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## Fast-Track Regulation Agency Background Document

<b>Agency name</b>	Virginia Department of Taxation
<b>Virginia Administrative Code (VAC) citation(s)</b>	23 VAC 10-140-10
<b>Regulation title(s)</b>	Income Tax Withholding
<b>Action title</b>	Amend Income Tax Withholding Regulation to Conform to Law Changes and Existing Policy.
<b>Date this document prepared</b>	June 21, 2016

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

This regulatory action will amend a Virginia Income Tax Withholding Regulation section, 23VAC10-140-10, relating to Income Tax Withholding definitions. This action is necessary to reflect legislative changes re-defining the terms "employee," "employer," and "wages." Many of these definitions are also unnecessary because they provide no additional guidance to clear and unambiguous statutes. Therefore, this regulatory action will repeal Income Tax Withholding definitions that are unnecessary and will update all other definitions to conform legislative changes and current tax policy. The amendment of this section does not reflect a change in existing tax policy and will have no impact on the administration of the tax.

## Acronyms and Definitions

*Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.*

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The following acronyms are used in this Agency Background Document. Every technical term used in this document is defined in the regulation.

- IRA:** means Individual Retirement Account
- IRP:** means Individual Retirement Plan
- P.D.:** means Public Document
- SEPP:** means Simplified Employee Pension Plan

## Statement of final agency action

*Please provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.*

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The Tax Commissioner approved the amendment of the Income Tax Withholding Regulation section 23VAC10-140-10 on May 2, 2016.

## Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person’s overall regulatory authority.*

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Code of Virginia § 58.1-203 provides that the “Tax Commissioner shall have the power to issue regulations relating to the interpretation and enforcement of the laws of this Commonwealth governing taxes administered by the Department.” The authority for the current regulatory action is discretionary.

## Purpose

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

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This regulatory action is needed to amend a section of the Income Tax Withholding Regulation, 23 VAC 10-140-10, that does not conform to legislative changes and current tax policy. Many of the definitions in this section can be repealed because they provide no additional guidance to clear and unambiguous statutes. Other definitions will be updated so that they conform to legislative changes and current tax policy. Amendment of this section does not reflect any change in existing tax policy and will have no

impact on the administration of the tax. As this regulatory action does not reflect a change in existing departmental policy, it will have no effect on the health, safety and welfare of citizens.

### Rationale for using fast-track process

*Please explain the rationale for using the fast-track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?*

The fast-track process is intended for proposed regulations that are expected to be noncontroversial. As the regulation will be amended to reflect current law, and will not make any changes to the Department's current policy regarding Income Tax Withholding, this action is not expected to be controversial. The Department has issued numerous published ruling letters and other P.D.s that address Income Tax Withholding. These P.D.s and recent law changes form the basis for the proposed changes to this regulation.

### Substance

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of changes" section below.*

This regulatory action will amend a Virginia Income Tax Withholding Regulation section, 23VAC10-140-10, relating to Income Tax Withholding definitions. Many of these definitions are outdated because they have not been amended to conform to the following legislation enacted by the General Assembly:

- House Bill 1734 (1991 Acts of Assembly, Chapter 362) and Senate Bill 765 (1991 Acts of Assembly, Chapter 456): This legislation amended Virginia withholding requirements to conform to federal withholding requirements. See P.D. 91-297.
- House Bill 950 (1987 Acts of Assembly, Chapter 531); Senate Bill 623 (1993 Acts of Assembly, Chapter 54) and House Bill 1079 (2014 Acts of Assembly, Chapter 225). This legislation amended Virginia withholding requirements to require withholding of tax on certain prizes paid by the Virginia Lottery.
- Senate Bill 389 (1992 Acts of Assembly, Chapter 519): This legislation excluded from withholding IRPs and SEPPs.

Many of these definitions are also unnecessary because they provide no additional guidance to clear and unambiguous statutes. Therefore, this regulatory action will repeal Income Tax Withholding definitions that are unnecessary and will update all other definitions to conform legislative changes and current tax policy. Amending this section does not reflect any change in existing tax policy and will have no impact on the administration of tax. Because of this, the amendment of this section is not expected to be controversial.

### Issues

*Please identify the issues associated with the proposed regulatory action, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community,*

government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.

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This regulatory action will ease voluntary taxpayer compliance and the Department's administration of the state tax laws by amending a regulation section that does not conform to legislative changes and current policy. Amending of this regulatory section will result in no disadvantage to the public or the Commonwealth.

### Requirements more restrictive than federal

*Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.*

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Through House Bill 1734 (1991 Acts of Assembly, Chapter 362) and Senate Bill 765 (1991 Acts of Assembly, Chapter 456), the General Assembly amended Virginia withholding requirements to conform to federal withholding requirements. See P.D. 91-297. The intent of the legislation was to lessen the administrative burden on employers. The requirement for Virginia withholding on virtually every payment for which federal withholding is required allows employers to follow one set of rules in determining whether a payment is subject to withholding. Because this regulatory action will bring the regulation in conformity with current law, which incorporates such legislative changes, the proposed regulation is not expected to have more restrictive requirements than corresponding federal requirements.

### Localities particularly affected

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

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No localities are particularly affected by this regulatory action.

### Regulatory flexibility analysis

*Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

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As these regulation sections amend a regulatory section so that it conforms to existing law and tax policy, amendment is necessary. The only alternative to amendment would be to leave in place a regulation section that contradicts existing law and tax policy.

**Economic impact**

*Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including:</b>  <b>a) fund source / fund detail; and</b>  <b>b) a delineation of one-time versus on-going expenditures</b></p>	<p>As this section of the Income Tax Withholding Regulation will be amended to bring it in conformity with current law and tax policy, there are no costs related to its amendment.</p>
<p><b>Projected cost of the new regulations or changes to existing regulations on localities.</b></p>	<p>As this section of the Income Tax Withholding Regulation will be amended to bring it in conformity with current law and tax policy, there are no costs related to its amendment.</p>
<p><b>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</b></p>	<p>As this section of the Income Tax Withholding Regulation will be amended to bring it in conformity with current law and tax policy, no one will be affected by its amendment.</p>
<p><b>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means a business entity, including its affiliates, that:  a) is independently owned and operated and;  b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>As this section of the Income Tax Withholding Regulation will be amended to bring it in conformity with current law and tax policy, no one will be affected by its amendment.</p>
<p><b>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including:</b>  <b>a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and</b>  <b>b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</b></p>	<p>As this section of the Income Tax Withholding Regulation will be amended to bring it in conformity with current law and tax policy, no one will be affected by its amendment.</p>
<p><b>Beneficial impact the regulation is designed to produce.</b></p>	<p>As this section of the Income Tax Withholding Regulation will be amended to bring it in conformity with current law and tax policy, its amendment will ensure uniform application of the tax laws to taxpayers. In addition, business taxpayers will be better equipped to predict the tax consequences of transactions and avoid unanticipated tax assessments as the result of audits.</p>

### Alternatives

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.*

The only alternative would be to keep the regulation section unchanged. By keeping the regulation section unchanged, the Department would continue to have a regulation section that is not in conformity with current law and tax policy.

### Public participation notice

*If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.*

### Periodic review and small business impact review report of findings

*If this fast-track is the result of a periodic review/small business impact review, use this form to report the agency's findings. Please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review and (2) indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.*

Commenter	Comment	Agency response

This fast-track is not a result of a periodic review/small business impact review.

### Family impact

*Please assess the impact of this regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and*

one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

As the regulation section will be amended to conform to current law and tax policy, its amendment will have no impact on the institution of the family and family stability.

**Detail of changes**

*Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below.*

For changes to existing regulation(s), please use the following chart:

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change, intent, rationale, and likely impact of proposed requirements</b>
23VAC10-140-10	Not applicable	The regulation sets forth a definition for “employee.”	<p>This action will update the regulatory definition of “employee” to repeal regulatory language that does not conform to Senate Bill 389 (1992 Acts of Assembly, Chapter 519), which excludes beneficial owners of an IRA or SEPP from the definition of “employer.”</p> <p>This action will preserve regulatory language relating to determining if an employer-employee relationship exists based upon federal law. This is not a change to existing policy.</p>
23VAC10-140-10	Not applicable	The regulation sets forth a definition for “employer.”	<p>This action will repeal the regulatory definition of “employer,” which does not conform to the following legislation enacted by the General Assembly:</p> <ul style="list-style-type: none"> <li>• House Bill 950 (1987 Acts of Assembly, Chapter 531), as modified by Senate Bill 623 (1993 Acts of Assembly, Chapter 54) and House Bill 1079 (2014 Acts of Assembly, Chapter 225): This legislation specifically includes within the definition of “employer” a person from whom another person receives a prize in excess of \$5,001 pursuant to the Virginia Lottery Law (Va. Code § 58.1-</li> </ul>



			<p>4000 et seq.).</p> <ul style="list-style-type: none"> <li>Senate Bill 389 (1992 Acts of Assembly, Chapter 519): This legislation specifically excludes from the definition of “employer” a financial institution, corporation, partnership or other person or entity with respect to benefits paid as custodian, trustee or depository for an IRA or SEPP.</li> </ul> <p>This action will repeal regulatory language that does not conform to such legislation and provides no additional guidance to the statutory definition. This is not a change to existing policy.</p>
<p>23VAC10-140-10</p>	<p>Not applicable</p>	<p>The regulation sets forth a definition for “wages.”</p>	<p>This action will amend the regulatory definition of “wages,” which does not conform to the following legislation enacted by the General Assembly:</p> <ul style="list-style-type: none"> <li>House Bill 1734 (1991 Acts of Assembly, Chapter 362) and Senate Bill 765 (1991 Acts of Assembly, Chapter 456): This legislation re-defined wages as wages defined under § 3401(a) of the Internal Revenue Code, along with any amounts from which federal income tax is withheld under the provisions of §§ 3402 and 3405 of the Internal Revenue Code. See P.D. 91-297.</li> <li>House Bill 950 (1987 Acts of Assembly, Chapter 531); Senate Bill 623 (1993 Acts of Assembly, Chapter 54); and House Bill 1079 (2014 Acts of Assembly, Chapter 225): This legislation specifically includes in the definition of “wages” all prizes in excess of \$5,001 paid by the Virginia Lottery.</li> <li>Senate Bill 389 (1992 Acts of Assembly, Chapter 519): This legislation specifically excludes from the definition of “wages” amounts paid pursuant to IRPs and SEPPs as defined in §§ 7701 (a)(37) and 408 (c) of the Internal Revenue Code.</li> </ul>



			This action will repeal regulatory language that does not conform to such legislation and provides no additional guidance to the statutory definition. This is not a change to existing policy.
23VAC10-140-10	Not applicable	The regulation explains the impact if a payment is excluded from the definition "wages."	<p>The action will update the regulation to explain that, even if a payment is excluded from "wages," the payee and the payor may still agree pursuant to § 58.1-466 of the Code of Virginia to have amounts withheld from such payments. See P.D. 92-185.</p> <p>This action will also modify the regulatory language used to describe "wages" to more accurately reflect legislative changes. The regulatory language appears to generally equate "wages" with "remuneration." However, due to the legislative changes discussed above, the term "wages" encompasses many types of payments, including not only remuneration but also certain prizes paid by the Virginia Lottery and any amounts from which federal income tax is withheld under the provisions of §§ 3402 and 3405 of the Internal Revenue Code. This is not a change to existing policy.</p>

If an existing regulation or regulations (or parts thereof) are being repealed and replaced by one or more new regulations, please use the following chart:

Current chapter-section number	Proposed new chapter-section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements

If a new regulation is being promulgated, that is not replacing an existing regulation, please use this chart:

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements

If the proposed regulation is intended to replace an emergency regulation, and the proposed regulation is identical to the emergency regulation, please choose and fill out the appropriate

chart template from the choices above. In this case “current section number” or “current chapter-section number” would refer to the **pre-emergency** regulation.

If the proposed regulation is intended to replace an emergency regulation, and the proposed regulation includes changes since the emergency regulation, please create two charts: 1) a chart describing changes from the **pre-emergency** regulation to the proposed regulation as described in the paragraph above, and 2) a chart describing changes from the **emergency** regulation to the proposed regulation. For the second chart please use the following title: “Changes from the Emergency Regulation.” In this case “current section number” or “current chapter-section number” would refer to the **emergency** regulation.