



## Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	Department of Taxation
<b>Virginia Administrative Code (VAC) citation</b>	23 VAC10-210-1080
<b>Regulation title</b>	Chapter 210—Retail Sales and Use Tax
<b>Action title</b>	Occasional Sales
<b>Date this document prepared</b>	November 27, 2006

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Purpose

*Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.*

Virginia Administrative Code Cite	Virginia Code Cite	Chapter	Proposed change and rationale
23VAC10-210-1080	§ 58.1-602	N/A	Provide clarification regarding the exemption available for “occasional sales.”

The exemption provided in the statute relies solely on the definition of “occasional sale” as provided under Code of Virginia, § 58.1-602. The regulation is relatively clear concerning the sale of tangible personal property. However, there have been several Public Documents issued addressing the instances in which the sale of a business constitutes an “occasional sale.” Occasional sales are exempt from the sales and use tax under § 58.1-609.10(2). The term “occasional sale” is defined under § 58.1-602 as follows:

“Occasional sale” means a sale of tangible personal property not held or used by a seller in the course of an activity for which he is required to hold a certificate of registration, including the sale or exchange of all or substantially all the assets of any business and the reorganization or liquidation of any business.

In a 1998 Circuit Court decision out of the City of Richmond, *Steuart Petroleum Co. v. Virginia Department of Taxation*, 44 Va. Cir. 392 (1998), a petroleum marketing company sold twenty-four

convenience stores to five separate purchasers through five separate transactions. The transactions occurred over a nine-month period. Finding that the five transactions constituted a series of sales sufficient in “number, scope, and character to constitute an activity requiring the holding of a certificate of registration,” the Virginia Tax Department concluded that the transactions did not constitute an “occasional sale” and thus, were not eligible for the exemption from the retail sales and use tax.

Applying the language of the Code and corresponding regulations, the Court granted the petitioner a refund for the full amount of tax assessed. Among its observations, the Court noted that TAX’s application of the regulation was overly broad and erroneous. The Court placed particular emphasis on the regulation’s alternative definitions for “occasional sale,” as “a sale by a person who is engaged in sales on three or fewer separate occasions within one calendar year, **or** ... the sale or exchange of all or substantially all the assets of any business; **or** the reorganization or liquidation of any business.”

Based on these alternative definitions for occasional sales, the Court found the Tax Department’s conclusion that the occasional sale exemption did not apply simply because the five separate transactions exceeded the “three or fewer separate occasions” requirement erroneous. As the Court stated, “(t)ransactions resulting in the sale of all of the assets of a business or the liquidation of any business may also qualify for the ‘occasional sale’ label, even if the sales occur on more than three separate occasions within one calendar year.” A statement indicating that these are alternative definitions, and that the “three or fewer” requirement need not be invoked in classifying all types of occasional sales would be useful in applying the regulations to a specific set of facts.

In addition, it is the opinion of the Attorney General’s office that this regulation disregards the language in Code of Virginia § 58.1-602 by limiting the term “occasional sale” to tangible personal property sold which is not held or used by the seller in an activity for which he is required to hold a certificate of registration. The Attorney General believes the regulation reads the word “including” as the word “and.” In essence, the regulation may be interpreted to read that no registered dealers can make occasional sales. The Attorney General believes, as set forth in their opinions, that this is not the intent of the statute and the regulation should be amended to clarify this.

In addition to the above, a considerable amount of rulings and appeals have addressed the sale of a division or subsidiary of a business and when such sale would qualify for the occasional sale exemption. Greater detail contained within the regulation would provide clarification as to the application of the retail sales and use tax in these situations.

This regulatory action is necessary to ensure a predictable and adequate revenue stream for the government to provide for the health, safety, and welfare of its citizens.

## Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

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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.

## Need

*Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.*

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Government must have predictable and adequate revenue to provide for the health, safety, and welfare of its citizens. Tax regulations enhance customer service and voluntary compliance. The interpretations, examples, and other guidance in tax regulations ensure uniform application of the tax laws to taxpayers. Business taxpayers in particular find regulations essential in predicting the tax consequences of transactions and avoiding unanticipated tax assessments as the result of audits. Tax regulations also ensure that audits and other compliance activity cause the assessment and collection of the correct amount of tax.

## Substance

*Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.*

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The regulation at issue provides processes and procedures for the tax treatment of “occasional sales.” This regulatory action will clarify the criteria necessary in order for a transaction to be labeled an “occasional sale,” particularly concerning the sale of a business or a subsidiary of a business, and when such transaction would be labeled an “occasional sale.”

## Alternatives

*Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.*

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The Department considered alternatives to the proposed regulatory action. Doing nothing would leave the regulation inconsistent with the statute. Repealing the regulation would reduce the level of customer service and, as a result, tend to reduce the level of voluntary compliance with the tax laws. Audit and compliance activity would produce less uniform results and would be much less effective in enforcing the tax laws.

Since 1980, administrative interpretations of the tax laws that are not in the form of published rulings or a regulation have not been admissible as evidence in court. Code of Virginia § 58.1-205. Even published “rulings and policies themselves are not entitled to great weight, unless expressed in regulations.” *Chesapeake Hospital Authority v. Commonwealth*, 262 Va. 551, 554 S.E. 2d. 55 (2001). Therefore, to ensure enforcement, it is necessary to promulgate regulations containing the Tax Commissioner’s interpretations of the tax laws.

## Public participation

*Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments on this notice.*

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TAX is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. TAX is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so at the public hearing or on the Town Hall Public Comment Forum for this action or by email to the agency contact person listed on the Town Hall for this regulatory action. In order to be considered comments must be received by the last day of the public comment period.

A public hearing will be held and notice of the hearing may be found on the Virginia Regulatory Town Hall website ([www.townhall.virginia.gov](http://www.townhall.virginia.gov)) and can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

## Participatory approach

*Please indicate, to the extent known, if advisers (e.g., ad hoc advisory committees, technical advisory committees) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.*

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TAX is using the participatory approach to develop the proposal. TAX will form a technical advisory committee to consist of interested parties to assist in the development of the proposed regulation. Persons interested in participating on the advisory committee should contact the agency contact person listed for this regulatory action on the Town Hall prior to the end of the public comment period.

Kristen Peterson, Analyst  
600 East Main Street  
Richmond, VA 23219  
Ph: (804) 371-2340  
Fax: (804) 371-2355  
E-mail: [Kristen.Peterson@tax.virginia.gov](mailto:Kristen.Peterson@tax.virginia.gov)

## Family impact

*Assess the potential impact of the proposed 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.*

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This regulatory action is not expected to have an impact on family formation, stability, and autonomy.