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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 10-390-40
<b>Regulation title(s)</b>	Virginia Soft Drink Excise Tax Regulations
<b>Action title</b>	Amend the Virginia Soft Drink Excise Tax Regulations to Conform to Statutory Changes
<b>Date this document prepared</b>	June 19, 2018

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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 the Virginia Soft Drink Excise Tax Regulations to conform to current law and existing administrative procedures regarding the collection of the tax, and to strike provisions that are no longer accurate due to changes in such law and procedures.

The affected provisions deal with the collection of the soft drink excise tax, return due dates and extensions, and penalties and interest that may apply for failure to timely file or pay the amount of tax due. This regulatory action does not reflect any change in current tax policy.

## 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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Not applicable.

## 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 amendments to the Virginia Soft Drink Excise Tax Regulations on June 19, 2018.

## 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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Virginia Code § 58.1-203 authorizes the Tax Commissioner to issue regulations relating to the interpretation and enforcement of the laws governing taxes administered by the Department of Taxation ("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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As a result of a periodic review of the Virginia Soft Drink Excise Tax Regulations initiated by the Department on June 27, 2016 and completed July 18, 2016, the Department has determined that 23 VAC 10-390-40, relating to collection of the soft drink excise tax, should be amended. This regulatory action is necessary to reflect legislative changes and administrative procedures affecting the collection of the soft drink excise tax. In addition, some existing regulatory language is unnecessary because it provides no additional guidance regarding clear and unambiguous statutes. Therefore, this regulatory action will update the regulation to conform to legislative changes and administrative procedures. It will also repeal language that is duplicative or outdated. The amendment of this regulation does not reflect a 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 the Soft Drink Excise Tax, this action is not expected to be controversial.

## 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 section of the Virginia Soft Drink Excise Tax Regulations, 23VAC10-390-40, relating to collection of the soft drink excise tax. Virginia imposes an annual excise tax on wholesalers and distributors of carbonated soft drinks. The tax is based on the gross receipts of each wholesaler and distributor from the sale of such soft drinks during the year. The *Code of Virginia* requires that this tax be collected by the Department in the same manner as the income tax is collected.

This regulatory action will amend this section of the Virginia Soft Drink Excise Tax Regulations to conform to current law and existing administrative procedures regarding the collection of the tax, and to strike provisions that are no longer accurate due to changes in the law. The affected provisions deal with the collection of the soft drink excise tax, return due dates and extensions, and penalties and interest that may apply for failure to timely file or pay the amount of tax due.

During the 2005, 1999, 1991, and 1989 Sessions, the General Assembly made several modifications to the way in which the Virginia income tax is collected:

- House Bill 2325 (2005 *Acts of Assembly*, Chapter 100): This legislation eliminated the requirement for income taxpayers to file an extension form with the Department before they could elect to file their income tax return on extension.
- House Bill 1678 (1999 *Acts of Assembly*, Chapter 180) and Senate Bill 868 (1999 *Acts of Assembly*, Chapter 146): This legislation modified Va. Code § 58.1-15 by equalizing the rate of interest charged (on assessments) and the rate of interest paid (on refunds).
- Senate Bill 739 (1991 *Acts of Assembly*, Chapter 316): This legislation modified Va. Code § 58.1-15 relating to the rate of interest charged (on assessments) or paid (on refunds). This legislation also increased the penalty for late-filed income tax returns and the penalty for late payment of the income tax from 5 percent to 6 percent.
- House Bill 1596 (1989 *Acts of Assembly*, Chapter 629): This legislation modified the penalty for late-filed income tax returns from ten percent to five percent per month (for up to 5 months) for individuals and from \$100 to the greater of \$100 or five percent per month (for up to 5 months) for corporations. This legislation also modified the penalty for late paying an income tax liability from five percent to five percent per month (for up to 5 months).

Because this regulation was promulgated prior to the enactment of such legislation, this regulation section is inconsistent with these legislative changes. Other language is unnecessary because it provides no additional guidance to clear and unambiguous statutes. Therefore, this regulatory action will update language to conform to legislative changes and current administrative procedures, and it will repeal other language that is duplicative or outdated. 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.*

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 administrative procedures, and by striking obsolete language. Therefore, 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.*

There are no applicable 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.*

No locality would be particularly affected by the repeal of this regulation.

**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.

As this regulatory action amends a regulatory section so that it conforms to existing law and administrative procedures, this action is necessary. The only alternative to this action would be to leave in place a regulation section that contradicts existing law and administrative procedures. As a result, this regulatory action is 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.

**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 Soft Drink Excise Tax Regulation will be amended to bring it in conformity with current law and administrative procedures, there will be no costs to the state 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 Soft Drink Excise Tax Regulation will be amended to bring it in conformity with current law and administrative procedures, there will be no costs to localities 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>During Fiscal Year 2017, there were approximately 70 taxpayers who filed Soft Drink Excise Tax returns. As this section of the Virginia Soft Drink Excise Tax Regulations will be amended to bring it in conformity with current law and administrative procedures, no taxpayers 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 Virginia Soft Drink Excise Tax Regulations will be amended to bring it in conformity with current law and administrative procedures, no taxpayers, including small businesses, 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></p>	<p>As this section of the Virginia Soft Drink Excise Tax Regulations will be amended to bring it in conformity with current law and administrative procedures, no taxpayers will be affected by its amendment.</p>

<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>	
<b>Beneficial impact the regulation is designed to produce.</b>	As this section of the Soft Drink Excise Tax Regulation will be amended to bring it in conformity with current law and administrative procedures, its amendment will ensure uniform application of the tax laws to taxpayers. In addition, business taxpayers will be better equipped to understand the options available to them regarding filing their Soft Drink Excise Tax returns and paying any associated tax liability.

### 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 unchanged. By keeping the regulation unchanged, the Department would continue to have a regulation that is not in conformity with current law and administrative procedures. Because this action would only amend the regulation to bring it in conformity with current law and administrative procedures, it would not affect small businesses.

### 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

No comments were received.

As a result of a periodic review of the Virginia Soft Drink Excise Tax Regulations initiated by the Department of Taxation on June 27, 2016 and completed July 18, 2016, the Department of Taxation has determined that 23 VAC 10-390-40, relating to collection of the Soft Drink Excise Tax, should be amended. This action is necessary to reflect legislative changes affecting the collection of the soft drink excise tax. Some existing regulatory language is unnecessary because it provides no additional guidance regarding clear and unambiguous statutes. Other language is unnecessary because it refers to a mailing address to which to send soft drink excise tax returns that the Department no longer uses. Therefore, this regulatory action will update language to conform to legislative changes and current administrative procedures, and it will repeal other language that is duplicative or outdated. The amendment of this regulation does not reflect a 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.

Amendment of the regulation does not reflect any change in current tax policy. Amendment of the regulation will have no impact on the administration of the Virginia Soft Drink Excise Tax. Consequently, small businesses will not be affected by this regulatory action.

**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.*

Because this action would only amend the regulation to bring it in conformity with current law and administrative procedures, it will have no impact on the institution of the family; family stability; the authority and rights of parents in the education, nurturing, and supervision of their children; economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; the marital commitment; or disposable family income.

**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:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
23VAC10-390-40(A)	Not applicable	Provides that a check for the amount of tax, and if applicable, penalty and interest, should be made payable to the Department and submitted with the properly filed return.	<p>The action will change the regulatory language so that it refers to "payments" rather than referring specifically to "checks." This change would be consistent with any electronic payment options that may become available.</p> <p>The word "should" has been changed to "shall" to conform to § 3.22 of the <u>Form, Style, and Procedure Manual for Publication of Virginia Regulations</u>.</p>
23VAC10-390-40(B)	Not applicable	Provides an address to which returns are required to be filed and a return due date.	<p>This action will repeal regulatory language that refers to a specific mailing address to which to send soft drink excise tax returns that the Department no longer uses. Repealing this language will allow the Department flexibility to change the mailing address that it lists on its forms and instructions.</p> <p>The action will clarify the return due dates applicable to corporate taxpayers and non-corporate taxpayers. This is consistent with current administrative procedures. See Soft Drink Excise Tax Return Instructions, Page 2 (Form 404).</p> <p>The phrase "are required to" has been changed to "shall" to conform to § 3.22 of the <u>Form, Style, and Procedure Manual for Publication of Virginia Regulations</u>.</p>
23VAC10-390-40(B)(1)	Not applicable	Provides that the process for electing an extension of time for filing the soft drink excise tax return and the extended return due date.	<p>This action will repeal regulatory language that requires that a taxpayer who seeks to file on extension to submit a request for extension form with the Department prior to the original due date of the return. In House Bill 2325 (2005 Acts of Assembly, Chapter 100), the General Assembly eliminated this requirement for income taxpayers. Because <i>Va. Code</i> § 58.1-1703 requires that the soft drink excise tax be collected in the same manner as the income tax, this requirement was also eliminated for soft drink excise taxpayers by operation of law. Repealing regulation language regarding this requirement will make the regulation consistent with current law and administrative procedures. See Soft</p>



			<p>Drink Excise Tax Return Instructions, Page 2 (Form 404).</p> <p>Because the rules regarding extensions constitute a separate requirement regarding the Soft Drink Excise Tax collection procedures, this regulatory action moves such rules to a new subsection C relating solely to extensions. Because this regulatory action creates a new subsection C, the subsequent subsections have been re-alphabetized in accordance with § 3.7 of the <u>Form, Style, and Procedure Manual for Publication of Virginia Regulations</u>.</p> <p>These changes will allow taxpayers to elect an extension of time within which to file the Soft Drink Excise Tax return to the extended due date set forth and in the manner prescribed for filing Virginia income tax returns on extension.</p>
23VAC10-390-40(B)(2)	Not applicable	Provides that, if an extension of filing time is granted by the Department, interest at the rate established pursuant to Section 6621 of the Internal Revenue Code of 1954, as amended, accrues from the date the return was originally due to be filed to the date of payment.	<p>This action will modify regulatory language that provides that the interest rate for extension purposes is the interest rate established under IRC § 6621. In House Bill 1678 (1999 <i>Acts of Assembly</i>, Chapter 180), Senate Bill 868 (1999 <i>Acts of Assembly</i>, Chapter 146), and Senate Bill 739 (1991 <i>Acts of Assembly</i>, Chapter 316), the General Assembly modified the interest rate charged on underpayments and overpayments so that it generally equaled the IRC § 6621, plus two percent. Modifying regulation language regarding the interest rate will make the regulation consistent with current law and administrative procedures. See Soft Drink Excise Tax Return Instructions, page 2 (Form 404).</p> <p>The action will clarify the penalties applicable to taxpayers filing on extension. This clarification is consistent with current administrative procedures. See Soft Drink Excise Tax Return Instructions, page 2 (Form 404). This modified regulation language will also be contained in subdivision 1 of new subsection C.</p>
23VAC10-390-40(C)	Not applicable	Provides that penalties and interest are imposed for failure to file a return, for late	After the promulgation of this regulation, several bills were enacted by the General Assembly that modified the

		<p>filing, for filing a false or fraudulent return, and for failure to pay when due the full amount of tax as shown on the face of the return and are assessed in the same manner as the income tax penalties.</p>	<p>underlying statutory provisions relating to the percentages used to calculate the "late file" and "late payment" penalties for income tax purposes:</p> <ul style="list-style-type: none"> <li>• Senate Bill 739 (1991 <i>Acts of Assembly</i>, Chapter 316): This legislation increased the income tax late filing and late payment penalties from 5 percent to 6 percent per month (for up to 6 months).</li> <li>• House Bill 1596 (1989 <i>Acts of Assembly</i>, Chapter 629): This legislation modified the penalty for late-filed income tax returns from ten percent to five percent per month (for up to 5 months) for individuals and from \$100 to the greater of \$100 or five percent per month (for up to 5 months) for corporations. This legislation also increased the income tax late payment penalty 5 percent to 5 percent per month (for up to 5 months).</li> </ul> <p>Because <i>Va. Code</i> § 58.1-1703 requires that the Soft Drink Excise Tax be collected in the same manner as the income tax, the penalty percentages used for Soft Drink Excise Tax purposes have changed accordingly by operation of law.</p> <p>Because such legislation was enacted after promulgation of this regulation, the information currently provided regarding penalties is incomplete and inaccurate. The information is also unnecessary because it is duplicative of the information that is already provided in sections of the <i>Code of Virginia</i> cited in this regulation section. This regulatory action will strike such unnecessary information.</p> <p>The action will also clarify which penalties are applicable to corporate taxpayers and non-corporate taxpayers. It will provide that, if the taxpayer is not a corporation, the nature and amount of the penalties imposed shall be determined as if the comparable</p>
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			<p>individual income tax penalties apply to the soft drink excise tax rather than the individual income tax. It will also provide that, if the taxpayer is a corporation, the nature and amount of the penalties imposed shall be determined as if the comparable corporate income tax penalties apply to the soft drink excise tax rather than the corporate income tax. This is consistent with current administrative procedures. See Soft Drink Excise Tax Return Instructions, Page 2 (Form 404).</p> <p>This modified regulation language regarding penalties will be in a new subsection D.</p>
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