

**PROPOSED REGULATION OF THE
NEVADA TAX COMMISSION**

LCB File No. R137-15

February 1, 2016

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

AUTHORITY: §§1-5, NRS 360.090, 372.725 and 374.725.

A REGULATION relating to taxation; establishing provisions relating to the imposition, collection and remittance of sales and use taxes by retailers located outside this State; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Existing law requires the Nevada Tax Commission to prescribe regulations for carrying on the business of the Commission and of the Department of Taxation. (NRS 360.090)

Existing law requires every retailer whose activities have a sufficient nexus with this State to impose, collect and remit the sales and use taxes imposed in this State. (NRS 372.724, 374.724) Assembly Bill No. 380 of the 78th Legislative Session requires a retailer who engages in certain specified activities to collect and remit the sales and use taxes in this State. (Assembly Bill No. 380, chapter 219, Statutes of Nevada 2015, at page 1016)

Assembly Bill No. 380 creates a presumption that a retailer is required to impose, collect and remit sales and use taxes if the retailer is: (1) part of a controlled group of business entities that has a component member who has physical presence in this State; and (2) the component member with such physical presence engages in certain activities in this State that relate to the ability of the retailer to make retail sales to residents of this State. A retailer may rebut this presumption by providing proof to the Department that the component member with physical presence in this State did not engage in any activity in this State that was significantly associated with the retailer’s ability to establish or maintain a market in this State for the retailer’s products or services. (Sections 2 and 5 of Assembly Bill No. 380, chapter 219, Statutes of Nevada 2015, at pages 1017 and 1019) **Section 3** of this regulation authorizes a retailer, in providing such proof, to provide to the Department a written certification obtained from each component member. **Section 3** also establishes the requirements for such a written certification.

Assembly Bill No. 380 also creates a presumption that a retailer is required to impose, collect and remit sales and use taxes if: (1) the retailer enters into an agreement with a resident of this State under which the resident receives certain consideration for referring potential customers to the retailer through a link on the resident’s Internet website or otherwise; and (2) the cumulative gross receipts from sales by the retailer to customers in this State through all such

referrals exceeds a certain amount during the preceding four quarterly periods. A retailer may rebut this presumption by providing proof to the Department that each resident with whom the retailer has an agreement did not engage in any activity that was significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services during the preceding four quarterly periods. Such proof may consist of the sworn written statements of each resident with whom the retailer has an agreement stating that the resident did not engage in any solicitation in this State on behalf of the retailer during the preceding four quarterly periods if the statements were obtained from each resident and provided to the Department in good faith. (Sections 3 and 6 of Assembly Bill No. 380, chapter 219, Statutes of Nevada 2015, at pages 1018 and 1020)

Section 4 of this regulation authorizes a retailer, in providing such proof, to: (1) provide to the Department a written certification obtained from each resident on a form provided by the Department; or (2) show that the agreement between the retailer and each resident prohibits the resident from engaging in any solicitation activities in this State that refer potential customers to the retailer and, if the resident is an organization, requires the organization to maintain on its Internet website information alerting its members to the prohibition on such solicitation. **Section 4** also establishes the requirements for the written certification.

Section 5 of this regulation: (1) requires a retailer located outside this State that is required to impose, collect or remit the sales or use tax and that is making a sale of tangible personal property either at retail or for storage, use or other consumption in this State, to register with the Department before, or at the time of, making the sale; and (2) sets forth certain requirements for such registration.

Section 1. Chapter 372 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 5, inclusive, of this regulation.

Sec. 2. 1. *The purpose of sections 2 to 5, inclusive, of this regulation is to reduce the disparate impact of the responsibility to collect taxes on brick and mortar retailers with physical presence in this State and online retailers who utilize residents of this State and domestic commercial entities to establish presence in this State by proxy.*

2. It is the policy of the Department:

(a) To ensure that, for the purpose of requiring a retailer to impose, collect and remit the sales and use taxes imposed in this State, the activities of the retailer establish a substantial nexus with this State.

(b) To apportion the tax burden fairly among all retailers availing themselves of the markets in this State.

(c) Not to discriminate against interstate commerce.

(d) To collect taxes that fairly relate to the services of this State.

Sec. 3. 1. For the purpose of rebutting the presumption set forth in subsection 1 of section 2 and subsection 1 of section 5 of Assembly Bill No. 380, chapter 219, Statutes of Nevada 2015, at pages 1017 and 1019, and, pursuant to subsection 2 of section 2 and subsection 2 of section 5 of Assembly Bill No. 380, chapter 219, Statutes of Nevada 2015, at pages 1018 and 1020, providing proof satisfactory to the Department that, during the calendar year in question, the activities of a component member with physical presence in this State are not significantly associated with a retailer's ability to establish or maintain a market in this State for the retailer's products or services, a retailer may provide to the Department a written certification obtained from each component member if the written certification is obtained from the component member and provided to the Department in good faith.

2. The written certification described in subsection 1:

(a) May be submitted in paper or electronic form;

(b) Must contain a statement that the activities of the component member 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;

(c) Must be signed, either manually or electronically, as applicable, by the component member or, if the component member is an organization, by a person who has the authority to execute binding contracts on behalf of the organization; and

(d) Must include 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.

3. A retailer shall retain physical or electronic copies of all written certifications obtained from a component member and make such copies available to the Department upon request.

4. As used in this section, “component member” has the meaning ascribed to it in sections 2 and 5 of Assembly Bill No. 380, chapter 219, Statutes of Nevada 2015, at pages 1017 and 1019.

Sec. 4. 1. For the purpose of rebutting the presumption set forth in subsection 1 of section 3 and subsection 1 of section 6 of Assembly Bill No. 380, chapter 219, Statutes of Nevada 2015, at pages 1018 and 1020, and, pursuant to subsection 2 of section 3 and subsection 2 of section 6 of Assembly Bill No. 380, chapter 219, Statutes of Nevada 2015, at pages 1019 and 1020, providing proof satisfactory to the Department that each resident with whom a retailer has an agreement did not engage in any activity in this State that was significantly associated with the retailer’s ability to establish or maintain a market in this State for the retailer’s products or services during the preceding four quarterly periods ending on the last day of March, June, September and December, a retailer may:

(a) Provide to the Department a written certification obtained from each resident, on a form provided by the Department, if the written certification is obtained from the resident and provided to the Department in good faith; or

(b) Show that the agreement between the retailer and each resident prohibits the resident from engaging in any solicitation activities in this State that refer potential customers to the retailer and, if the resident is an organization, requires the organization to maintain on its Internet website information alerting its members to the prohibition.

2. *The written certification described in paragraph (a) of subsection 1:*

(a) May be in paper or electronic form;

(b) Must contain a statement that the resident did not engage in any solicitation activities in this State on behalf of the retailer during the preceding four quarterly periods ending on the last day of March, June, September and December and, if the resident is an organization, a statement certifying that the organization's Internet website includes information alerting its members to the prohibition against engaging in solicitation activities in this State that refer potential customers to the retailer;

(c) Must be signed, either manually or electronically, as applicable, by the resident or, if the resident is an organization, by a person who has the authority to execute binding contracts on behalf of the organization; and

(d) Must include the name and address of the resident and, if the resident is an organization, the name and address of the person signing the certification.

3. *A retailer shall retain physical or electronic copies of all written certifications obtained from a resident and make such copies available to the Department upon request.*

4. *As used in this section:*

(a) "Advertisement" means any announcement of goods for sale through the use of purchased space or time in print or electronic media for the purpose of communicating information to the general public. The term includes online advertising generated as the result of a generic algorithmic function that is anonymous and passive in nature, including, without limitation, advertisements associated with Internet search engines, banner advertisements, click-through advertisements, cost-per-action advertisements and links to a retailer's website.

(b) “Solicitation activities” means direct or indirect communication with a specific person in this State in a manner that is intended to incite the person to purchase tangible personal property from a specific retailer and establish or maintain a market in this State for the products or services offered by the retailer. The term includes, without limitation, distributing flyers, coupons, newsletters or other printed promotional materials or the electronic equivalents thereof, initiating telephone calls and sending emails. The term does not include an advertisement.

Sec. 5. 1. A retailer located outside this State that is required to impose, collect or remit the sales or use tax pursuant to section 2, 3, 5 or 6 of Assembly Bill No. 380, chapter 219, Statutes of Nevada 2015, at pages 1017 to 1020, inclusive, and that is making a sale of tangible personal property, whether at retail or for storage, use or other consumption in this State, shall register with the Department before, or at the time of, making the sale.

2. To register with the Department pursuant to subsection 1, a retailer shall indicate the existence of any agreement with a resident of this State under which the resident, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers to the retailer. If such an agreement exists, the retailer shall state the cumulative gross receipts from sales by the retailer to customers in this State who are referred to the retailer by a resident with such an agreement with the retailer during the four quarterly periods ending on the last day of March, June, September and December immediately preceding the retailer’s registration.

3. If a retailer is unable to determine which sales to customers in this State were the result of an agreement with a resident of this State as described in subsection 2, all gross receipts from sales by the retailer to customers in this State will be considered for purposes of

establishing the presumption that the retailer must impose, collect and remit sales and use taxes.

4. As used in this section, “commission or other consideration based upon the sale of tangible personal property” includes, without limitation, an agreement to pay an amount of money based on the level of sales completed, cost per mille advertising, the payment of a flat fee in exchange for a referral, the payment of a fixed price in exchange for providing a referral link, or any other item of value given in exchange for a referral.