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Fast-Track Regulation Agency Background Document

Agency name	Department of Taxation
Virginia Administrative Code (VAC) Chapter citation(s)	23 VAC10-210
VAC Chapter title(s)	Retail Sales and Use Tax
Action title	Amendment of the Retail Sales and Use Tax Regulation to Reflect Statutory Changes
Date this document prepared	January 10, 2023

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

As a result of a periodic review of the Retail Sales and Use Tax Regulation initiated by the Department of Taxation (the "Department") on August 10, 2022 and completed January 10, 2023, the Department has determined that the regulation should be amended. The Department received no comments during the periodic review. The amendment of the regulation does not reflect any change in current tax policy and will have no impact on the administration of the Retail Sales and Use Tax. The regulation will simply be amended to reflect statutory changes.

Legislation enacted in the 2017 Session of the General Assembly, House Bill [1890](#) and Senate Bill [1308](#) (2017 Acts of Assembly, Chapter [436](#) and [449](#)) changed the Retail Sales and Use Tax treatment of persons who sell certain items of tangible personal property listed in the statutory law and install these items onto the customer's real property. Prior to the law change, dealers that both sold and installed fences, venetian blinds, window shades, awnings, storm windows and doors, floor coverings, cabinets,

countertops, kitchen equipment, window air conditioning units or other like or comparable items were exempted from the general rule that contractors are the users of the tangible personal property they install and instead were required to collect tax from their customers on the sale of such items. The legislation changed the tax treatment of these transactions to treat the sellers as contractors who are the users and consumers of the items they install and thus required to pay the tax on their purchase of the items. Accordingly, no tax is collected from the contractors' customers on the sale of the tangible personal property to be installed. This action will amend [23 VAC10-210-410](#) (Contractors respecting real estate) to reflect this statutory change.

Additionally, legislation enacted in the 2019 Session of the General Assembly, Senate Bill [1615](#) (2019 Acts of Assembly, Chapter [758](#)) repealed the restriction prohibiting Retail Sales and Use Tax dealers from absorbing the payment of the tax. Prior to this law change, dealers were generally prohibited from absorbing, or advertising or holding out to the public that they will absorb payment of, all or any part of the sales or use tax due on a taxable transaction. The only exception to the prohibition was during the annual Sales Tax Holiday that takes place on the first Friday in August and ends at 11:59 PM on the following Sunday. This action will amend [23 VAC10-210-340](#) (Collection of Tax by Dealers) to reflect this statutory change. This action will also amend the section to remove language listing the different tax rates in different areas of the Commonwealth to eliminate the need for future amendments of the section whenever there is a rate change.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

Not applicable

Statement of Final Agency Action

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.

The Department of Taxation approved the amendment of the Virginia Retail Sales and Use Tax Regulation on January 10, 2023

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in the ORM procedures, "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

Consistent with Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track rulemaking process.

This action is prompted by a recently completed periodic review of the Retail Sales and Use Tax regulation. As explained in the Brief Summary above, this action will amend [23 VAC10-210-410](#) (Contractors respecting real estate) to reflect the changes made by 2017 Acts of Assembly, Chapters [436](#) and [449](#) and it will amend [23 VAC10-210-340](#) (Collection of Tax by Dealers) to reflect the changes made by 2019 Acts of Assembly, Chapter [758](#).

The changes to [23 VAC10-210-410](#) (Contractors respecting real estate) are necessitated by 2017 legislation that received industry support because it provided administrative simplification to businesses by treating businesses that sell and install the statutorily listed items the same as other contractors. The statutory provision repealed by the legislation had caused confusion among some taxpayers as to whether they should be paying the tax on their purchases of the listed items or collecting sales tax on their sales of the items. The Department of Taxation has implemented the legislation and is not aware of any concerns expressed by the affected parties. Accordingly, the changes to this regulation section are expected to be noncontroversial.

The changes to [23 VAC10-210-340](#) (Collection of Tax by Dealers) are necessitated by 2019 legislation that allowed Virginia dealers to offer to absorb payment of the sales tax for their customers, as allowed in some other states. The Department of Taxation has implemented the legislation and is not aware of any concerns expressed by affected parties. Accordingly, the changes to this regulation section are expected to be noncontroversial.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

Code of Va. § [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. Code of Va. § [58.1-601](#) authorizes the Department of Taxation to administer the Retail Sales and Use Tax.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it is intended to solve.

This action is necessary to conform [23 VAC10-210-410](#) (Contractors respecting real estate) to current statutory law by reflecting the changes made by 2017 Acts of Assembly, Chapters [436](#) and [449](#) to Code of Va. § [58.1-610](#). The legislation struck a provision of subsection D of Code of Va. § [58.1-610](#) which deemed persons who sell certain listed items and install the items onto the customer's real property to be retailers rather than contractors. Prior to the law change, dealers that both sold and installed fences, venetian blinds, window shades, awnings, storm windows and doors, floor coverings, cabinets, countertops, kitchen equipment, window air conditioning units or other like or comparable items were exempted from the general rule that contractors are the users of the tangible personal property they install and instead were required to collect tax from their customers on the sale of such items. The legislation thereby changed the tax treatment of these transactions to treat the sellers as contractors who are the users and consumers of the items they install and thus required to pay the tax on their purchase of the items. Accordingly, no tax is collected from the contractors' customers on the sale of the tangible personal property to be installed.

This action is also necessary to conform [23 VAC10-210-340](#) (Collection of Tax by Dealers) to current statutory law by reflecting the changes made by 2019 Acts of Assembly, Chapter [758](#), which repealed Va.

Code § 58.1-626, which prohibited dealers from absorbing the payment of the tax, and added Va. Code § [58.1-626.1](#), which allows dealers to absorb payment of the tax provided that such dealer:

- Separately states the sales price of the item and the full amount of tax due on the item at the point of sale; and
- Remits to the Department of Taxation the full amount of tax due with the return that covers the period in which the dealer completed the sale or transaction.

This action will also amend the section to remove language listing the different tax rates in different areas of the Commonwealth to eliminate the need for future amendments of the section whenever there is a rate change.

Without this regulatory change, the regulation will be incorrect and potentially a source of confusion for dealers and their customers. As the Retail Sales and Use Tax plays a critical role in providing revenue for Virginia’s General Fund, as well as funding for transportation and public schools, this regulatory change is essential to protect the health, safety, or welfare of citizens by eliminating a potential source of confusion for taxpayers.

Substance

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 action will amend [23 VAC10-210-410](#) (Contractors respecting real estate) to reflect the changes made by 2017 Acts of Assembly, Chapters [436](#) and [449](#) to Code of Va. § [58.1-610](#). Specifically, the action will strike all of the current text in subsection D, which states that persons selling and installing tangible personal property that becomes real property after installation, including fences, venetian blinds, window shades, awnings, storm windows and doors, floor coverings, cabinets, kitchen equipment, window air conditioning units, and other like or comparable items, are treated as retailers rather than using or consuming contractors. In order to maintain the current numbering of the succeeding subsections of the regulation, the stricken text will be replaced with “Reserved.”

This action will also amend [23 VAC10-210-340](#) (Collection of Tax by Dealers) to reflect the changes made by 2019 Acts of Assembly, Chapter [758](#), which repealed Va. Code § 58.1-626, which prohibited dealers from absorbing the payment of the tax, and added Va. Code § [58.1-626.1](#), which allows dealers to absorb payment of the tax provided that such dealer:

- Separately states the sales price of the item and the full amount of tax due on the item at the point of sale; and
- Remits to the Department of Taxation the full amount of tax due with the return that covers the period in which the dealer completed the sale or transaction.

This action will also amend subsection D of [23 VAC10-210-340](#) (Collection of Tax by Dealers) to remove language listing the different tax rates in different areas of the Commonwealth to eliminate the need for future amendments of the section whenever there is a rate change.

Issues

Identify the issues associated with the regulatory change, 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, include a specific statement to that effect.

As the regulatory action will update the regulation to reflect current law, there are no issues or disadvantages to the public, the Commonwealth, or the agency associated with this action. The primary advantage to the public, the Commonwealth, and the agency is that this action will conform the regulation to current statutory law.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and 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 specific statement to that effect.

There are no applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Consistent with § 2.2-4007.04 of the Code of Virginia, identify any other state agencies, localities, or other entities particularly affected by the regulatory change. Other entities could include local partners such as tribal governments, school boards, community services boards, and similar regional organizations. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected

As the regulatory action will update the regulation to reflect current law, there are no issues or disadvantages to any other state agencies associated with this action and thus, no state agencies are particularly affected.

Localities Particularly Affected

As the regulatory action will update the regulation to reflect current law, there are no issues or disadvantages to any localities associated with this action and thus, no localities are particularly affected.

Other Entities Particularly Affected

As the regulatory action will update the regulation to reflect current law, there are no issues or disadvantages to any entities associated with this action and thus, no entities are particularly affected.

Economic Impact

Consistent with § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact,

specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is the proposed change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources</p>	<p>As the Department implemented the changes reflected in this action when the legislation necessitating them took effect, there is no cost to the Department of Taxation from the regulatory change.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>As this action will update the regulation to reflect current law, there is no cost to other state agencies from the regulatory change.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>Conforming the regulation to current law will eliminate the potential confusion of having a regulation that differs from current statutory law.</p>

Impact on Localities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a or 2) on which it was reported. Information provided on that form need not be repeated here.

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>As the regulatory action will update the regulation to reflect current law, there will be no costs, savings, fees or revenues to localities related to the regulatory change.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>Updating the regulation will eliminate any potential confusion caused by having a regulation which is out-of-date.</p>

Impact on Other Entities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a, 3, or 4) on which it was reported. Information provided on that form need not be repeated here.

<p>Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.</p>	<p>As the regulatory action will update the regulation to reflect current law, no individuals, businesses, or other entities will be affected by the regulatory change.</p>
<p>Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. 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 the regulatory action will update the regulation to reflect current law, no individuals, businesses, or other entities will be affected by the regulatory change.</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the</p>	<p>As the regulatory action will update the regulation</p>

<p>regulatory change. Be specific and include all costs including, but not limited to:</p> <ul style="list-style-type: none"> a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements. 	<p>to reflect current law, there are no costs related to the regulatory change to any individuals, businesses, or other entities.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>Updating the regulation will eliminate confusion and unnecessary regulation text.</p>

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.

As the regulatory action will update the regulation to reflect current law, the only alternative to this action would be to leave in place the outdated provisions.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

Regulatory Flexibility Analysis

Consistent with § 2.2-4007.1 B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.

As the regulatory action will update the regulation to reflect current law, the only alternative to this action would be to leave in place the outdated provisions.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

Consistent with § 2.2-4011 of the Code of Virginia, 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.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

The Department of Taxation is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to:

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 Richmond, Virginia 23261-7185
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 Telephone: (804) 371-2299
 Fax: (804) 774-3168

In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements

<p>23 VAC10-210-340 (B)</p>		<p>Subsection B paraphrases former <i>Va. Code</i> § 58.1-626 before its repeal by 2019 Acts of Assembly, Chapter 758. For the text prior to repeal, see 2006 Acts of Assembly, Chapter 579. In short, <i>Va. Code</i> § 58.1-626 prohibited dealers from holding out to the public that they will absorb the Retail Sales and Use Tax, except with respect to the annual sales tax holiday that is provided for by <i>Va. Code</i> § 58.1-611.2.</p>	<p>This action will strike the text of this subsection as necessitated by the repeal of <i>Va. Code</i> § 58.1-626 and replace it with the following text outlining the provisions of <i>Va. Code</i> § 58.1-626.1:</p> <p>“A dealer may absorb and assume payment of all or any part of the sales or use tax otherwise due from the purchaser, consumer, or lessee provided such dealer separately states the sales price of an item and the full amount of sales and use tax due on such item at the point of the sale or transaction, and such dealer remits to the Department the full amount of tax due with the return that covers the period in which the dealer completed the sale or transaction.”</p>
<p>23 VAC10-210-410 (D)</p>		<p>Subsection D explains the regulation’s requirement concerning any dealer who collects the tax at a rate higher than that allowed by law.</p>	<p>The action strikes language listing the rates in different areas of the Commonwealth, as follows:</p> <p>Overcollection of the tax. Any dealer who collects tax in excess of a 5.3% (6.0% in the Hampton Roads and Northern Virginia Regions) <u>the correct</u> rate or who otherwise overcollects the tax, except as may be authorized under the bracket system or the special provisions relating to vending machine sales, must remit any amount overcollected to the state on a timely basis. Failure to do so will result in a penalty of 25% of the amount of the overcollection. For definitions of the "Hampton Roads Region" and the "Northern Virginia Region" see 23VAC10-210-2070.</p> <p>This change is intended to eliminate the need to amend the section whenever there is a sales tax rate change. As the current references to different sales tax rates is not necessary, this change should have no impact on taxpayers.</p>
<p>23 VAC10-210-410 (G)</p>		<p>Subsection G explains the previous law’s requirement that persons who both sell and install fences, venetian blinds, window shades, awnings, storm windows and doors, floor coverings, cabinets, countertops, kitchen equipment, window</p>	<p>This action will strike the current text of subsection G and replace it with “Reserved.” to preserve the current numbering of the succeeding subsections in order to prevent confusion as all of these subsections are cited in numerous Public Documents issued by the Department of Taxation.</p>

		<p>air conditioning units or other like or comparable items were treated as retailers and thus required to collect the tax from their customers on the sale of such items.</p> <p>Subsection G operates as an exception to the general rule that contractors respecting real estate are the users and consumers of the items they sell and install and thus must pay sales tax on the items.</p>	<p>The striking of the current text of Subsection G will eliminate the regulation's requirement that sellers of the listed items are treated as retailers and thus required to collect the tax from their customers on the sale of such items. Such persons will be subject to the general rule that contractors respecting real estate are the users and consumers of the items they sell and install and thus must pay sales tax on the items</p> <p>As the statutory change necessitating this regulatory change was implemented in 2017, this change will have no impact on regulated parties.</p>
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