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From: Fernley, Bryan <[Bryan.Fernley@lcb.state.nv.us](mailto:Bryan.Fernley@lcb.state.nv.us)>

Sent: Friday, October 04, 2019 1:16 PM

To: Shellie Hughes <[shughes@tax.state.nv.us](mailto:shughes@tax.state.nv.us)>

Subject: RE: R002-17

Hi Shellie. We are working on the certificate. Here is a brief explanation of our reading of the statute:

You have asked for a brief answer to the question of whether an agency may adopt a proposed regulation after the 2-year period set forth in subsection 4 of NRS 233B.040 if the executive head of the agency appears personally before the Legislative Commission and explains the reasons that the proposed regulation was not adopted within that 2-year period. To answer that question, a court would look at the plain language of the statute and consider the provisions of the statute "as a whole." (Torres v. Goodyear Tire & Rubber Co., 130 Nev. 22, 26 (2014)); Arguello v. Sunset Station, Inc., 127 Nev. 365, 370 (2011)).

Subsection 4 of NRS 233B.040 states that:

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.

Under the plain language of this statute, the first sentence of the statute imposes a duty on an agency to adopt a proposed regulation within the 2-year period after the date on which the proposed regulation is submitted to the Legislative Counsel for review and drafting. (See NRS 0.025, which states that the term "shall" imposes a duty to act). The second sentence of subsection 4 of NRS 233B.040 states what is required to an agency that does not satisfy that duty to adopt a regulation within the 2-year period. Under that provision, if the agency does not adopt the regulation within the prescribed 2-year period, the executive head of the agency is required to appear before the Legislative Commission and explain why the proposed regulation has not been adopted. Reading the two sentences of the statute as a whole, subsection 4 imposes a duty on an agency to adopt a regulation within the 2-year period stated in that provision but if the agency does not adopt the regulation with that period, the agency complies with the statute by having the executive head of the agency appear before the Legislative Commission and explain the reasons for the failure to adopt the regulation within the period. Thus, if the executive head of an agency appears before the Legislative Commission and explains the reasons for the failure to adopt a proposed regulation with the 2-year period stated in subsection 4 of NRS 233B.040, the agency has complied with the statute and adoption of the regulation does not violate the Administrative Procedures Act.

This conclusion is supported by the legislative history of subsection 4 of NRS 233B.040. Subsection 4 of NRS 233B.040 was enacted by section 2 of AB252 of the 2013 Legislative Session. As introduced, subsection 4 of NRS 233B.040 would have been amended to deem that a regulation is withdrawn if the agency did not adopt it within the 2-year period and to authorize an agency to petition the Legislative Commission to allow the agency to adopt the regulation after that period. After the bill was amended to read as subsection 4 of NRS 233B.040 currently reads, Assemblyman Ira Hansen, the sponsor of the bill, explained to the Senate Committee on Government Affairs that section 2 of the bill

“provides that a regulation will be deemed withdrawn if the agency fails to adopt the proposed regulation within 2 years after the day of submission to the LCB or to successfully petition the Legislative Commission for an extension of time.” (Minutes of the Meeting of the Senate Committee on Government Affairs, April 29, 2013) Thus, even after the amendment to section 2 of AB252, the intent of the Legislature remained that a regulation could be adopted after the 2-year period stated in subsection 4 of NRS 233B.040 if the executive head of the agency appeared before the Legislative Commission and explained the reason that the regulation was not adopted within that period.

Finally, in the past, the Legislative Commission has approved regulations that were adopted by the agency after the 2-year period set forth in subsection 4 of NRS 233B.040. For example, R144-13 was submitted to LCB on 12/4/13, adopted initially by agency on 3/11/16, approved to be adopted after the 2-year period and regulation deferred by Legislative Commission on 4/4/16, approved by the Legislative Commission as early review on 6/28/16 and finally adopted with changes by agency on 9/9/16. In addition, at its February 27, 2018 meeting, the Legislative Commission approved the continuance of regulations not adopted within 2 years by the State Emergency Response Commission. (See Minutes of the February 27, 2018 Meeting of the Legislative Commission, pg. 20) In taking these actions, the Legislative Commission interpreted the statute as a whole to mean that an agency is in compliance with the statute if the executive head appears before the Legislative Commission explains the reason for adopting a regulation after the 2-year period, Based on the above analysis, such an interpretation is reasonable and within the language of the statute and, thus, entitled to deference.

## RESOLUTION

A resolution approving a continuance of a proposed regulation not adopted within 2 years after submission of the proposed regulation to the Legislative Counsel, as required by NRS 233B.040.

WHEREAS, Pursuant to subsection 4 of NRS 233B.040, an agency is required to adopt a proposed regulation not later than 2 years after the date on which the proposed regulation is submitted to the Legislative Counsel; and

WHEREAS, If an agency does not adopt a proposed regulation within the period prescribed by subsection 4 of NRS 233B.040, the executive head of the agency is required to appear personally before the Legislative Commission and explain why the proposed regulation has not been adopted within that period; and

WHEREAS, By having its executive head appear personally before the Legislative Commission and explain why a proposed regulation has not been adopted within the period prescribed by subsection 4 of NRS 233B.040, an agency complies with the requirements of subsection 4 of NRS 233B.040 and may adopt the proposed regulation after the period prescribed by that subsection; and

WHEREAS, The Department of Taxation submitted proposed regulation LCB File No. R002-17 to the Legislative Counsel on February 13, 2017 and had not adopted the proposed regulation within 2 years after that date; and

WHEREAS, On August 21, 2019, Melanie Young, the executive head of the Department of Taxation, appeared personally before the Legislative Commission to explain the reasons that proposed regulation LCB File No. R002-17 was not adopted within 2 years after it was submitted to the Legislative Counsel; and


WHEREAS, The Legislative Commission found that the executive head of the Department of Taxation presented a sufficient explanation to justify a continuance of proposed regulation LCB File No. R002-17 to allow the Department of Taxation to adopt the regulation more than 2 years after it was submitted to the Legislative Counsel;

RESOLVED BY THE LEGISLATIVE COMMISSION, That the executive head of the Department of Taxation appeared personally before the Legislative Commission on August 21, 2019 and explained why the Department of Taxation did not adopt LCB File No. R002-17 within 2 years after it was submitted to the Legislative Counsel; and be it further

RESOLVED, That because the Department of Taxation has complied with the provisions of NRS 233B.040, the Legislative Commission approves a continuance of proposed regulation LCB File No. R002-17 to allow the Department of Taxation to adopt the regulation more than 2 years after it was submitted to the Legislative Counsel; and be it further

Resolved, That this resolution be transmitted to the Department of Taxation and the Chair of the Nevada Tax Commission.

Adopted this 21st day of August 2019.

  
Richard S. Combs, Director  
Legislative Counsel Bureau, and  
Secretary, Legislative Commission



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**SUMMARY OF TESTIMONY PROVIDED TO THE LEGISLATIVE COMMISSION  
REGARDING AGENDA ITEM V B – AUGUST 21, 2019**

***B. Request by Tax Commission to Continue Regulation (R002-17) Not Adopted  
Within Two Years After Submission to the Legislative Counsel (NRS 233B.040)***

Melanie Young, Executive Director, Department of Taxation, stated the Department has not adopted R002-17 within the two-year statutory requirement and respectfully requested an extension so that the regulation could be adopted. She said the regulation provides guidance to taxpayers regarding the taxability of delivery charges, which are exempt from tax when they are separately stated on an invoice or other billing statement. She explained that handling charges are subject to tax regardless of the manner in which they are stated.

Ms. Young informed the Commission that taxpayers have expressed confusion regarding the regulatory differences between a delivery charge and a handling charge. This regulation addresses three issues: (1) when delivery charges are subject to taxation; (2) when tangible personal property is manufactured, assembled, or prepared; and (3) when the delivery occurs to a location prior to being delivered to the purchaser.

Ms. Young offered background relating to the Department's request. She stated approximately three years ago, several cases regarding the taxability of delivery charges were heard by the Nevada Tax Commission. The Commission directed the Department to review and revise *Nevada Administrative Code 372.101* to help resolve taxpayer confusion in interpreting the taxability of delivery charges. The Department began drafting regulations and submitted proposed language to the LCB on February 12, 2017. Since that time, the Department has held public workshops and made several revisions to the proposed regulation based on comments received. Furthermore, the issue regarding the taxability of delivery charges was brought before the Nevada Supreme Court. The Department delayed submission of R002-17 in anticipation of the outcome of litigation heard by the Supreme Court. The two-year statutory requirement for adopting R002-17 expired on February 13, 2019. The Department contacted the LCB and requested an opportunity to explain reasons for the delay. Based on the events that occurred while implementing the regulations following litigation in the Supreme Court, it was necessary to delay adopting the regulation as originally proposed.

Concluding, Ms. Young requested an extension to the two-year statutory requirement, as provided in subsection 4 of NRS 233B.040, so that the Department can move forward with the regulation and provide clarity to taxpayers.

**MOTION:** Vice Chair Ratti moved approval of an extension to the Nevada Tax Commission's adoption of R002-17. The motion was seconded by Assemblywoman Carlton and passed unanimously.

Prepared by:

A handwritten signature in cursive script that reads "Richard S. Combs".

Richard S. Combs  
Recording Secretary of the Legislative Commission