

## **STATEMENT BY JAMES C. LAREW**

Before the Iowa Department of Revenue

Re: Proposed Administrative Rules to Interpret Iowa Code Chapters 422 and 423

December 1, 2015

The Iowa Department of Revenue's proposal to create expansive sales and use tax exemptions through administrative rulemaking processes, rather than by amending Iowa Code Chapters 422 and 423, which its proponents, for years, have been unable to achieve through normal legislative processes, involves an unprecedented potential shift of institutional, constitutional forces:

On the one hand, the legislature traditionally rightfully insists that it, and it alone, possesses the constitutional power to tax and spend the resources of our citizens.

On the other hand, all administrations of all Governors, including their executive agencies, are driven by political hydraulic pressures to exceed the outer limits of their power—often to accomplish what are arguably desirable ends.

These hydraulic political pressures are sometimes disguised with blurring words, in the world of proposed changes to administrative rules, to the effect of simply making “technical adjustments” and “streamlining cumbersome distinctions.”

All Iowans and their elected legislators of both parties must consider whether it is time to resist and to check such political hydraulic pressures being applied to our tax laws.

The Revenue Department's proposed administrative rule changes aimed, in the words of the agency, to “implement a policy” must be viewed by

legislators with a jealous eye towards preserving their own constitutionally-derived tax and spend power.

Legislators--liberals, moderates and conservatives, alike--must surely be wary of what, in essence, amounts to an annual \$46 million (at least) interpretive loophole recently discovered by the Department of Revenue when reviewing its own longstanding *past* interpretations of statutory provisions whose words have not been altered by its authors: the Iowa General Assembly.

So, have the same Department officials simply been wrong—that is to say, perhaps arbitrary, capricious or otherwise beyond the authority delegated to the agency—in their former interpretations of the same statute, in which case, arguably, Iowa taxpayers, over the years, have been wrongfully denied tens of millions of dollars of exemptions from the incidence of sales tax?

Or, is the tax agency, now, with proposed pages and pages of new interpretations of unchanged Code provisions, simply aiming to alter Iowa's tax laws through the “back door”—that is, trying to achieve results through a rulemaking process that could not be obtained through the more open full-fledged, legislative process to amend Iowa's statutes that the Iowa Constitution anticipates?

In Iowa, sales and use taxes, once legislated into the Code, are presumed to be the rule. Exemptions are presumed to be the exceptions, with heavy burdens placed upon those taxpayers who claim exemptions.

The legislature has spoken so clearly to this point that it has retained the power to itself to create more than 90 specific instances in which such exemptions shall be granted in the Iowa Code.

The core legal issue here is whether the Department has been clearly delegated by the legislature the authority broadly to interpret those precise statutory terms in entirely new ways, all in the name of “implementing a policy” that it claims will eliminate “burdensome distinctions” and definitions, that in the opinion of the agency, do not “reflect modern manufacturing in Iowa.”

If the Department has the expansive authority to interpret the sales and use tax exemption statute in the new ways that it now claims, the agency should be able to point to provisions of the Iowa Code where that interpretive authority has been expressly granted to it.

But, in its rulemaking proposal, the Department can point to only two general such authorizing provisions--and neither of them is specific as to any interpretive power conferred to the agency with respect to our sales and use tax laws.

And the very specific exemptions contained in the statute itself clearly imply that the interpretive power exercised by the Department to create additional, other exemptions has not been conferred to the agency by the legislature.

Rather, it would appear that taxing and spending powers normally reserved to the legislature, and normally subject to careful monitoring by ways and means committee members of the House and Senate, in this instance, have been avoided by the initiation of a rulemaking process by a private conservative pressure group whose members enjoy a constant lobbying presence in the state capitol and in the Governor's office.

The Department’s originally-drawn proposed rules anticipated that they would be applied to contracts entered into after January 1, 2016. However, after the rules were met by a firestorm of protest at the Administrative Rules Review Committee’s October 13, 2015, meeting,

the Department agreed to delay the implementation of the rules for six months—now, to apply to contracts entered into after July 1, 2016.

Ostensibly, the reason for the implementation delay, which gives rise to this very public hearing, was to give the legislature an opportunity to pass new statutory amendments to align with the new taxing policy that the Department, through its proposed administrative rules, intends to achieve. Unfortunately, the delay decision creates the appearance that political theater is more highly valued than conducting serious rulemaking processes within the bounds of established legal and constitutional norms.

This is new territory. And it hardly represents a conservative approach to governance.

Moreover, what is sauce for the goose eventually becomes sauce for the gander, too.

The balance of political power changes from one election to the next.

The balance of constitutional power—the relationship between the Iowa General Assembly and executive departments of our state government—is more serious and more lasting.

Broad statutory interpretive powers given up by the legislature to an executive agency, in one moment of time, concerning one issue, are not easily later recovered.

These are big questions.

They need to be answered by citizens and by legislators who possess a large understanding of how Iowa's constitutional government should work.