



VSFA's Summary of Virginia Department of Taxation's Guidelines for Vape Shops

May 18, 2020

Introduction

During the 2020 General Assembly Session, Governor Northam's budget proposed a new wholesale tax on liquid nicotine at the rate of \$0.066/mL. Despite the Virginia Smoke Free Association's ("VSFA") ardent opposition, the General Assembly approved the budget, and the new tax becomes effective July 1, 2020. The budget directed the Department of Taxation (the "Department") to promulgate official guidelines (the "Guidelines") for the implementation of the new tax on liquid nicotine and the other additional increases in the taxes imposed on other tobacco products (collectively, the "OTP Tax"). The Guidelines now have been published and can be found on the Department's website at https://townhall.virginia.gov/GetFile.cfm?File=C:%5CTownHall%5Cdocroot%5CGuidanceDocs_Proposed%5C161%5CGDoc_TAX_4507_20200504.pdf.

Because the Guidelines address both the increase in the OTP Tax on premium cigars, moist snuff, etc., as well as the new application to liquid nicotine, VSFA has prepared this summary of the provisions of the Guidelines relating only to the new tax on liquid nicotine, including the key terms and examples relating thereto. This summary is intended to serve as a quick-reference guide to the new tax for vape shop owners, distributors and manufacturers. It is not a substitute for reading the official Guidelines in full, nor is it intended as legal advice. For specific questions, please contact an attorney, a tax professional, or the Department's Tobacco Unit at 804.371.0730 or TobaccoUnit@tax.virginia.gov.

General Overview

The intent is that the \$0.066/mL tax will be paid only once and be paid by the distributor, which is defined below. This is consistent with the implementation of the OTP Tax on all other tobacco products. However, if the wholesale tax has not been paid before the liquid nicotine reaches the retailer, the retail seller is responsible for paying the tax. Consequently, vape shops should consider registering as a "Distributor" before October 1, 2020, to collect the tax if they are purchasing liquid nicotine from distributors that are not registered with the Department. Since out-of-state manufacturers and distributors are not required to register with the Department, they must do so voluntarily. The Department maintains a list of registered Distributors, and the process to register is described below. Please note the tax does not apply to liquid nicotine sold to out-of-state entities or consumers, nor on liquid nicotine inventory purchased before July 1, 2020. As explained below, retailers, distributors or manufacturers found to have knowingly or intentionally attempted to evade the tax are subject to monetary penalties and may face criminal charges.

Key Terms Defined in the Guidelines.

"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.

"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.

"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 FDA under Chapter V (21 U.S.C. § 351 et seq.) of the Federal Food, Drug, and Cosmetic Act.

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

"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.

Imposition of the Tax

The tax is imposed on liquid nicotine at a rate of \$0.066/mL, 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 irrespective of the nicotine concentration. Although nicotine vapor products (i.e., hardware) are not subject to the tax, any liquid nicotine provided with any nicotine vapor product is subject to the tax. 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 \(B\)](#).

As stated above, the tobacco products tax is generally paid by licensed distributors. **However, if the tax is not paid by the distributor, then the retailer is effectively deemed the "distributor" and is liable for the payment of the tax.** The Department maintains a current list of licensed distributors that is updated on a

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monthly basis and posted on the Department's website at <https://www.tax.virginia.gov/sites/default/files/inline-files/otp-licensed-distributors-list.pdf>. Persons who purchase tobacco products for resale, such as vape shops, should check this list frequently to ensure that they are buying from licensed distributors.

The tax is imposed on liquid nicotine 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. 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. See VA Tax "Guidelines and Rules for the Tobacco Products Tax" at 5.

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. See VA Tax "Guidelines and Rules for the Tobacco Products Tax" at 5.

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. See VA Tax "Guidelines and Rules for the Tobacco Products Tax" at 5.

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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 ($\$0.066 \times 1,000 \text{ mL}$) in tax for the liter of liquid nicotine. See VA Tax "Guidelines and Rules for the Tobacco Products Tax" at 8.

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.

The distributor pays \$33.00 ($\$0.066 \times 500 \text{ mL}$) in tax for the 0.5 liters of liquid nicotine. There is no tobacco products tax due on the devices. See VA Tax "Guidelines and Rules for the Tobacco Products Tax" at 8-9.

Obtaining a License to Collect the Tax

If you sell liquid nicotine products at retail, whether you need to register for Virginia's tobacco products tax depends on where you get your supplies from. If you only buy from a wholesaler who is a licensed tobacco products dealer, you don't have to register for tobacco products tax. However, if any of your suppliers are not licensed tobacco products dealers, you'll need to register as a "licensed distributor" for the collection of the tax and file monthly tobacco tax returns. In order to collect the tax and become a licensed distributor, you must:

1. File and submit to VA Tax a
 - A. [Form TT-1](https://www.tax.virginia.gov/forms/search?search=tt-1) (<https://www.tax.virginia.gov/forms/search?search=tt-1>) Application for Cigarette Stamping Permit and Tobacco Products Tax Distributor's License, and a
 - B. [TT-1 Schedule A](https://www.tax.virginia.gov/forms/search?search=tt-1%20schedule%20a) (<https://www.tax.virginia.gov/forms/search?search=tt-1%20schedule%20a>) Personal Data Sheet;
2. Pay a non-refundable application fee of \$600;
3. Consent to criminal background checks for
 - A. Your "principle operatives," including, (i) any officer, (ii) director, (iii) manager, (iv) sole proprietor, (v) partner, (vi) member, (vii) stockholder, (viii) any other person with 10% or more ownership interest;
 - B. Anyone who has control over the purchase, storage, sale or distribution of cigarettes and other tobacco products; or
 - C. Anyone who has control over compliance with cigarette or tobacco products tax laws.

Any person who assumes one of these roles after the initial application will need to submit a TT-1 Schedule A within 10 days of assuming the role, and apply for a background check within 30 days. There is a \$100 fee for every background check done after the initial application is approved.

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VA Tax 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.

VA Tax 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](#).

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

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

Example 27

A licensed distributor located in Virginia and other states sells tobacco products, including liquid nicotine, to retailers and other licensed distributors located in Virginia and other states. The initial distributor and must 1) obtain a license from the VA Tax; 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. See VA Tax "Guidelines and Rules for the Tobacco Products Tax" at 14.

Example 28

A retailer located in Virginia buys tobacco products, including liquid nicotine, exclusively from a distributor located in another state that has not obtained a tobacco products tax license from VA Tax. The retailer is a distributor and must 1) obtain a license from VA Tax; 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. See VA Tax "Guidelines and Rules for the Tobacco Products Tax" at 14.

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Example 29

A retailer located in Virginia buys tobacco products, including liquid nicotine, exclusively from a licensed distributor. The retailer 1) has obtained a copy of the distributor's license issued by VA Tax; 2) has not been notified by the distributor or VA Tax that the 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 VA Tax, file a monthly return or to pay the tax regarding these purchases. See VA Tax "Guidelines and Rules for the Tobacco Products Tax" at 14.

Filing of Monthly Returns

Every distributor registered for the tax is required to file [Form TT-8](https://www.business.tax.virginia.gov/tax_eforms/TT8-eForm.html) (https://www.business.tax.virginia.gov/tax_eforms/TT8-eForm.html), 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](#).

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:

1. Previously taxed tobacco products that have been returned to the manufacturer;
2. Previously taxed tobacco products that have been exchanged for untaxed product;
3. Previously taxed tobacco products sold in other states;
4. Exempt sales; and
5. 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 (5%) of the tax due if the failure is for not more than one month, with an additional two percent (2%) for each additional month, or fraction thereof, during which the failure continues, not to exceed 20 percent (20%) 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 (50%) of the tax due. It will be *prima facie* evidence of intent to defraud the Commonwealth when any distributor reports its tax liability at 50 percent (50%) 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 (7) days.

Record Keeping

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 licensed 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](#).

Manufacturer's Report

Each manufacturer that ships tobacco products, including liquid nicotine, 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 liquid nicotine, the report must include both the units and the 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

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

DISCLAIMER

This document is a summary of the Virginia Department of Taxation's "Guidelines and Rules for the Tobacco Products Tax" as it relates to the \$0.066/mL tax on liquid nicotine, effective July 1, 2020. It is NOT a substitute for reading the official Guidelines in whole, nor is it intended as legal advice. For specific questions, please contact an attorney, a tax professional, or the Virginia Department of Taxation's Tobacco Unit at 804.371.0730 or TobaccoUnit@tax.virginia.gov.