



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

<b>Agency name</b>	Department of Taxation ("TAX")
<b>Virginia Administrative Code (VAC) citation</b>	23 VAC 10-210-560
<b>Regulation title</b>	Chapter 210 - Retail Sales and Use Tax
<b>Action title</b>	Fabrication
<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
23 VAC 10-210-560	§ 58.1-609.5	Chapter 6	Amend the current sales and use tax regulation on Fabrication to more accurately set forth TAX's policy.

The sales and use tax is applied differently to fabricators who fabricate for their own use and consumption and fabricators who fabricate for resale. The operation of a fabricator may constitute fabrication for which the total charge is taxable as opposed to an operation that constitutes a tax exempt service. This regulation will be amended to more clearly set forth the policy with respect to all fabricators.

This regulation will be amended to reflect the 2005 opinion of the Circuit Court of the City of Richmond in the case of Hardaway Construction Corporation of Tennessee v. Commonwealth of Virginia, Department of Taxation. In this case the Circuit Court opined that the operation of fabrication does not implicate the Virginia use tax, only the imposition of the sales tax.

### 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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This regulation will be divided into five sections to make the regulation easily readable and to ensure an accurate understanding of TAX’s policy with respect to fabricators. The regulation will include a separate Definitions section, numerous examples as to what constitutes fabrication, and provide lists to distinguish which operations constitute fabrication for which the total charge is taxable as opposed to operations which constitute a tax exempt service.

**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.*

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.

## 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.*

TAX will use the participatory approach to develop the proposal if it receives at least 10 written requests to use the participatory approach prior to the end of the public comment period. Persons requesting TAX to use the participatory approach and interested in assisting in the development of a proposal should contact the agency contact person listed for this regulatory action on the Town Hall. Notification of the composition of the advisory committee will be sent to all applicants.

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## 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.