

Guidelines for the Application of the Retail Sales and Use Tax to Sales of Accommodations Facilitated by Accommodations Intermediaries

[Senate Bill 1398](#) (2021 *Acts of Assembly*, Special Session I, Chapter 383) changes the application of the Retail Sales and Use Tax to sales of accommodations facilitated by accommodations intermediaries beginning September 1, 2021. The legislation makes similar changes to the local transient occupancy taxes. Additionally, these changes will apply to the state imposed transient occupancy taxes that fund transportation purposes in certain localities under [Va. Code § 58.1-1743](#) and [Va. Code § 58.1-1744](#) because these taxes are administered by local governments in the same manner as their local transient occupancy taxes. These guidelines provide processes and procedures for implementing the provisions of *Va. Code* §§ 58.1-602, 58.1-603, and 58.1-612.2, relating to the Retail Sales and Use Taxation of accommodations, as required by Senate Bill 1398.

These guidelines are not rules or regulations subject to the provisions of the Administrative Process Act (*Va. Code* § 2.2-4000 *et seq.*) and are being published in accordance with the requirement that the Tax Commissioner publish these guidelines pursuant to the third enactment clause of 2021 Senate Bill 1389, as well as the Tax Commissioner's general authority to supervise the administration of the tax laws of the Commonwealth pursuant to *Va. Code* § 58.1-202. As necessary, additional information will be published and posted on the Department of Taxation's ("the Department's") website, www.tax.virginia.gov.

These guidelines represent the Department's interpretation of the relevant laws. They do not constitute formal rulemaking and hence do not have the force and effect of law or regulation. In the event that the final determination of any court holds that any provision of these guidelines is contrary to law, taxpayers who follow these guidelines will be treated as relying on erroneous written advice for purposes of waiving penalty and interest under *Va. Code* §§ 58.1-105, 58.1-1835, and 58.1-1845. To the extent there is a question regarding the application of these guidelines, taxpayers are encouraged to write to the Department and seek a written response to their question.

Background on the Taxation of Accommodations

In [Public Document 06-139](#) (October 24, 2006), the Department determined that the Retail Sales and Use Tax levied on transient accommodations is to be computed only upon the amount paid to the provider of the accommodations without regard to any service fee paid to a third-party facilitator of the rental transaction.

Senate Bill 1398 changes this treatment by providing that, beginning September 1, 2021, the Retail Sales and Use Tax shall be calculated based on the total charges or the total price paid for the use or possession of transient lodgings, including any fees charged by accommodations intermediaries for the facilitation of transactions for the provision of transient accommodations.

Definitions

Senate Bill 1398 provides several new definitions for purposes of the Retail Sales and Use Tax. (See *Va. Code* § 58.1-602).

“Accommodations” means any room or rooms, lodgings, or accommodations in any hotel, motel, inn, tourist camp, tourist cabin, camping grounds, club, or any other place in which rooms, lodging, space, or accommodations are regularly furnished to transients for a consideration.

“Accommodations fee” means the room charge less the discount room charge, if any, provided that the accommodations fee shall not be less than \$0.

“Accommodations intermediary” means any person other than an accommodations provider that facilitates the sale of an accommodation, charges a room charge to the customer, and charges an accommodations fee to the customer, which fee it retains as compensation for facilitating the sale. For purposes of this definition, “facilitates the sale” includes brokering, coordinating, or in any other way arranging for the purchase of the right to use accommodations via a transaction directly, including via one or more payment processors, between a customer and an accommodations provider. An “accommodations intermediary” does not include a person:

1. If the accommodations are provided by an accommodations provider operating under a trademark, trade name, or service mark belonging to such person; or
2. Who facilitates the sale of an accommodation if (i) the price paid by the customer to such person is equal to the price paid by such person to the accommodations provider for the use of the accommodations and (ii) the only compensation received by such person for facilitating the sale of the accommodation is a commission paid from the accommodations provider to such person.

“Accommodations provider” means any person that furnishes accommodations to the general public for compensation. The term “furnishes” includes the sale of use or possession or the sale of the right to use or possess.

“Affiliate” means with respect to any person, any other person directly or indirectly controlling, controlled by, or under common control with such person. For purposes of this definition, ‘control’ (including control by and under common control with) shall mean the power, directly or indirectly, to direct or cause the direction of the management and policies of such person whether through ownership or voting securities or by contract or otherwise.

“Discount room charge” means the full amount charged by the accommodations provider to the accommodations intermediary, or an affiliate thereof, for furnishing the accommodations.

“Room charge” means the full retail price charged to the customer by the accommodations intermediary for the use of the accommodations, including any accommodations fee as well as any charges made in connection with the rental of the accommodations, before taxes. The room charge shall be determined in accordance with [23 Virginia Administrative Code \(“VAC”\) 10-210-730](#) and the related rulings of the Department on the same.

Collection of the Tax

Beginning September 1, 2021, for any retail sale of accommodations facilitated by an accommodations intermediary, the accommodations intermediary shall be deemed a dealer making a retail sale of accommodations and must collect the Retail Sales and Use Tax computed on the room charge.

When the accommodations are at a hotel, the accommodations intermediary shall remit the Retail Sales and Use Tax on the accommodations fee to the Department. Any remaining Retail Sales and Use Tax must be remitted to the hotel, which shall remit such taxes to the Department. If the accommodations are not at a hotel, the accommodations intermediary shall remit the Retail Sales and Use Tax on the entire transaction to the Department. (See *Va. Code* § 58.1-612.2 B).

Additional charges levied in connection with the rental of accommodations that are not part of the “room charge” and the tax collectible on such charges are collectible from the customer by the accommodations provider. In such instances, the accommodations provider shall remit the taxes collected on the additional charges to the Department and the locality, as appropriate. (See [23 VAC 10-210-730](#))

Invoice Requirements

In any retail sale of accommodations facilitated by an accommodations intermediary, the accommodations intermediary shall separately state the amount of the tax on the bill, invoice, or similar documentation and shall add the tax to the room charge. Thereafter, the tax shall be a debt from the customer to the accommodations intermediary, recoverable at law in the same manner as other debts. Where the retail sale of accommodations is not facilitated by an accommodations intermediary, the accommodations provider shall separately state the amount of the tax in the bill, invoice, or similar documentation and shall add the tax to the total price paid for the use or possession of the accommodations. (See *Va. Code* § 58.1-612.2 E).

Marketplace Facilitators

Accommodations intermediaries may have an obligation to register and collect the Retail Sales and Use Tax as marketplace facilitators. For additional information, please see the Guidelines for Remote Sellers and Marketplace Facilitators, [Public Document 20-43](#) (June 27, 2019).

Marketplace facilitators are generally permitted to apply for waivers of their duty to collect and remit tax pursuant to *Va. Code* § 58.1-612.1 D 3 based on a showing either of undue hardship or that all of their marketplace sellers are already registered dealers. In the past, these waivers may have permitted accommodations intermediaries to allow accommodations providers to collect and remit all taxes due on retail sales of accommodations.

Senate Bill 1398, however, specifies instances in which an accommodations intermediary must collect the Retail Sales and Use Tax and remit such tax to the Department, and does not allow affected taxpayers to obtain similar waivers or to use existing waivers. Accommodations intermediaries, where they are deemed dealers for purposes of a retail sale of accommodations, may not assign or otherwise transfer their duty to collect and remit taxes as required by law to accommodations providers or any other entity.

The accommodations intermediary is required to collect the Retail Sales and Use Tax on the room charge. When the accommodations are at a short-term rental, as defined in *Va. Code* § 15.2-983, or any other accommodation aside from a hotel, then the accommodations intermediary is required to remit the Retail Sales and Use Tax on the full room charge to the Department. (See *Va. Code* § 58.1-612.2 B).

When the accommodations are at a hotel, the accommodations intermediary is required to remit the taxes on the accommodations fee to the Department. The accommodations intermediary must then remit any remaining taxes to the hotel, and the hotel is required to remit such taxes to the Department. In such cases, the accommodations intermediary does not need to request a waiver under the marketplace facilitator legislation since the hotel is explicitly required to remit the tax under *Va. Code* § 58.1-612.2 B. However, the accommodations intermediary does have the obligation to collect the Retail Sales and Use Tax from the customer and remit it to the hotel. (See *Va. Code* § 58.1-612.2 B).

Effective Date of Law Change

The law change applies to rentals of accommodations to transients on and after September 1, 2021. Accommodations i) furnished on or after September 1, 2021, and ii) paid for on or after September 1, 2021, are subject to the law change regardless of when the rental was reserved. The law change will not apply to accommodations furnished to transients prior to September 1, 2021, but paid for on or after September 1, 2021; nor will it apply when the accommodations are paid for in full prior to September 1, 2021, even if the accommodations are not furnished to the transient until on or after September 1, 2021.

Retail Sales and Tax Rates

Retail Sales and Use Tax vary by locality. The tax rates for each locality are available on the Department's website, www.tax.virginia.gov.

Examples

Example 1. On September 3, 2021, a customer books and pays for a one-night reservation for a hotel to be occupied on September 13, 2021 through an accommodations intermediary's website at a rate of \$100 per night plus an accommodations fee of \$10. The accommodations intermediary had previously applied for and obtained a waiver of its obligation to collect taxes pursuant to *Va. Code* § 58.1-612.1 D 3. However, pursuant to *Va. Code* § 58.1-612.2 B, the accommodations intermediary is required to remit the Retail Sales and Use Tax on the \$10 accommodations fee to the Department. The accommodations intermediary must then remit the Retail Sales and Use Tax on the \$100 discount room charge to the hotel, which must remit the taxes to the Department.

If the customer had booked and paid for the reservation prior to September 1, 2021, even though the accommodations were to be occupied after September 1, 2021, the law change would not affect the transaction.

Example 2. On August 1, 2021, a customer books, but does not pay for, a reservation at a hotel through an accommodations intermediary's website for August 28, 2021. The customer subsequently stays one night and therefore vacates the room before September 1, 2021. The customer pays for the reservation on September 2, 2021. The law change would not have any effect on the transaction since the accommodations were furnished before September 1, 2021 despite the fact that the customer paid after September 1.

If the same customer extended their stay until September 1, 2021 and paid for the extended period on or after September 1, 2021, the law change would apply to the accommodations furnished and paid for after September 1, 2021 but not the accommodations furnished and paid for in August.

Example 3. A customer books a one-night reservation with a hotel through the hotel's website. No facilitator is involved in the reservation. As the hotel is the dealer in this transaction, the Retail Sales and Use Tax would be remitted by the hotel to the Department on the hotel's next monthly sales tax return.

Example 4. A customer books a one-night reservation for a hotel through an accommodations intermediary's website after September 1, 2021. The Retail Sales and Use Tax levied on the accommodations fee would be remitted by the intermediary to the Department on the intermediary's next monthly sales tax return. The remaining Retail Sales and Use Tax collected on the transaction would be remitted to the hotel for the hotel to remit to the Department with the hotel's next monthly sales tax return.

If the customer had accrued additional charges for a taxable item, such as movie rentals during the stay at the hotel, and such charges were not part of the total room charge collected by the intermediary, it is the hotel's responsibility to collect the Retail Sales and Use Tax due on those charges from the customer and remit the taxes to the Department.

Additional Information

These guidelines are available online under the Guidance Documents section of the Department's website, located at <http://tax.virginia.gov/guidance-documents>. The Department will issue additional guidance regarding this law change if necessary. For additional information, please visit www.tax.virginia.gov or contact the Department at (804) 367-8037.

Approved:

A handwritten signature in black ink, reading "Craig M. Burns". The signature is written in a cursive style with a long, sweeping tail on the "s".

Craig M. Burns
Tax Commissioner