



## Proposed Regulation Agency Background Document

<b>Agency name</b>	Department of Taxation ("TAX")
<b>Virginia Administrative Code (VAC) citation</b>	23 VAC 10-210-1020
<b>Regulation title</b>	Chapter 210 – Retail Sales and Use Tax
<b>Action title</b>	Amends 23 VAC 10-210-1020, "Motor Vehicle Refinishers, Painters, and Car Washers", to reflect a statutory change.
<b>Date this document prepared</b>	October 1, 2008

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.*

The 2005 General Assembly enacted House Bill 2762 (2005 Acts of Assembly, Chapter 121) amending the definition of "retail sale" and "sale at retail" set forth in § 58.1-602 of the Code of Virginia to include separately stated charges for materials used in automotive refinishing and repair when such materials become permanently attached to the vehicle being refinished or repaired. This change in the definition of "retail sale" and "sale at retail" is a departure from TAX's longstanding policy that treats automotive refinishers and painters as service providers and the taxable user and consumer of tangible personal property used in providing their service. This legislative change allows automotive refinishers and repairers the option of continuing to operate as service providers or to be treated as retailers by separately stating their charges for materials.

## 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., the 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.

## Purpose

*Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.*

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As a result of legislation passed by the 2005 General Assembly, the law with respect to the application of the sales and use tax to automotive refinishers and repairers was altered. A legislative change in the definition of “retail sale” and “sale at retail” provided automotive refinishers and repairers the option of continuing to operate as service providers, or to treat themselves as retailers with respect to tangible personal property that becomes permanently attached to motor vehicle during the repair process. The purpose of this action is to amend it to reflect this legislative change and to provide guidance to the automotive refinishing industry as to their options with respect to applying the sales and use tax.

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.

## Substance

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the “Detail of changes” section.)*

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The 2005 General Assembly amended the definition of “retail sale” and “sale at retail” to include separately stated charges for materials used in automotive refinishing and repair when such materials become permanently attached to the vehicle being refinished or repaired. This change in the definition of “retail sale” and “sale at retail” is a departure from longstanding policy that treats automotive refinishers and painters as service providers and the taxable user and consumer of tangible personal property used in providing their service.

Prior to the law change, automotive refinishers and painters are treated as service providers and are the taxable user and consumer of all tangible personal property, i.e. primer, paint, sealant, etc., consumed by them in restoring motor vehicles. The wording of this legislative change allows automotive refinishers and repairers the option of continuing to operate as service providers or to be treated as retailers by separately stating their charges for materials. This regulation section is being amended to reflect this

legislative change, provide guidance to the industry, and to also alleviate any confusion that may result from the differing tax application within the same industry.

**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 the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.*

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The primary advantages to this regulatory action are to provide guidance to the automotive refinishing industry and the general public as to the tax application to the automotive refinishing and repair industry as a result of the 2005 legislative to the definition of “retail sale” and “sale at retail”. This guidance will ensure compliance with TAX’s policies with regard to automotive refinishers and painters and ensure that these policies are universally applied by TAX’s audit staff.

The regulatory action poses no disadvantages to the public or the Commonwealth.

**Requirements more restrictive than federal**

*Please identify and describe any requirement of the proposal which are 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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There are no federal requirements applicable to this regulatory action.

**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.

**Public participation**

*Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.*

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 Code of Va. § 2.2-4007.1. 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.

**Economic impact**

*Please identify the anticipated economic impact of the proposed regulation.*

<b>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</b>	As the proposed regulatory activity is declarative of current law, the cost to the state to implement and enforce the amended regulation is anticipated to be de minimis.
<b>Projected cost of the regulation on localities</b>	As the proposed regulatory activity is declarative of current law, there is no anticipated cost on localities.
<b>Description of the individuals, businesses or other entities likely to be affected by the regulation</b>	As the proposed regulatory activity is declarative of current law, there is no anticipated cost on localities.
<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 (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	As the proposed regulatory activity is declarative of current law, it is not likely to affect individuals, businesses or other entities.
<b>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</b>	As the proposed regulatory activity is declarative of current law, it is not likely to affect individuals, businesses or other entities.

## 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.*

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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.

## Regulatory flexibility analysis

*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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The Department has considered modifying the regulatory methods for small businesses. The regulatory methods follow the least intrusive and burdensome method consistent with statutory language, and could not be made less burdensome for small businesses without jeopardizing the enforcement of the tax laws.

## Family impact

*Please assess the 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.

**Detail of changes**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

For changes to existing regulations, use this chart:

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change and rationale</b>
10-210-1020	N/A	Currently, this regulation section states that automotive painters, repairers and refinishers are service providers and are the taxable users and consumers of all tangible personal property used by them in painting, repairing and refinishing of automobiles, when such tangible personal property becomes permanently attached to the vehicle.	The 2005 General Assembly passed legislation that amended the definition of "retail sale" and "sale at retail" to include separately stated charges for materials used by automotive refinishers and repairers, thus allowing automotive repairers and refinishers to purchase these items exempt for resale and charge the tax to the customer on the separately stated charges. This option of accounting for the sales is totally at the discretion of the repairer and refinisher. This regulatory action amends the regulation section to conform to this statutory change. (House Bill 2762, Chapter 121, 2005 General Assembly).
10-210-1020	N/A	Current regulation section does not address consumables used by motor vehicle refinishers and painters that elect to treat themselves as retailers.	The regulation section has been amended to add a section to further clarify that consumables are taxable to motor vehicle refinishers and painters, regardless of their election of tax treatment.