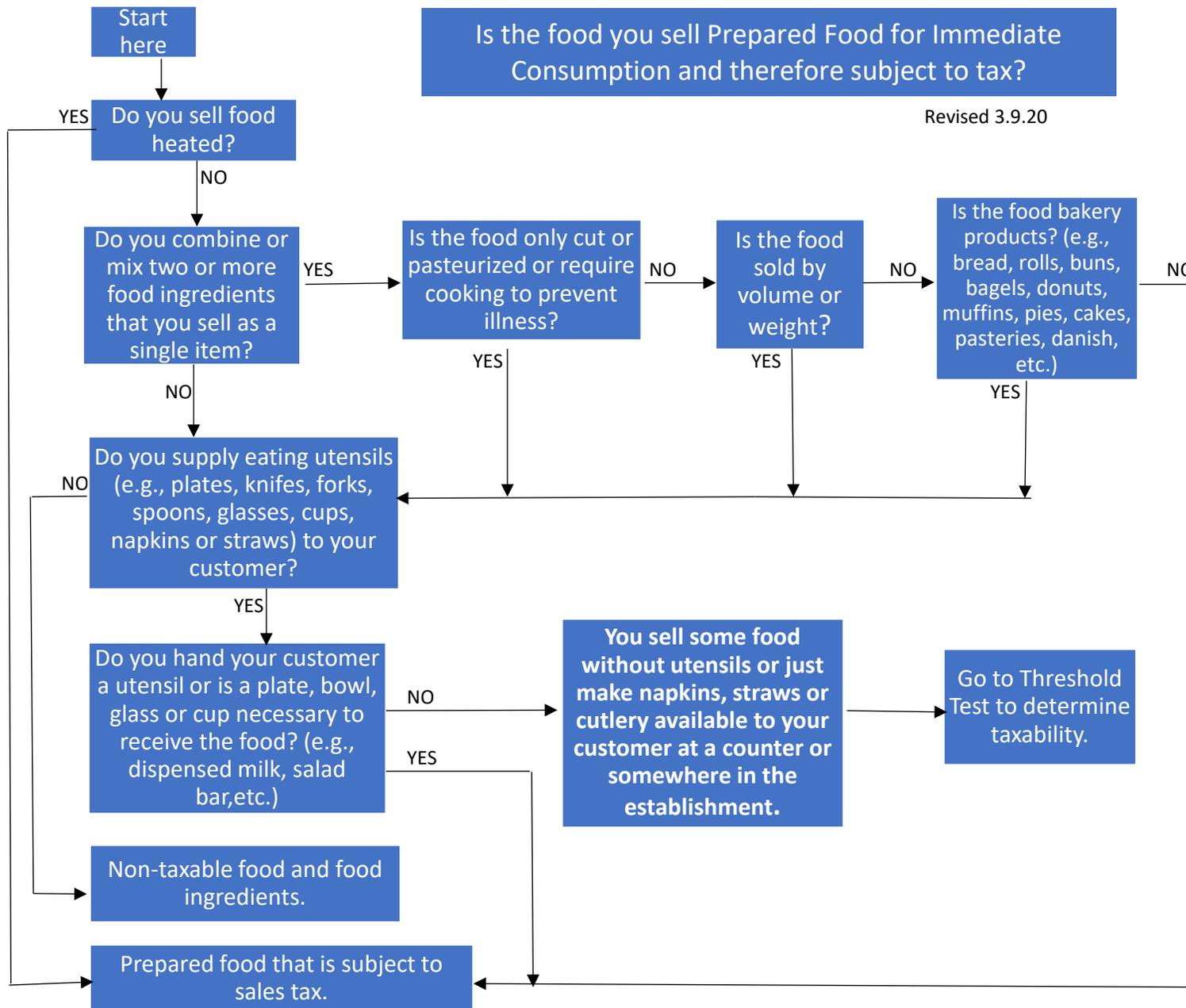
Members of the public who are disabled and require accommodations or assistance at the meeting are requested to notify the Department of Taxation in writing or by calling 775-684-2030 no later than five working days prior to the meeting.

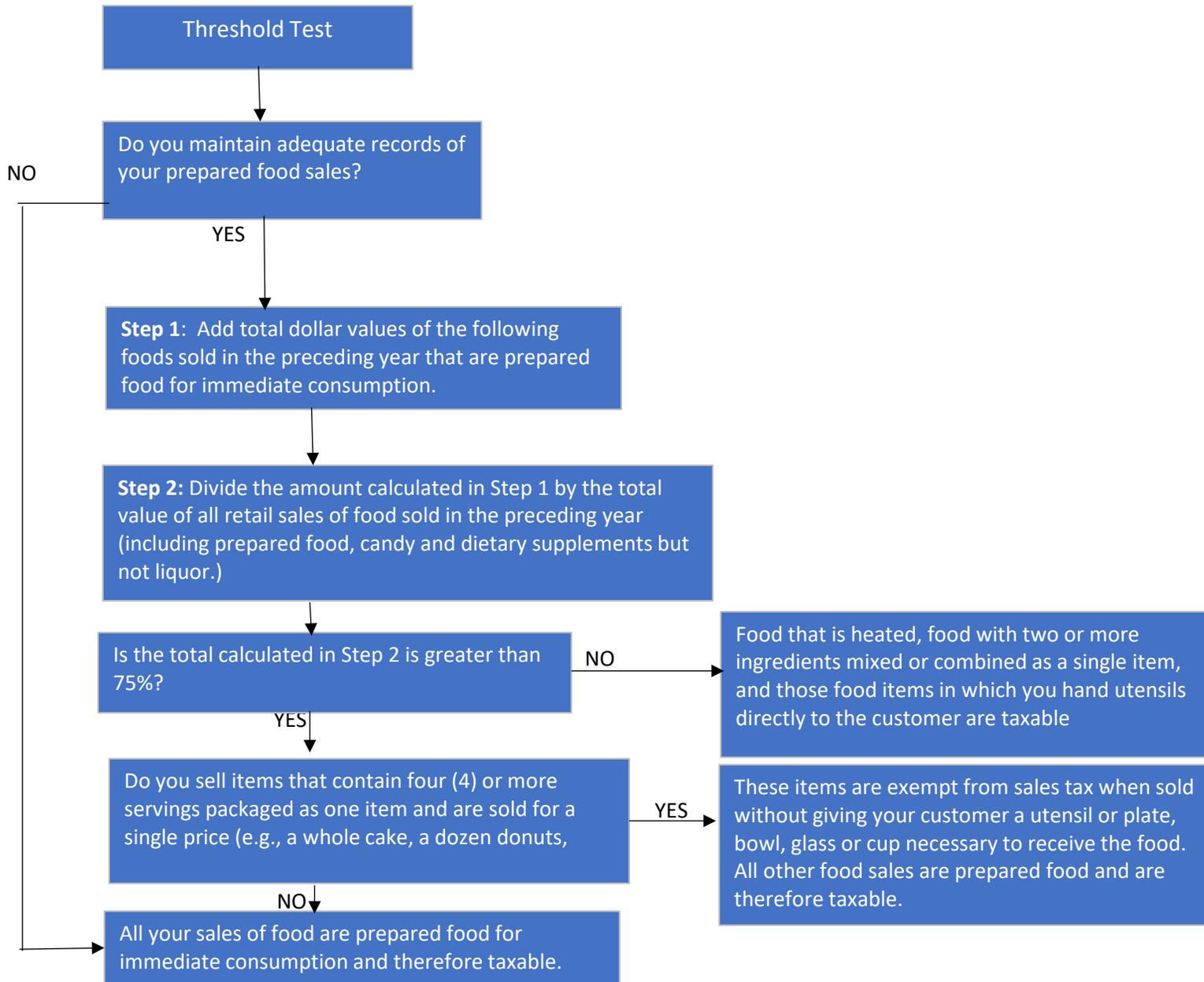
Notice has been posted at the following locations: The Department of Taxation - 1550 College Parkway, Carson City, Nevada. Notice was mailed to each County Public Library for posting.

Notice has been EMAILED for posting at the following locations: Department of Taxation - 4600 Kietzke Lane, Building L, Suite 235, Reno, Nevada; Department of Taxation - 555 E. Washington Avenue, Grant Sawyer Office Building, Las Vegas, Nevada; Department of Taxation - 2550 Paseo Verde Parkway, Suite 180, Henderson; The Legislative Building, Capitol Complex, Carson City, Nevada; and the Nevada State Library, 100 Stewart Street, Carson City, Nevada, Interested Parties Group & Mailing List maintained by the Department. Notice of this meeting was posted on the Internet through the Department of Taxation website <https://tax.nv.gov/>, on the Legislative website at www.leg.state.nv.us. and at the Nevada Public Notice Website <https://notice.nv.gov/>.

- I. **Regulation:** NAC 372.605 indicates that food/food ingredients are considered prepared food if 1) food is sold in a heated state; 2) two or more ingredients are mixed or combined as a single item; or 3) the item is sold with utensils provided by the seller.
- II. **Problem:** The last requirement has been an issue because what is considered utensils “provided” by the seller?
 - (a) **How we interpret the language:** We have considered “provided” by the seller to mean utensils only have to be physically present somewhere in the establishment and available to the buyer.
 - (b) **How other Member states interpret the language:** Several states had this same issue and brought this to the attention of the Streamlined Sales Governing Board. Some states interpreted the language to require that utensils actually be handed to the purchaser by the seller and other states took the position that utensil need only be made available by the seller.
 - (c) **Solution:** Streamlined Sales Governing Board came up with a standard definition for all Member states to apply so that the law would be administered in a consistent manner among the member states. The Governing Board came up with a 75% Threshold Test to make determinations of taxability of prepared food.
- III. **Test:** Sellers will need to keep records of their food sales and separate them by prepared food items that fall under subsection 1 and 2 of NAC 372.605. This will be the numerator. The Denominator includes all food and food ingredients including prepared food. Alcoholic beverages are not included in the calculation. Calculating the numerator and denominator, we will arrive at a percentage. For example, a sandwich shop has sales of \$60,000 a year in prepared food and has total food sales of \$80,000. The percentage of prepared food to total sales is .75 or 75%.
 - (a) If a seller has a sales percentage greater than 75%, then utensils merely made available to purchasers in a common area are treated as utensils “provided by the seller.”
 - (b) If a seller has a sales percentage of 75% or less, then utensils have to be physically handed to the purchaser to be considered “provided by the seller.”
- IV. **Exceptions:** 4 or more servings packaged as one item sold for a single price
- V. **Procedure:** The prepared food sales percentage is calculated by the seller annually based on prior tax year data. New Businesses make a good faith estimate for their first year and should adjust after the first 3 months if actual prepared food sales percentages materially affect the 75% test.
- VI. **Examples:**
 - (a) XYZ Bakery is under the 75% threshold. XYZ Bakery sells an unheated, unprepared bagel to a customer. The exclusion for bakery items applies and tax is not due as long as XYZ Bakery did not hand the customer an eating utensil to use to consume the bagel.

- (b) Donut World is over the 75% threshold and has a kiosk where utensils are made available for its customers. Donut World sells two donuts to a customer. Donuts are a bakery item, however, because Donut World is over the 75% threshold and makes eating utensils available for its customers, Donut World is required to charge tax on the sale of the two donuts.
- (c) ABC Café is over the 75% threshold and has a kiosk where it makes eating utensils available for its customers. ABC Café sells a loaf of bread to a customer. The sale of the loaf of bread is not taxable because it contains four or more servings and the employee did not hand the customer a utensil to use to consume the bread.
- (d) Donut World is over the 75% threshold and has a kiosk where it makes eating utensils available for its customers. Donut World sells a bag of ground or whole bean coffee to a customer. The sale of the bag of ground or whole bean coffee is not taxable because it contains four or more servings and the employee did not hand the customer a utensil to use to consume the coffee.
- (e) Convenience Store A is under the 75% threshold and sells prepackaged sandwiches which were made by a third party. Because Convenience Store A is under the 75% threshold and the employees do not actually hand the customers an eating utensil to use to consume the sandwiches, the sales of the prepackaged sandwiches are not subject to tax.
- (f) Convenience Store B is over the 75% threshold and sells prepackaged sandwiches which were made by a third party. Convenience Store B provides eating utensils at a kiosk near the cash register. Because Convenience Store B is over the 75% threshold and makes eating utensils available for its customers, the sales of the prepackaged sandwiches are subject to tax.





**SMALL BUSINESS IMPACT STATEMENT AS REQUIRED BY
NRS 233B.0608**

LCB File No. R056-18

1. Background

Under existing law food for human consumption is exempt from sales and use tax in this State. Existing law excludes from this exemption and imposes sales and use taxes on prepared food intended for immediate consumption. NRS 372.284 and 374.289 define prepared food to include food sold with eating utensils provided by the seller. This regulation clarifies what it means to be sold with eating utensils provided by the seller; whether the utensils have to be handed to the customer or whether the utensils have to be made available at a kiosk or common area. Section 1 describes the circumstances under which food is deemed to be sold with eating utensils provided by the seller and whether the seller is to directly give or hand a utensil to the purchaser or make utensils available to the purchaser at a kiosk or common area; a determination which is made based on the percentages of food sold by the seller that is prepared food. Section 1 also establishes the method for calculating the percentage of prepared food sold by the seller and requires a seller who sells or intends to sell prepared food from multiple establishments to calculate the percentage of prepared food for every such establishment and use the average of those calculations as the percentage of prepared food that the seller has sold or will sell. Section 2 excludes certain items containing four or more servings per container from the definition of “prepared food intended for immediate consumption”.

The Department of Taxation has drafted Proposed Regulation R056-18 to provide clarity as to determine whether food sold by a retailer is prepared food intended for immediate consumption for the purposes of the imposition of sales and use tax on the retail sale.

2. A description of the manner in which comment was solicited from affected small businesses, a summary of their responses, and an explanation of the manner in which other interested persons may obtain a copy of the summary.

The Department of Taxation prepared and disseminated a questionnaire seeking information from small businesses regarding the possible impact of LCB File No R056-18. The proposed language and questionnaire was dispersed to the following:

- Emailed by the Department to 210 members of its interested parties list.
- Emailed by the Nevada Taxpayers Association to its list of interested taxpayers.

No response was received for LCB File No. R056-18.

3. The manner in which the analysis was conducted, including the methods used to determine the impacts of the proposed regulation on small business.

The Department analyzed LCB Draft of Proposed Regulation R056-18 prior to mailing out the Small Business Impact Questionnaire and used informed, reasonable judgment in determining that there will not be an impact on small businesses due to the nature of the regulatory changes.

No response was received for the LCB Draft of Proposed Regulation R056-18. The proposed regulation provides clarification for the taxability of prepared food intended for immediate consumption.

4. The estimated economic effect of the proposed regulation on the small businesses which it is to regulate:

Direct and indirect adverse effects

The Department finds that there is no reasonable, foreseeable or anticipated direct or indirect adverse economic effect on small businesses.

Direct and indirect beneficial effects

The Department finds that there is no reasonable, foreseeable or anticipated direct or indirect beneficial economic effect on small businesses.

5. A description of the methods that the agency considered to reduce the impact of the proposed regulation on small businesses and a statement regarding whether the agency actually used any of those methods.

The proposed permanent regulation presents no reasonable, foreseeable or anticipated adverse impact to small businesses; therefore no efforts were required to reduce the impact on small businesses.

6. 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.

7. If the proposed 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 permanent regulation does not include new fees or increase an existing fee.

8. If the proposed regulation includes provisions which duplicate or are more stringent than federal, state or local standards regulating the same activity, an explanation of why such duplicative or more stringent provisions are necessary.

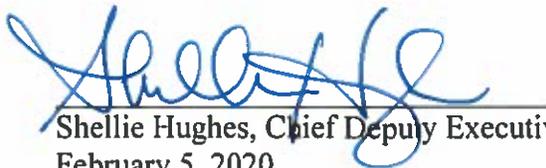
The proposed regulation does not overlap or duplicate any regulation of other federal,

state or local government entities.

9. The reasons for the conclusion of the agency regarding the impact of a regulation on small businesses.

The Department has determined that there will be no adverse impacts to small businesses based on its analysis.

I hereby certify, to the best of my knowledge or belief, a concerted effort was made to determine the impact of the proposed regulation on small businesses and that this statement was properly prepared and the information contained herein is accurate.



Shellie Hughes, Chief Deputy Executive Director
February 5, 2020

LCB File No. R056-18

Background:

- Nevada is a full member to the Governing Board of the Streamlined Sales and Use Tax Agreement (SSUTA).
- 23 states are members of the SSUTA
- The purpose of SSUTA is to simplify tax administration and reduce tax burden.

Purpose of R056-18

- **Inconsistent defined terms in NRS 360B**
- **NRS 360B.460 subsection 3 definition of “food sold with eating utensils provided by the seller.”**
 - **Utensils are physically present in the establishment and available to the customer.**

Or

- **Utensils must be physically handed to the customers when they purchase their food.**

LCB File No. R056-18

- **Solution: a 75% Threshold Test**
 - **Sales percentage of 75% or less: means physically give or hand the utensil to the purchaser.**
 - **Sales percentage greater than 75%, means made available to purchasers somewhere in the establishment. Utensils at a kiosk or common area are treated as utensils “provided by the seller.”**
- **The Streamlined Sales and Use Tax Governing Board approved.**
- **16 out of the 23 member states have adopted.**

Contents of R056-18

Section 1

- Provides the method of calculation when determining whether food sold at retail is sold with eating utensils provided by the seller.

Subsection 1

- Provides the time frame when a seller must calculate the percentage of retail sales of prepared food.

Subsection 1(a)

- Calculate the sum of (1) the total dollar value of all retail sales of food described in NRS 360B.460 subsection 1 in the immediately preceding tax year or business fiscal year, (2) the total dollar value of all retail sales of food described in NRS 360B.460 subsection 2 in the immediately preceding tax year or business fiscal year and (3) the total value of all retail sales of food which is incapable of being transferred to the purchaser without the use of a plate, bowl, glass or cup in the immediately preceding tax year or business fiscal year.

Subsection 1(b)

- Divide the amount calculated in 1(a) by the total value of all retail sales of food by the seller including prepared food, candy and dietary supplements during the immediately preceding tax year or business fiscal year.
- If the seller has more than one establishment that sells prepared food as defined in NRS 360B.460, the calculation must be performed for each establishment and an average of those calculations will be used.

Contents of R056-18

Subsection 2

- Discusses how to calculate the sum if the seller did not make any retail sales of prepared food during the immediately preceding tax year or business fiscal year or is a new business.
- Subsection 2(a) and (b) follows the same calculations as 1(a) and (b) using the seller's estimates of total sales. If actual retail sales during the first three months of such sales materially affect the calculation, the seller must perform the calculation using revised estimates and use that calculation.

Subsection 3

- If the percentage calculated by the seller is 75 percent or less, utensils are provided by the seller if the seller's practice for the item is to physically give or hand the utensil to the purchaser.

Subsection 4

- If the percentage calculated by a seller is more than 75 percent, utensils are provided by the seller if they are merely made available to purchasers somewhere in the establishment.

Subsection 5

- Provides the requirement for a retailer to maintain records to substantiate the calculations. These records are already required to be retained by the taxpayer in NRS 372.735.

Contents of R056-18

Section 2

- Clarifies that subsections 1, 2 and 3 of NRS 360B.460 are each separate definitions of prepared food and excludes food sold as a single item when it contains four or more servings per container from the definition of prepared food. The seller is required to maintain records to substantiate these items. These records are already required to be retained pursuant to NRS 372.735

Section 3

- Transitory language that indicates that the Department will begin enforcing the regulation 90 days after the effective date. The Department will also post notice of this regulation and effective date on its website and make other efforts to notify taxpayers. The failure of a taxpayer to receive notice does not excuse the taxpayer from compliance with any requirement in this regulation.