

**PROPOSED REGULATION OF THE
NEVADA TAX COMMISSION**

LCB File No. R189-18

August 9, 2018

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

AUTHORITY: §§1-3, NRS 360.090, 372.724, 372.725, 374.724 and 374.725.

A REGULATION relating to taxation; revising 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 imposes upon each retailer a sales tax measured by the gross receipts of the retailer from the retail sale of tangible personal property in this State. (NRS 372.105, 374.110, 374.111) Under existing law, a retailer is required to collect the sales tax from the purchaser in a transaction to which the sales tax applies. (NRS 372.110, 374.115)

Existing law also imposes a use tax on the storage, use or other consumption in this State of tangible personal property purchased outside of this State from a retailer in a transaction that would have been subject to the sales tax in this State if it had occurred within this State. (NRS 372.185, 374.190, 374.191) Under existing law, the use tax is required to be paid by the purchaser who stores, uses or consumes the tangible personal property in this State, but any retailer maintaining a place of business in this State is required to collect the use tax from the purchaser at the time of the sale. (NRS 372.190, 372.195, 374.195, 374.200)

Under existing law, the Commerce Clause of the United States Constitution prohibits a state from requiring a retailer to collect sales and use taxes unless the activities of the retailer have a substantial nexus with the taxing state. (*Quill Corp. v. N.D.*, 504 U.S. 298 (1992)) In *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and *Quill*, the United States Supreme Court held that a retailer has sufficient nexus with a state to satisfy the requirements of the Commerce Clause of the United States Constitution only if the retailer has a physical presence in the state. In *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018), the United States Supreme Court overruled the physical presence rule of *National Bellas Hess* and *Quill* and held that, regardless of whether a retailer has a physical presence in a state, a retailer has sufficient nexus with a state if the retailer “avails itself of the substantial privilege of carrying

on business” in the state. (*S.D. v. Wayfair, Inc.*, 138 S.Ct. 2080, 2099 (2018) (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)) Based on this standard, the United States Supreme Court held that a retailer who satisfies the criteria set forth in a South Dakota law relating to the amount of sales or number of transactions in that state has a sufficient nexus with that state to satisfy the requirements of the Commerce Clause of the United States Constitution, regardless of whether the retailer has a physical presence in the state.

The provisions of existing law relating to the imposition, collection and remittance of sales and use taxes apply to every retailer who has a sufficient nexus with this State to satisfy the requirements of the United States Constitution. (NRS 372.724, 374.724) **Section 2** of this regulation adopts provisions based on the South Dakota law at issue in *Wayfair* to impose the requirements of existing law relating to the imposition, collection and remittance of sales and use taxes on a retailer who has no physical presence in this State but who, in the preceding or current calendar year, has a certain amount of retail sales of tangible personal property for delivery in this State or a certain number of transactions involving the retail sale of tangible personal property for delivery in this State. Under **section 2**, the requirements relating to the imposition, collection and remittance of sales and use taxes apply to a retailer who meets the criteria set forth in **section 2** beginning on the first day of the first month that begins at least 30 calendar days after the retailer meets that threshold.

Section 1 of this regulation establishes that the purpose of this regulation is to reduce the disparate impact of the responsibility to collect taxes on retailers located in this State and retailers located outside this State who avail themselves of the substantial privilege of carrying on business in this State.

Section 3 of this regulation requires the Department of Taxation to establish the date on which the Department will begin to enforce the provisions of this regulation relating to the imposition, collection and remittance of sales and use taxes on retailers who satisfy the criteria set forth in **section 2**. Under **section 3**, the Department is prohibited from imposing on such retailers the requirements of existing law relating to the imposition, collection and remittance of sales and use taxes before the date established by the Department unless a retailer voluntarily consents to those requirements.

Section 1. Section 4 of LCB File No. 137-15 is hereby amended to read as follows:

Section 4. The purpose of sections 2 to 7, inclusive, of LCB File No. R137-15 , **as amended by LCB File No. R189-18**, is to reduce the disparate impact of the responsibility to collect taxes on retailers located in this State and remote retailers located outside this State who utilize residents of this State and businesses with a physical presence in this

State to establish presence in this State by proxy ~~+~~ *or who avail themselves of the substantial privilege of carrying on business in this State.*

Sec. 2. Section 7 of LCB File No. R137-15 is hereby amended to read as follows:

Section 7. 1. For the purpose of determining whether the activities of a retailer located outside this State have a sufficient nexus with this State to satisfy the requirements of the United States Constitution, *except as otherwise provided in NRS 372.7243, 372.7247, 374.7243 or 374.7247 or section 5 or 6 of LCB File No. R137-15*, the activities of a retailer ~~are presumed to~~ have a sufficient nexus with this State if the retailer is making a sale of tangible personal property, whether at retail or for storage, use or other consumption in this State, and the retailer:

(a) Is part of a controlled group of corporations that has a component member with physical presence in this State and the activities performed in this State by the component member are:

(1) Listed in paragraph (b) of subsection 1 of NRS 372.7243 or paragraph (b) of subsection 1 of NRS 374.7243; or

(2) Significantly associated with the retailer's ability to establish or maintain a market in this State for the retailer's products or services; ~~or~~

(b) Enters into an 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, and the cumulative gross receipts from sales by the retailer to customers in this State who are referred to the retailer by all residents with such an agreement with the retailer is in excess of \$10,000

during the preceding four quarterly periods ending on the last day of March, June, September and December ~~+~~;

(c) Does not have a physical presence in this State, does not have a sufficient nexus with this State pursuant to paragraph (a) or (b) and in the immediately preceding calendar year or the current calendar year:

(1) The gross revenue of the retailer from the retail sale of tangible personal property delivered in this State is greater than \$100,000; or

(2) The retailer made 200 or more retail sales of tangible personal property for delivery in this State; or

(d) Engages in any other activity that establishes a sufficient nexus with this State to satisfy the requirements of the United States Constitution.

2. 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 paragraph (b) of subsection 1, all gross receipts from sales by the retailer to customers in this State will be considered for purposes of establishing ~~the presumption~~ that the activities of a retailer have a sufficient nexus with this State ~~+~~ *pursuant to paragraph (b) of subsection 1.*

3. If the activities of a retailer located outside this State ~~are presumed to~~ have a sufficient nexus with this State ~~+, the retailer shall:~~ *pursuant to:*

(a) ~~Impose, collect or remit~~ *Paragraph (a), (b) or (d) of subsection 1:*

(1) The provisions of chapters 360B, 372 and 374 of NRS relating to the imposition, collection and remittance of the sales ~~or~~ tax and the collection and

remittance of the use tax ~~pursuant to NRS 372.7243, 372.7247, 374.7243 or 374.7247;~~
apply to the retailer; and

~~*(b) Register*~~

(2) The retailer shall register with the Department pursuant to NRS 360B.200
before, or at the time of, making the sale.

(b) Paragraph (c) of subsection 1:

*(1) Beginning on the first day of the first calendar month that begins at least 30
calendar days after the retailer satisfied the criteria set forth in subparagraph (1) or (2)
of paragraph (c) of subsection 1, the provisions of chapter 360B, 372 and 374 of NRS
relating to the imposition, collection and remittance of the sales tax and the collection
and remittance of the use tax apply to the retailer; and*

*(2) Not later than the first day of the first calendar month that begins at least 30
calendar days after the retailer satisfied the criteria set forth in subparagraph (1) or (2)
of paragraph (c) of subsection 1, the retailer shall register with the Department pursuant
to NRS 360B.200.*

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.

Sec. 3. This regulation, LCB File No. R189-18, 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. The Department of Taxation shall establish the date on which the Department will begin to enforce the provisions of this regulation which impose requirements relating to the imposition, collection and remittance of sales and use taxes on retailers who satisfy the criteria set forth in paragraph (c) of subsection 1 of section 7 of LCB File No. R137-15, as amended by section 2 of LCB File No. 189-18. The Department shall post notice of the date established pursuant to this subsection on the Internet website of the Department and make such other efforts to notify retailers of that date as the Executive Director of the Department deems appropriate. The failure of a retailer to receive notice of the date established by the Department pursuant to this subsection does not excuse the retailer from compliance with any requirement relating to the imposition, collection and remittance of sales and use taxes.

2. Notwithstanding the provisions of section 7 of LCB File No. R137-15, as amended by section 2 of LCB File No. 189-18, and except as otherwise provided in subsection 3, before the date established by the Department of Taxation pursuant to subsection 1, the Department shall not require a retailer who satisfies the criteria of paragraph (c) of subsection 1 of section 7 of LCB File No. R137-15, as amended by section 2 of LCB File No. 189-18, to comply with the requirements of chapters 360B, 372 and 374 of NRS relating to the imposition, collection and remittance of sales and use taxes.

3. The provisions of subsection 2 do not prohibit a retailer who satisfies the criteria set forth in paragraph (c) of subsection 1 of section 7 of LCB File No. R137-15, as amended by section 2

of LCB File No. R189-18, from voluntarily complying with the requirements of chapters 360B, 372 and 374 of NRS relating to the imposition, collection and remittance of sales and use taxes before the date established by the Department of Taxation pursuant to subsection 1. If, before the date established by the Department pursuant to subsection 1, a retailer who satisfies the criteria set forth in paragraph (c) of subsection 1 of section 7 of LCB File No. R137-15, as amended by section 2 of LCB File No. R189-18, voluntarily complies with the requirements of chapters 360B, 372 and 374 of NRS relating to the imposition, collection and remittance of sales and use taxes, the provisions of chapter 360 of NRS relating to the payment, collection, administration and enforcement of taxes, and the provisions of chapters 360B, 372 and 374 of NRS relating to the imposition, collection and remittance of sales and use taxes, apply to the retailer.