

GUIDELINES AND RULES FOR THE TOBACCO PRODUCTS TAX

May 4, 2020

Effective July 1, 2020, Item 3-5.21 of House Bill 30 (the 2020 Appropriation Act) increases the tobacco products tax rates on all products subject to the tax for taxable sales or purchases occurring on and after such date. This provision also imposes the tobacco products tax on liquid nicotine products at the rate of \$0.066 per milliliter of liquid nicotine, effective July 1, 2020. Additionally, the cigarette tax rate is increased effective July 1, 2020. Guidance regarding the cigarette tax rate increase was provided in the Virginia Cigarette Tax Rate Increase Guidelines and Rules, available separately on the Department of Taxation's (the Department's) website.

Item 3-5.21 of the 2020 Appropriation Act requires the Tax Commissioner to establish guidelines and rules ("guidelines") for implementation of the increased tobacco products tax rates and the tobacco products tax on liquid nicotine. Item 3-5.21(D) of the 2020 Appropriation Act provides that the development and publication of these guidelines is exempt from the provisions of the Administrative Process Act (*Va. Code* § 2.2-4000 *et seq.*).

These guidelines supersede any guidance for the tax issued previously that may be in conflict with these guidelines. These guidelines are available online in the Law, Rules and Decisions section of the Department's website. As necessary, additional guidelines and rules will be published and posted on the Department's website at www.tax.virginia.gov. For additional information, please contact the Department's Tobacco Unit at tobaccounit@tax.virginia.gov or call (804) 371-0730.

Definitions

For purposes of the Tobacco Products Tax:

"Affiliate" means an individual or entity that controls, is controlled by, or is under common control with another individual or entity. An individual or entity controls an entity if the individual or entity owns, directly or indirectly, more than 10 percent of the voting securities of the entity.

"Alternative nicotine product" means any noncombustible product containing nicotine that is not made of tobacco and is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means. "Alternative nicotine product" does not include any nicotine vapor product or any product regulated as a drug or device by the U.S. Food and Drug Administration under Chapter V (21 U.S.C. § 351 *et seq.*) of the Federal Food, Drug, and Cosmetic Act.

"Chewing tobacco" means any leaf tobacco not intended to be smoked.

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“Cigar” means any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco (other than any roll of tobacco that is a cigarette).

“Cigarette” means any product that contains nicotine, is intended to be burned and produces smoke from combustion under ordinary conditions of use, and consists of or contains (i) any roll of tobacco wrapped in paper or in any substance not containing tobacco; (ii) tobacco, in any form, that is burned and functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (iii) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (i) of this definition. The term “cigarette” includes “roll-your-own” tobacco, which means any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes. For purposes of this definition of “cigarette,” 0.09 ounces of “roll-your-own” tobacco shall constitute one individual “cigarette.”

“Distributor” means 1) any person engaged in the business of selling tobacco products in the Commonwealth who brings, or causes to be brought, into the Commonwealth from outside the Commonwealth any tobacco products for sale in the Commonwealth; 2) any person who makes, manufactures, fabricates, or stores tobacco products in the Commonwealth for sale in the Commonwealth; 3) any person engaged in the business of selling tobacco products outside the Commonwealth who ships or transports tobacco products to any person in the business of selling tobacco products in the Commonwealth; or 4) any retail dealer in possession of untaxed tobacco products in the Commonwealth.

“Dry snuff” means a tobacco product consisting of finely cut, ground, or powdered tobacco that is not intended to be smoked and is intended to be placed in the nasal cavity. “Dry snuff” may also be known as “nasal snuff.”

“Heated tobacco product” means a product containing tobacco that produces an inhalable aerosol (i) by heating the tobacco by means of an electronic device without combustion of the tobacco or (ii) by heat generated from a combustion source that only or primarily heats rather than burns the tobacco.

“Liquid nicotine” means a liquid or other substance containing nicotine in any concentration that is sold, marketed, or intended for use in a nicotine vapor product.

“Loose leaf tobacco” means any leaf tobacco that is not intended to be smoked, but shall not include moist snuff.

“Manufacturer” means a person who manufactures or produces tobacco products and sells tobacco products to a distributor.

“Manufacturer’s representative” means a person employed by a manufacturer to sell or distribute the manufacturer’s tobacco products.

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“Manufacturer’s sales price” means the actual price for which a manufacturer, manufacturer’s representative, or any other person sells tobacco products to an unaffiliated distributor.

“Moist snuff” means a tobacco product consisting of finely cut, ground, or powdered tobacco that is not intended to be smoked but shall not include any finely cut, ground or powdered tobacco that is intended to be placed in the nasal cavity. “Moist snuff” includes items such as snus and dissolvable tobacco products.

“Nicotine vapor product” means any noncombustible product containing nicotine that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor from nicotine in a solution or other form. “Nicotine vapor product” includes any electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and any cartridge or other container of nicotine in a solution or other form that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device. “Nicotine vapor product” does not include any product regulated by the U.S. Food and Drug Administration under Chapter V (21 U.S.C. § 351 et seq.) of the Federal Food, Drug, and Cosmetic Act.

“Person” means any individual, corporation, partnership, association, company, business, trust, joint venture, or other legal entity.

“Pipe tobacco” means any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco to be smoked in a pipe.

“Retail dealer” means any person who sells or offers any tobacco products for sale to consumers.

“Smokeless tobacco” means any snuff or chewing tobacco.

“Snuff” means any finely cut, ground, or powdered tobacco that is not intended to be smoked.

“Tobacco product” or “tobacco products” means any (i) cigar; (ii) smokeless tobacco; (iii) pipe tobacco; (iv) loose leaf tobacco; or (v) liquid nicotine. “Tobacco products” does not include any cigarette, roll-your-own tobacco, heated tobacco product, alternative nicotine product, or nicotine vapor product. Although “tobacco products” does not include any nicotine vapor product, “tobacco products” includes any liquid nicotine provided with any nicotine vapor product.

“Wholesale dealer” means any person who sells tobacco products at wholesale to retail dealers or institutional, commercial or industrial users.

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(See *Va. Code* § 58.1-1000, *Va. Code* § 58.1-1021.01, and Item 3-5.21 of 2020 House Bill 30).

Imposition of the Tax

The tobacco products tax is generally paid by licensed distributors. No person may engage in the business of selling tobacco products as a distributor in the Commonwealth without first having received a separate license from the Department for each place of business. Each application for a distributor's license must be accompanied by an application fee. The Department will conduct a background investigation of the applicant and such of its officers and employees as deemed necessary by the Department. (See Licensing of Distributors)

In order to facilitate the implementation of the imposition of the tax on liquid nicotine, the Department will allow persons to sell liquid nicotine subsequent to July 1, 2020 and prior to January 1, 2021 without having obtained a distributors license on the following conditions:

- The person files their return and pays the tobacco products tax to the Department; and
- The person files their distributor's application with the Department and pays their application fee prior to October 1, 2020.

The Department maintains a current list of licensed distributors that is updated on a monthly basis and posted on the Department's website at www.tax.virginia.gov. Persons who purchase tobacco products for resale should check this list frequently to ensure that they are buying from licensed distributors.

Any person, except as provided by law, who imports, transports, or possesses for resale tobacco products upon which the tax has not been paid is liable for the tax on the untaxed tobacco products and, in certain situations, penalties. (See Penalties Applicable to Unlawful Possession of Tobacco Products)

The tax is imposed on tobacco products a distributor 1) brings or causes to be brought into the Commonwealth for sale in the Commonwealth; 2) makes, manufactures, or fabricates in the Commonwealth for sale in the Commonwealth; or 3) ships or transports to retailer dealers in the Commonwealth to be sold by those retail dealers in the Commonwealth. The tax, however, is due when tobacco products are sold in the Commonwealth and not when the tobacco products are brought into the Commonwealth for sale. The tax is imposed once, and only once, on all tobacco products for sale in the Commonwealth. (See *Va. Code* § 58.1-1021.02)

Distributors may sell tobacco products, with proper documentation, to other licensed distributors and affiliates exempt from the tax. The purchasing distributor is liable for the tax for such tobacco products when he sells to a retailer within the Commonwealth.

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Licensed distributors will continue to be liable for the tax on sales of tobacco products to retailers in Virginia.

Each distributor who sells tobacco products to another licensed distributor or an affiliate must render with each sale itemized invoices showing the distributor's name and address, the purchaser's name and address, the date of sale, all prices, and the wording "Virginia Tobacco Products Tax NOT Paid." The seller must preserve legible copies of invoices for three years after the date of sale.

Example 1

A distributor sells tobacco products to a retailer in Virginia. The distributor pays the tax on the products. The retailer subsequently ships the tobacco products to a store in North Carolina for sale in that state. The retailer asks for a refund of the tax. As the tax was imposed on the sale of the tobacco products by the distributor to the retailer, no refund would be owed to the retailer.

Example 2

Distributor A sells tobacco products to another licensed distributor in Virginia, Distributor B. Distributor A does not pay the tax on the products. Distributor B subsequently sells the tobacco products to a retailer in Virginia for sale in the Commonwealth. Distributor B pays the tax on the products.

Example 3

Distributor A sells tobacco products to another licensed distributor in Virginia, Distributor B. Distributor A does not pay the tax on the products. Distributor B subsequently ships the tobacco products to a retailer in North Carolina for sale in that state. No tobacco products tax is owed on the transaction.

New Rates

Effective July 1, 2020, the tax is imposed on moist snuff at the rate of \$0.36 per ounce with a proportionate tax at the same rate on all fractional parts of an ounce based on net weight as listed by the manufacturer on the package in accordance with federal law. Dry snuff, however, is subject to the tax at the rate of 20% of the manufacturer's sales price.

The tax is imposed on loose leaf tobacco at rates of \$0.42 for each unit that is less than 4 ounces, \$0.80 for each unit that is at least 4 ounces but not more than 8 ounces, \$1.40 for each unit that is more than 8 ounces but not more than 24 ounces. Units of loose leaf tobacco that exceed 24 ounces are subject to the tax at a rate of \$0.42 per unit plus \$0.42 for each 4 ounce increment that the unit exceeds 16 ounces. Plug tobacco and other tobacco products containing fine tobacco or not sold in loose form, however, are not considered loose leaf tobacco. Such products are subject to the tax at the rate of 20% of the manufacturer's sales price.

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Distributors should calculate the tax based on the net weight of the consumer sized unit produced by the manufacturer to be sold to consumers as a single unit and containing one individual package. If the net weight is listed using a unit of measurement other than ounces, the distributor must convert the net weight to ounces in order to determine the tax due. The distributor may round to the nearest hundredth of an ounce.

A distributor who calculates and pays the tax in good faith reliance on the net weight listed by the manufacturer on the package or on the manufacturer's invoice shall not be liable for additional tax, or for interest or penalties, solely by reason of a subsequent determination that such weight information was incorrect.

The tax is imposed on liquid nicotine at a rate of \$0.066 per milliliter of liquid. This rate is imposed regardless of whether the liquid nicotine is sold in single-use cartridges or containers, or sold in customized amounts to be used in a reusable device.

All other tobacco products, other than moist snuff, loose leaf tobacco, and liquid nicotine are subject to the tax at the rate of 20% of the manufacturer's sales price.

Heated tobacco products are not subject to the tobacco products tax.

Although nicotine vapor products are not subject to the tax, any liquid nicotine provided with any nicotine vapor product is subject to the tax.

Roll-your-own tobacco remains subject to the cigarette excise tax at the rate of 10% of the manufacturer's sales price. The cigarette excise tax due on roll-your-own tobacco is reported on Form TT-8, Virginia Tobacco Products Tax Return.

Example 4

A distributor brings a can of moist snuff into the Commonwealth for sale. The net weight listed by the manufacturer on the package is 1.2 ounces. The actual weight of the can is 1.3 ounces.

The tax on the can is calculated by multiplying \$0.36 by the number of ounces listed on the package, 1.2. The distributor pays \$0.43 ($\0.36×1.2) in tax. The distributor is not liable for the additional tax on the actual weight of the can or for interest or penalties solely because the weight information was incorrect.

Example 5

On a two-for-one promotion, a manufacturer located outside of Virginia sells 10 one-ounce cans of moist snuff. The distributor resells the 10 packages to a retail dealer located in Virginia for the price of 5 cans. The distributor would pay the tax on the 10 one-ounce cans. The distributor pays \$3.60 ($\0.36×10) in tax.

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Example 6

As a promotional offer, a manufacturer located outside of Virginia provides a free sample of a 1 ounce package of snus with the purchase of a 1 ounce can of moist snuff. The distributor resells the can of moist snuff to a retail dealer located in Virginia with the free sample of snus. The distributor would pay the tax on the both the 1 ounce can of moist snuff and the 1 ounce package of snus. The distributor pays \$0.72 ($\0.36×2) in tax.

Example 7

A distributor brings one unit of loose leaf tobacco into the Commonwealth for sale. The net weight listed by the manufacturer on the unit is 3 ounces. The actual weight of the unit of loose leaf tobacco is 4 ounces.

The tax on a 3 ounce unit of loose leaf tobacco is \$0.42. The distributor pays \$0.42 in tax. The distributor is not liable for the additional tax on the actual weight of the unit or for interest or penalties solely because the weight information was incorrect.

Example 8

A distributor brings a case of 30 consumer sized units of loose leaf tobacco into the Commonwealth for sale. The net weight listed by the manufacturer on the case is 90 ounces and the net weight listed on each unit is 3 ounces.

The distributor calculates the tax based on the net weight of each consumer sized unit and not on the net weight of the case. The rate of tax on a 3 ounce unit of loose leaf tobacco is \$0.42. The distributor pays \$12.60 ($30 \times \0.42) in tax.

Example 9

A distributor brings one unit of loose leaf tobacco into the Commonwealth for sale. The net weight listed by the manufacturer on the unit is 20 ounces.

The tax on a 20 ounce unit of loose leaf tobacco is \$1.40. The distributor pays \$1.40 in tax.

Example 10

A distributor brings one unit of loose leaf tobacco into the Commonwealth for sale. The net weight listed by the manufacturer on the unit is 28 ounces.

The tax on the unit of loose leaf tobacco is calculated by adding \$0.42 for each 4-ounce increment that the unit exceeds 16 ounces to \$0.42 for the unit. A unit of 28 ounces exceeds 16 ounces by 12 ounces ($28 - 16$), or 3 4-ounce increments ($12 \div 4 = 3$). The distributor pays \$1.68 ($\$0.42 + (3 \times \$0.42)$) in tax.

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Example 11

A distributor brings one unit of loose leaf tobacco into the Commonwealth for sale. The net weight listed by the manufacturer on the unit is 30 ounces.

The tax on the unit of loose leaf tobacco is calculated by adding \$0.42 for each 4-ounce increment that the unit exceeds 16 ounces to \$0.42 for the unit. A unit of 30 ounces exceeds 16 ounces by 14 ounces ($30 - 16$), or 4 4-ounce increments ($14 \div 4 = 3.5$). The distributor pays \$2.10 ($\$0.42 + (4 \times \$0.42)$) in tax.

Example 12

On a two-for-one promotion, a manufacturer located outside of Virginia sells 10 three-ounce units of loose leaf tobacco. The distributor resells the 10 units to a retail dealer located in Virginia for the price of 5 units. The distributor would pay the tax on the 10 three-ounce units. The distributor pays \$4.20 ($\0.42×10) in tax.

Example 13

As a promotional offer, a manufacturer located outside of Virginia provides a free sample of a one-ounce package of snus with the purchase of a 3 ounce unit of loose leaf tobacco. The distributor resells the unit of loose leaf tobacco to a retail dealer located in Virginia with the free sample of snus. The distributor would pay the tax on the both the three-ounce unit of loose leaf tobacco and the one-ounce package of snus. The distributor pays \$0.42 in tax for the unit of loose leaf tobacco and \$0.36 ($\0.36×1) in tax for the snus, for a total of \$0.78 ($\$0.42 + \0.36).

Example 14

In July, a distributor brings one liter of liquid nicotine into the Commonwealth for sale. The liquid nicotine is for use in open-system refillable vapor devices. The distributor sells the liquid nicotine to a retailer in August. The distributor reports the sale on his August return due in September.

The tax on liquid nicotine is calculated by multiplying \$0.066 by the milliliters of liquid nicotine. The distributor pays \$66.00 ($\$0.066 * 1,000 \text{ mL}$) in tax for the liter of liquid nicotine.

Example 15

In July, a distributor brings closed-system vapor devices and 0.5 liter of liquid nicotine in the form of cartridges to be used in the closed-system vapor devices into the Commonwealth for sale. The distributor sells the vapor devices and the cartridges to a retailer in August. The distributor reports the sale on his August return due in September.

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The distributor pays \$33.00 ($\$0.066 * 500 \text{ mL}$) in tax for the 0.5 liters of liquid nicotine. There is no tobacco products tax due on the devices.

Manufacturer's Sales Price

Manufacturer's sales price is the total amount for which tobacco products are sold, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the dealer, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, losses or any other expenses whatsoever, including federal excise taxes. Manufacturer's sales price does not include any cash discount allowed and taken or finance charges, carrying charges, service charges or interest from credit extended on sales of tobacco products. In the event that the buyer and seller are affiliates or the Department determines that the price established by the parties is not consistent with arms-length transactions involving similar products, the manufacturer's sales price must be the greater of the sales price established by the parties or the manufacturer's list price for the tobacco products. If a distributor is unable to determine the manufacturer's sales price, he may use the purchase price of the tobacco products to compute the tax liability. (See *Va. Code* § 58.1-1021.01)

Example 16

A distributor brings roll-your-own tobacco into the Commonwealth for sale. The manufacturer's sales price is \$10. The distributor pays \$1 ($\$10 * 0.1$) in tax.

Example 17

A distributor brings a unit of plug tobacco into the Commonwealth for sale. The manufacturer's sales price is \$10. The distributor pays \$2 ($\$10 * 0.2$) in tax.

Example 18

A manufacturer located outside of Virginia sells 1,000 packages of pipe tobacco with a list price of \$1 each to a licensed distributor for \$1,000 in July. The distributor resells the 1,000 packages to a retail dealer located in Virginia for \$1,500 in August. The distributor reports the tobacco products on the August return due September 20 as having a manufacturer's sales price of \$1,000 and pays \$200 ($\$1,000 * 0.20$) in tax.

Example 19

On a two-for-one promotion, a manufacturer located outside of Virginia sells 2,000 cigars with a list price of \$1 each to a licensed distributor for \$1,000 in July. The distributor resells the 2,000 packages to a retail dealer located in Virginia for \$1,500 in August. The distributor reports the tobacco products on the August return due September 20 as having a manufacturer's sales price of \$1,000 and pays \$200 ($\$1,000 * 0.20$) in tax for the tobacco products.

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Exemptions

The tax does not apply to any transactions in interstate or foreign commerce, or to the federal government, its agencies and instrumentalities that, under provisions of the United States Constitution, Virginia is prohibited from taxing. (See *Va. Code* § 58.1-1021.02 (B))

Penalties Applicable to Unlawful Possession of Tobacco Products

No person may engage in the business of selling tobacco products as a distributor in the Commonwealth without first having received a separate license from the Department for each place of business.

Any person, except as provided by law, who imports, transports, or possesses for resale tobacco products upon which the tax has not been paid is liable for the tax on the untaxed tobacco products. Additionally, if such person imports, transports, or possesses such tobacco products in such a manner as to knowingly or intentionally evade or attempt to evade the tax, he will be required to pay a penalty of \$2.50 per tobacco product, up to \$500, for the first violation by the person within a 36 month period, \$5 per tobacco product, up to \$1,000, for the second violation by the person within a 36 month period, and \$10 per tobacco product, up to \$50,000, for the third or subsequent violation by the person within a 36 month period. This penalty applies to both retailers and individuals purchasing tobacco products from exempt entities as well as licensed distributors.

Where willful intent to defraud the Commonwealth of the tax is found, a penalty of \$25 per tobacco product, up to \$250,000, may be imposed. Any person who commits a voluntary, conscious, and intentional act to defraud the Commonwealth is subject to the increased penalty. *Black's Law Dictionary*, Ninth Edition, defines "fraud" as "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." (See *Va. Code* § 58.1-1021.04:3)

For the purposes of determining the amount of the civil penalty, the unit or package intended to be sold to consumers as a single product, such as the unit or package upon which the "stock keeping unit" or "SKU" has been applied, shall be considered one "tobacco product."

For the purposes of determining the number of violations made within a 36 month period, a business that has undergone a corporate or similar reorganization will be considered the same legal entity, even if it results in the use of a new tax registration number or Federal Employer Identification Number (FEIN). A legal entity that purchases the assets of an existing business through a bona fide sale will not be liable for prior violations by such business. It is the burden of the business to show that it is a new legal entity for the purposes of determining the number of violations.

Additionally, any person who is not a licensed distributor may not import, transport, or possess, for resale, any tobacco products in the Commonwealth. Such tobacco products, as well as tobacco products imported, transported, or possessed in a manner as to

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knowingly and intentionally evade or attempt to evade the tax, are subject to seizure, forfeiture and destruction by any law-enforcement officer. All fixtures, equipment, materials and personal property used in substantial connection with the sale or possession of tobacco products involved in a knowing and intentional violation of the tax are subject to seizure and forfeiture by a law-enforcement officer of the Commonwealth. (See *Va. Code* § 58.1-1021.04:3)

The Department maintains a current list of licensed distributors that is updated on a monthly basis and posted on the Department's website at www.tax.virginia.gov. Persons who purchase tobacco products for resale should check this list frequently to ensure that they are buying from licensed distributors.

Example 20

Dealer A is a retailer but not a licensed distributor who has imported an inventory of 20 packages of 5 cigars wrapped in cellophane upon which an "SKU" has been applied and imported the tobacco products in a manner so as to knowingly and intentionally evade the tax. Dealer A would owe the tax on the 20 packages of cigars and would also be subject to a penalty of \$50 ($20 * \2.50) if it is his first violation within a 36 month period.

Example 21

Dealer A is a retailer but not a licensed distributor who possesses an inventory of 20 cigars individually wrapped in cellophane upon which an "SKU" has been applied and possesses the tobacco products in a manner so as to knowingly and intentionally evade the tax. Dealer A would owe the tax on the 20 cigars and would also be subject to a penalty of \$50 ($20 * \2.50) if it is his first violation within a 36 month period.

Example 22

Dealer A is a retailer but not a licensed distributor and possesses an inventory of 10 packages of 8 cans of moist snuff wrapped in cellophane upon which an "SKU" has been applied and possesses the tobacco products in a manner so as to knowingly and intentionally evade the tax. Dealer A has opened one package to sell separately to fulfill specific orders and the other 9 packages are unopened and intended to be sold whole. The opened package would be considered 8 tobacco products as Dealer A intends to sell each can as a single product. The other 9 unopened packages would be considered 9 tobacco products, for a total of 17 tobacco products. Dealer A would owe the tax on the 17 tobacco products and would also be subject to a penalty of \$42.50 ($17 * \2.50) if it is his first violation within a 36 month period.

Example 23

Dealer A is a retailer but not a licensed distributor and possesses an inventory of 300 cigars individually wrapped in cellophane upon which an "SKU" has been applied and possesses the tobacco products in a manner so as to knowingly and intentionally

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evade the tax. It is his second violation within a 36-month period. Dealer A would owe the tax on the 300 cigars and would also be subject to a penalty of \$1,000, as the civil penalty is capped at \$1,000 for the second violation ($300 * \$5.00 = \$1,500 > \$1,000$).

Example 24

Dealer A is a retailer but not a licensed distributor and possesses an inventory of 20 cigars individually wrapped in cellophane upon which an "SKU" has been applied and possesses the tobacco products in a manner so as to knowingly and intentionally evade the tax. Dealer A has had one other violation occurring 40 months prior to this violation. Dealer A would owe the tax on the 20 cigars and would also be subject to a penalty of \$50 ($20 * \2.50) as it is his first violation within a 36 month period.

Example 25

Dealer A is a retailer but not a licensed distributor and possesses an inventory of 20 cigars individually wrapped in cellophane upon which an "SKU" has been applied and possesses the tobacco products in a manner so as to knowingly and intentionally evade the tax. Dealer A had a violation that occurred 30 months prior to this violation. Dealer A would owe the tax on the 20 cigars and would also be subject to a penalty of \$100 ($20 * \5.00) as it is his second violation within a 36 month period.

30 months later, Dealer A has another violation in which he possesses an inventory of 10 cigars individually wrapped in cellophane upon which an "SKU" has been applied and possesses the tobacco products in a manner so as to knowingly and intentionally evade the tax. As the first violation occurred 60 months prior to this violation, Dealer A would owe the tax on the 10 cigars and would also be subject to a penalty of \$50 ($10 * \5.00) as it is his second violation within a 36 month period.

Example 26

Dealer A is a retailer but not a licensed distributor and possesses an inventory of 300 cigars individually wrapped in cellophane upon which an "SKU" has been applied and possesses the tobacco products in a manner so as to knowingly and intentionally evade the tax. Dealer A has been selling tobacco products to retailers in Virginia for the past year and has not remitted any tobacco products tax. Distributor A has also recently been convicted of smuggling tobacco products during the year. Dealer A would owe the tax on the 300 cigars and would also be subject to the increased intent to defraud penalty in the amount of \$7,500 ($300 * \25.00).

Licensing of Distributors

In order to facilitate the implementation of the imposition of the tax on liquid nicotine, the Department will allow persons to sell liquid nicotine subsequent to July 1, 2020 and prior

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to January 1, 2021 without having obtained a distributors license on the following conditions:

- The person files their return and pays the tobacco products tax to the Department; and
- The person files their distributor's application with the Department and pays their application fee prior to October 1, 2020.

Each application for a distributor's license must be accompanied by a non-refundable application fee, not to exceed \$750 for a three year permit. The Department currently charges an application fee of \$600. In the event that the applicant has more than one place of business, the Department may waive the application fee for its other places of business. In the event that the applicant has paid an application fee to obtain a cigarette stamping permit for a location, the Department may waive the tobacco products tax license application fee for that location.

Every application for a license must be made on a form prescribed by the Department and the following information must be provided:

- The name and address of the applicant. If the applicant is a corporation, it must also provide the name and address of its principal officers. If the applicant is any other type of legal entity, it must also provide the name and address of each of its members;
- The address of the applicant's principal place of business;
- The location where the business to be licensed is to be conducted; and
- Such other information as the Department may require.

Application forms are available on the Department's web site, www.tax.virginia.gov.

The application fee will be applied to the Department's administrative and other costs of processing distributor's license applications, conducting background investigations and issuing distributor's licenses. Any amount collected in excess of such costs as of June 30 in even numbered years will be reported to the State Treasurer and deposited into the state treasury.

The Department will conduct a background investigation of the applicant and such of its officers and employees as deemed necessary by the Department. The background investigation may include a Virginia Criminal History Records search. The Department may also conduct a National Criminal Records search and fingerprinting as required by the Federal Bureau of Investigation. In addition to the background investigations required to obtain a license, the Department may conduct background investigations of officers and employees hired after the license is issued or renewed. The Department may also require distributors to notify the Department of personnel changes in positions requiring a background investigation.

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The Department may refuse to issue a distributor's license or may suspend, revoke or refuse to renew a distributor's license if it determines that the applicant or any of its officers and employees have been 1) found guilty of any fraud or misrepresentation in any connection; 2) convicted of robbery, extortion, burglary, larceny, embezzlement, fraudulent conversion, gambling, perjury, bribery, treason, or racketeering; or 3) convicted of a felony. Any person who knowingly and willfully falsifies, conceals or misrepresents a material fact or knowingly and willfully makes a false, fictitious or fraudulent statement or representation in an application for a distributor's license is guilty of a Class 1 misdemeanor.

The Department may at any time revoke the license issued to any distributor who violates any of the provisions of the tax, or of these guidelines and rules. No license may be transferred to another person.

Each distributor must prominently display its license, or a copy thereof, at the licensed premises and provide a copy to each wholesale or retail dealer located in the Commonwealth to whom it sells tobacco products. In the event that its license expires or is revoked, the distributor must immediately notify each wholesale or retail dealer located in the Commonwealth to whom it sells tobacco products. (See *Va. Code* § 58.1-1021.04:1)

Example 27

A wholesale dealer located in Virginia and other states sells tobacco products to retail and licensed wholesale dealers located in Virginia and other states. The wholesale dealer is a distributor and must 1) obtain a license from the Department; 2) provide a copy of its license to each of its customers located in Virginia; 3) file monthly returns concerning its sales of tobacco products during the preceding month to Virginia retailers; and 4) pay the tax due regarding such sales at the time the return is filed.

Example 28

A retail dealer located in Virginia buys tobacco products exclusively from a wholesale dealer located in another state that has not obtained a tobacco products tax license from the Department. The retail dealer is a distributor and must 1) obtain a license from the Department; 2) file monthly returns concerning its purchases of tobacco products during the preceding month; and 3) pay the tax due on such purchases at the time the return is filed. In this example, the manufacturer's sales price, if the tobacco products are subject to the tax based on the manufacturer's sales price, would be the purchase price paid by the retail dealer.

Example 29

A retail dealer located in Virginia buys tobacco products exclusively from a licensed distributor. The retail dealer 1) has obtained a copy of the distributor's license issued by the Department; 2) has not been notified by the distributor or the Department that the

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registration has been terminated; and 3) each invoice received from the distributor reflects that the tax due regarding the products listed on the invoice will be paid by the distributor by the wording "Virginia Tobacco Products Tax Paid." Regardless of whether the distributor is located in Virginia or another state, the retail dealer is not a distributor and is not required to obtain a license with the Department, file a monthly return or to pay the tax regarding these purchases.

Filing of Monthly Returns

Every distributor registered for the tax is required to file Form TT-8, Virginia Tobacco Products Tax Return, on or before the 20th day of the month following the reporting period. A return must be filed for each month even if no tax is due. At the time of filing Form TT-8, Virginia Tobacco Products Tax Return, the distributor must pay the amount of tax due. The return for each period becomes delinquent on the twenty-first day of the succeeding month if not paid. (See *Va. Code* § 58.1-1021.02:1)

For the purpose of compensating distributors for accounting for the tax, a distributor is allowed when filing a monthly return and paying the tax to deduct two percent of the tax otherwise due if the amount due was not delinquent at the time of payment. (See *Va. Code* § 58.1-1021.03).

Distributors are required by the Department to complete and retain detailed schedules supporting all entries on monthly returns, including but not limited to information on:

- Previously taxed tobacco products that have been returned to the manufacturer;
- Previously taxed tobacco products that have been exchanged for untaxed product;
- Previously taxed tobacco products sold in other states;
- Exempt sales; and
- Sales and purchases of previously taxed products.

Penalties and Interest

Any distributor who fails to file a return or pay the full amount of the tax due will be subject to a penalty equal to five percent of the tax due if the failure is for not more than one month, with an additional two percent for each additional month, or fraction thereof, during which the failure continues, not to exceed 20 percent in the aggregate. In no case, however, will the penalty be less than \$10 and the minimum penalty will apply whether or not any tax is due for the period for which such return was required. The Department has, in its discretion, the authority to waive these penalties. Interest will accrue until the tax is paid. (See *Va. Code* § 58.1-1021.04 (A))

Any distributor who files a false or fraudulent return with willful intent to defraud the Commonwealth, or willfully fails to file a return with the intent to defraud the Commonwealth, will be subject to a penalty equal to 50 percent of the tax due. It will be prima facie evidence of intent to defraud the Commonwealth when any distributor

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reports its tax liability at 50 percent or less of the actual amount. (See *Va. Code* § 58.1-1021.04 (B))

Credits and Refunds

In the event that the Department determines that the amount paid regarding any monthly return was greater than the amount of tax due the Commonwealth, the excess may be taken as a credit by the distributor against a subsequent month's tobacco products tax liability.

If, however, the distributor requests a refund, such excess will be refunded to the distributor within 45 days of the request. The refund will include interest from the due date of the return to which such excess is attributable to or the date such excess was paid to the Department, whichever is later, and end on a date determined by the Department preceding the date of the refund check by not more than seven days.

Records

Each distributor must keep in each licensed place of business complete and accurate records for that place of business, including itemized invoices of: 1) tobacco products held, purchased, manufactured, brought in or caused to be brought in from outside the Commonwealth or shipped or transported to retailers in the Commonwealth; 2) all sales of tobacco products made; 3) all tobacco products transferred to other retail outlets owned or controlled by that licensed distributor; and 4) any other records required by the Department. All such books, records and other papers and documents must be preserved for a period of at least three years, unless the Department authorizes, in writing, their destruction or disposal at an earlier date. At any time during usual business hours, duly authorized agents or employees of the Department may enter any place of business of a distributor and inspect the premises, the books, records and other papers and documents required to be kept and the tobacco products contained therein. (See *Va. Code* § 58.1-1021.04:2)

Each distributor who sells tobacco products to persons other than to another licensed distributor, an affiliate or an ultimate consumer must render with each sale itemized invoices showing the distributor's name and address, the purchaser's name and address, the date of sale, all prices, and the wording "Virginia Tobacco Products Tax Paid." In the event that items subject to the tax are sold with items not subject to the tax, the invoice must show separate subtotals for taxable and nontaxable items or the seller must issue separate invoices for taxable and nontaxable items. The seller must preserve legible copies of invoices for three years after the date of sale. Each distributor must procure itemized invoices of all tobacco products purchased. The invoices must show the name and address of the seller and the date of purchase. The distributor must preserve a legible copy of each invoice for three years after the date of purchase.

Persons failing to make records available for inspection by the Department during regular business hours are guilty of a Class 2 misdemeanor under *Va. Code* § 58.1-103.

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Manufacturer's Report

Each manufacturer that ships tobacco products to any person located in the Commonwealth is required to file a report with the Department no later than the twentieth of each month identifying all such shipments made by the manufacturer during the preceding month unless the Tax Commissioner authorizes the manufacturer to file such reports for a period less frequently than monthly when, in the opinion of the Tax Commissioner, doing so would improve the efficiency of the administration of the tax imposed by this article.

The Tax Commissioner has determined that allowing manufacturers to file this report on an annual basis would improve the efficiency of the administration of the tobacco products tax. The report is due no later than February 20 of each year for the preceding calendar year. Each such report must identify for the preceding calendar year the names and addresses of the persons within the Commonwealth to whom the shipments were made and the quantities of tobacco products shipped, by type of product and brand. For tobacco products taxed based on weight or volume, such as moist snuff, loose leaf tobacco, and liquid nicotine, the report must include both the units and the weight or volume of each tobacco product shipped. Manufacturers may use their own template for the report as long as all of the information required is presented using a reasonable format. The Tax Commissioner reserves the right to convert a manufacturer back to filing the report on a monthly basis if the efficiency of the administration of the tax would be improved. Manufacturer reports should be mailed to:

Tobacco Unit
Department of Taxation
P.O. Box 715
Richmond, VA 23218-0715

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Appeals

Any person may appeal issues related to the tax to the Department using the administrative appeals process administered by the Department under *Va. Code* § 58.1-1820, *et seq.* and 23 VAC 10-20-165.

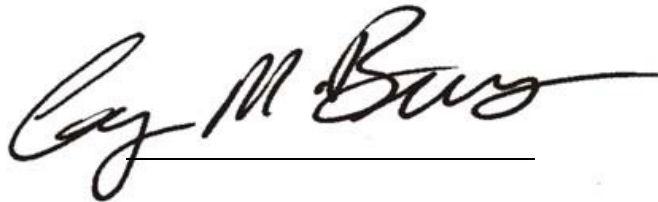
All appeals, along with supporting documentation, should be mailed to:

Appeals and Rulings
Department of Taxation
P.O. Box 27203
Richmond, VA 23261-7203

Additional Information

These Guidelines and rules are available on-line in the Laws, Rulings, and Decisions section of the Department's website, located at www.tax.virginia.gov. If you have any questions, please contact the Tobacco Tax Unit at (804) 371-0730.

Approved:

A handwritten signature in black ink, reading "Craig M. Burns", written over a horizontal line.

Craig M. Burns
Tax Commissioner