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SUBMITTED ELECTRONICALLY

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May 15, 2017

Virginia Department of Taxation
Office of Customer Services
P.O. Box 1115
Richmond, VA 23218-1115

Re: Comments on Draft Guidelines for Retail Sales and Use Tax Refund Claim Procedures

To Whom It May Concern:

Ryan, LLC (“Ryan”) has reviewed draft Guidelines for Retail Sales and Use Tax Refund Claim Procedures (“Draft Guidelines”) posted by the Department of Taxation earlier this year, and submits the following comments.

Generally, we find that the Draft Guidelines, if adopted as written, would create new burdens not only for vendors and their customers, but the Department’s auditors as well. As written, the Draft Guidelines leave the Department with broad discretion and a burdensome refund process, especially surrounding vendor claims. The Draft Guidelines create neither a fair nor equitable process for a taxpayer’s right to recover tax paid *in error* to Virginia. The Draft Guidelines may also either discourage potential refund claims or likely cause a claimant to forfeit potential refund amounts due to the numerous and arduous requirements that must be satisfied, as well as creating a seemingly duplicative process of review and approval of such claims. We request that the Department consider the following summary of concerns, as well as our suggestions for amendments to the Draft Guidelines. Ryan also submits proposed alternative language for these Draft Guidelines.

I. Comments on Draft Guidelines

• Tax Paid to Vendor Refunds:

- The Department seeks to formalize its stated policy of requiring that customers recover tax paid in error from the vendor rather than filing a claim with the Department. Under the Draft Guidelines, a customer that pays tax in error to a vendor must make every effort to obtain a refund or credit for sales tax **directly from the vendor prior to requesting a refund from the Department**. Only if the vendor is non-cooperative, out of business, cannot be found, or would suffer an economic burden by making the refund or credit could the customer then file the claim directly with the Department. A customer seeking refund directly from the Department would be required to show that it attempted to recover tax from the vendor in order to file a claim directly with the Commonwealth.

Ryan's Concerns

There is nothing under Virginia sales and use tax statutes or prior regulations that bars a taxpayer/customer from seeking a refund from the Commonwealth.¹ A customer is better able to support its refund claim rather than the vendor. Under the current Draft Guidelines a vendor must review its customer's request for refund. Upon the vendor submitting the request to the Department, now the Department must review the same request/claim for refund. It is far more efficient for a single review to occur. In matters of confirming exempt vs. taxable transactions vendors do not want to be the "middle man". Furthermore, a vendor will generally err on the side of charging and collecting sales tax if there is any doubt as to the taxability of a transaction. However, the Department, not the vendor, should be tasked with reviewing refund claims, particularly for transactions where tax was collected in error.

• Vendor Verification Required:

- The Draft Guidelines also would formalize a recent Department policy of requiring that customers obtain verification by vendors of certain information before the Department will issue a tax refund to the customer. Specifically, the

¹ "A dealer may request a refund for taxes erroneously or illegally collected. The dealer must show that the tax erroneously or illegally collected was paid by him and not passed on to the consumer, or the tax was collected from the consumer as tax and subsequently refunded to the consumer. Refunds cannot be authorized unless the request is made within three years from the due date of the return. The amount refunded will be the net amount of state and local tax remitted to the state on the transaction(s) generating the refund. Thus, if a dealer filed a timely return and deducted dealer's discount for the period for which the refund is claimed, the amount of refund will be reduced by the dealer's discount taken (3% of state tax)." 23 VAC 10-210-3040.

Draft Guidelines would create a new “Vendor Verification Form” which the customer would be required to get a representative of the vendor company to sign. The form requires the vendor to state the reason that the vendor did not refund the tax directly to the customer and certify the accuracy of the amount of tax being sought in the refund, and that the vendor has not already refunded or credited the tax to the customer.

- This verification would be required for each and every item included in the customer’s claim schedule. In the past, the Department allowed a sample of vendor verifications. Now the Department would require 100% verification from the vendors.
- Vendor denial of a claim is now formalized and can only be denied by the vendor if they view the item to be taxable, if they are out of business, or if the liability meets the calculation of more than double their average Virginia Sales and Use Tax monthly liability. Due to lack of guidance, vendors may not want to refund tax on issues they deem aggressive unless there is evidence within case law or public decisions on the issue.

Ryan’s Concerns

- Chilling Effect on Refund Claims
 - Ryan feels that the proposed refund claim process is one of the most (if not the most) onerous set of refund claim requirements in the country.
 - This new process is very time consuming. Reviewing a customer claim for refund and whether a vendor should refund tax on otherwise exempt transactions is not a high priority for vendors. Even if a vendor is willing to participate in this process, the multiple requirements a vendor must satisfy create an undue burden for the vendor, and in turn directly effects a claimant’s right to a refund on tax that was not applicable to its purchases. This will potentially adversely affect the ability of a claimant to recover the full amount of tax it should not have paid. What’s worse, given the numerous requirements that must be satisfied, a claimant may decide against pursuing a refund on tax that should have never been collected by the vendor due to the burdensome nature of the process.

- In the past, the Department allowed a sample of vendor verifications. Now the Department would require 100% verification from the vendors. This places an enormous time and resource constraint on vendors as well as auditors, who will essentially be reviewing the same transactions the Department now requires the vendor to verify.
- Undue Burden – Ryan identified the following as a burden placed upon taxpayers, vendors and auditors:
 - Time spent reviewing refund claimant returns as well as vendor certification forms slow the refund process down at every level. Two reviews are essentially taking place – the vendor’s review and the subsequent review by the Department. Ryan has worked with auditors and outside vendors throughout the proposed verification process. On average, this process has extended the verification process by several months.
 - The verification process will undoubtedly prolong the standard audit process performed by the Department, as vendors will be forced to spend additional time verifying refunds claimed by their customers in addition to the standard audit information requests. Ryan has spoken with several vendors who have expressed this concern.
 - The verification process is not a priority for vendors; this will also cause delays in the refund process as well as potentially impacting a claimant’s ability to recover all eligible amounts under statute.
 - In addition to reviewing the claim for refund (which vendors essentially already reviewed) auditors will be negatively affected as they will now need to allocate time verifying vendor information, thereby increasing an auditor’s overall review time.
 - For the refund package to be considered complete a vendor certification form must be completed and enclosed from **all** vendors. The statute of limitations will be impacted each time the Department receives the new Refund Claimant Return. Statute may be actively lost if vendors do not provide proper documentation in a timely manner.

- **Ryan's Suggested Amendment** – To reduce the burdens of this proposed change, Ryan suggests the creation of an Assignment of Right to Refund form for vendors. This form, signed by an authorized representative of the vendor, would allow the taxpayer the right to file and receive a refund from the Commonwealth. It would verify the vendor will not pursue that refund item with the Commonwealth. This type of process is commonly used in other jurisdictions.
 - Further, an Assignment of Right to Refund would allow the Department to deal directly with the vendor's customer in reviewing the refund claim and making a taxability determination on the transactions at issue. The customer/purchaser is better suited than its vendor in determining a qualifying exemption applicable to its purchases – so many exemptions are use-based and require information the customer is more likely to have compared with the vendor. This also removes the duplicative task of vendors having to review customer refund requests.
 - Furthermore, the Department should incorporate language that permits the use of sample data sets/transactions for purposes of its claim for refund process. This is a commonly accepted practice in other states and much more efficient.
- **Filing Procedure:**
 - The Draft Guidelines set forth a new "Refund Claimant Return" to be used by taxpayers in seeking refunds. If the Refund Claimant Return is not properly completed, the Department will notify the purchaser that information is missing. The taxpayer will then have 60 days to provide the Department with the missing information. All supporting documentation required for the processing of the refund claim must be provided upon request within 60 days, including Vendor Verification Forms for **all** transactions included in the claim.
- **Protective Claims**
 - The Draft Guidelines do not appear consistent with Virginia law, which allows a person to file a protective claim when seeking a refund of tax for transactions subject to dispute. Section 58.1-1824 allows the filing of a claim for refund for purposes of preserving judicial remedies. A protective claim, by definition, is one that puts the state on notice of the issue and amount in controversy and preserves

statute but does not require complete documentation to be submitted. Given the significant

- Since the Draft Guidelines create multiple requirements claimants and their vendors must satisfy in order to receive refunds through the vendors, successfully complying with these requirements will take significant time and effort. Because of these requirements and the lengthy vendor verification process, the Department should allow a claimant to file a Protective Claim when attempting to recover tax paid through its vendors. This will ensure that a claim (or portion thereof) does not fall out of statute.

Ryan's Concerns

- If the claimant does not provide the requested information within the required time period or the Refund Claimant Return is not complete, the refund claim will be decided on the information submitted. This allows the Department the authority to deem a claim imperfect and deny it due to incomplete vendor verifications. However, a claimant cannot control the vendor's response timing on their verification request – as previously noted, this is not a priority for the vendors.
- Due to the fact that vendor verifications cannot be controlled by claimants, the Department should allow a mechanism for claimants to work with vendors on that requirement after claims are filed. This will lead to possible lost refund opportunity for taxpayers if their original claims are not accepted.
- **Ryan's Suggested Amendment** – The Department adds specific language to the Guidelines allowing and outlining Protective Claim Procedures when seeking refund of tax paid through its vendors.

- **Page 4 Draft Guideline Language:**

Refunds by the Department of Taxation

In cases where the dealer is unable to provide a refund or credit the customer's account when requested, the customer may apply directly to the Department for a refund of the tax. Customers must make every effort, however, to receive a refund or credit for the tax directly from the dealer prior to requesting a refund from the Department. If a dealer filed a timely return and deducted dealer's discount under *Va. Code* § 58.1-622 for the period

for which the refund is claimed, the amount of refund will be reduced by the dealer's discount taken by the dealer. The customer's only recourse for recovering the amount of sales tax paid but not remitted to the Department by the dealer due to the dealer discount is from the dealer. The Department will not refund any amount of sales tax that was not remitted. (Source: 23 VAC 10-210-3040)

Ryan's Proposed Amendment:

Refunds by the Department of Taxation

In cases where the dealer is unable to **or otherwise will not** provide a refund or credit the customer's account when requested, the customer may apply directly to the Department for a refund of the tax. Customers must make every effort, **and provide reasonable documentation of these efforts**, however, to receive a refund or credit for the tax directly from the dealer prior to requesting a refund from the Department. If a dealer filed a timely return and deducted dealer's discount under *Va. Code* § 58.1-622 for the period for which the refund is claimed, the amount of refund will be reduced by the dealer's discount taken by the dealer. The customer's only recourse for recovering the amount of sales tax paid but not remitted to the Department by the dealer due to the dealer discount is from the dealer. The Department will not refund any amount of sales tax that was not remitted. (Source: 23 VAC 10-210-3040)

• **Page 6 Draft Guideline Language:**

Procedures for Customers to Seek Refunds from the Department

Any person who has paid sales tax on an exempt transaction upon which the dealer is unable to provide a refund or credit of the tax must adhere to the following process and file a complete Refund Claimant Return, along with a Refund Request Spreadsheet, with the Department in order to receive a refund of the tax remitted to the Department by the dealer. The Refund Request Spreadsheet is considered part of the Refund Claimant Return. (See pages A-1 and A-2 in Appendix A for the Refund Claimant Return and page A-3 in Appendix A for the Refund Request Spreadsheet)

The purchaser should provide a copy to the dealer, who should ensure that all of the information in the spreadsheet is accurate.

At a minimum, the Refund Claimant Return must provide:

- Purchaser's full legal name and business/trade name;
- Purchaser's federal employer identification number or social security number;

- Purchaser's contact information, if an individual, or that of a responsible officer;
- Proof of Exemption;
- Reason given by dealer for not allowing the exemption;
- Amount of refund requested;
- Date of purchase(s);
- Declaration that the tax has not been refunded or credited to the purchaser by the Department or the dealer and that the purchaser will immediately send any duplicate refund to the Department; and
- Authorization for the Department to communicate with and to receive and inspect records from any dealer regarding the claim for refund.

Ryan's Proposed Amendment:

Procedures for Customers to Seek Refunds from the Department

Any person who has paid sales tax on an exempt transaction upon which the dealer is unable to **or otherwise will not** provide a refund or credit of the tax must adhere to the following process and file a complete Refund Claimant Return, along with a Refund Request Spreadsheet, with the Department in order to receive a refund of the tax remitted to the Department by the dealer. The Refund Request Spreadsheet is considered part of the Refund Claimant Return. (See pages A-1 and A-2 in Appendix A for the Refund Claimant Return and page A-3 in Appendix A for the Refund Request Spreadsheet)

The purchaser should provide a copy to the dealer, who should ensure that all of the information in the spreadsheet is accurate.

At a minimum, the Refund Claimant Return must provide:

- Purchaser's full legal name and business/trade name;
- Purchaser's federal employer identification number or social security number;
- Purchaser's contact information, if an individual, or that of a responsible officer;
- ~~Proof of Exemption~~ **Statement of Legal Basis for Claim;**
- Reason given by dealer for not allowing the exemption;
- Amount of refund requested;
- Date of purchase(s);
- Declaration that the tax has not been refunded or credited to the purchaser by the Department or the dealer and that the purchaser will immediately send any duplicate refund to the Department; and
- Authorization for the Department to communicate with and to receive and inspect records from any dealer regarding the claim for refund.

Ryan's Concerns:

“Proof of Exemption” is overly broad and suggests an unclear legal standard. It is common in the review of a claim for an auditor to decide that he/she wants or needs to see some information the taxpayer has not anticipated. That type of dialogue should be encouraged so that the Commonwealth, at the end of the day, makes the correct taxability determination. This requirement, because it is both ambiguous and overly broad is open to abuse.

- **Page 7 Draft Guideline Language:**

The purchaser also must submit copies of all invoices and other documentation demonstrating that the transactions qualify for an exemption, embedded into the spreadsheet by line item. Examples of documentation the purchaser should provide include, but are not limited to, exemption certificates, contracts, purchase orders, credit memos, and agreements.

Ryan's Proposed Amendment:

The purchaser also must submit copies of all invoices **or other proof of procurement** and other documentation demonstrating that the transactions qualify for an exemption, embedded into **or linked to** the spreadsheet by line item. Examples of documentation the purchaser should provide include, but are not limited to, exemption certificates, contracts, purchase orders, credit memos, and agreements.

Ryan's Concerns:

“Or other proof of procurement” – This language is suggested for EDI transactions which are more commonplace for B2B transactions.

“Or linked to” – This language is suggested because logistical/technical challenges could arise with high volume claims, or line items requiring large volumes of documents to support claims.

- **Page 8 Draft Guideline Language:**

If the Refund Claimant Return is not complete, the Department will notify the purchaser that information is missing. The purchaser will then have 60 days to provide the Department with the missing information. All supporting documentation required for the processing of the refund claim must be provided upon request within 60 days. If the

taxpayer does not provide the requested information within the required time period or the Refund Claimant Return is not complete, the refund claim will be decided on the information submitted.

Ryan's Concerns:

This allows the Department authority to deem a claim "imperfect" and deny, with the added layer of complexity requiring vendor certification for some claims. Since vendor confirmation is difficult and cannot possibly be controlled by claimants, the Department should allow a mechanism for claimants to work with vendors on that requirement after claims are filed without penalty of losing statute for claimed transactions.

- **Page 9 Draft Guideline Language:**

For purposes of satisfying the three-year statute of limitations, an incomplete Refund Claimant Return is not sufficient. If a refund claim is denied and a taxpayer files a new Refund Claimant Return for the same transaction, the date of the request for purposes of the statute of limitations will be the date the Department receives the new Refund Claimant Return, not the date of the first refund claim that was denied.

Ryan's Concerns:

Virginia has a statute of limitations of three years for refund claims. 23 VAC 10-210-3040 states:

A dealer may request a refund for taxes erroneously or illegally collected. The dealer must show that the tax erroneously or illegally collected was paid by him and not passed on to the consumer, or the tax was collected from the consumer as tax and subsequently refunded to the consumer. Refunds cannot be authorized unless the request is made within three years from the due date of the return. The amount refunded will be the net amount of state and local tax remitted to the state on the transaction(s) generating the refund. Thus, if a dealer filed a timely return and deducted dealer's discount for the period for which the refund is claimed, the amount of refund will be reduced by the dealer's discount taken (3% of state tax).

This guideline provides the Department wide authority to deny a claim with no obligation to timely respond to claimants on their determination of whether a claim is considered "complete". Further, Draft Regulations do not toll the statute. It is unclear how the

Department will determine the statute of limitations under this Draft Guideline. This leaves the Department with broad discretion to treat it as though the clock has not been stopped at all if a claim is filed and subsequently determined to be incomplete. The statute will continue to run and the taxpayer potentially will lose its right to recover tax paid in error. This is not fair and equitable to the taxpayer. Further, this section should be addressed to allow claimant reasonable time to "perfect" claim, particularly when that requires working with vendors to secure verification.

- **Appendix A-2 Draft Guideline Language:**

I certify under penalty of law that the amount of sales and use tax for which I am submitting this claim for refund has NOT been refunded or credited to me by TAX or the vendor to whom the tax was previously paid. I will immediately send payment for any duplicate refund to the Virginia Department of Taxation, Refund Coordinator, P.O. Box 5771 Richmond, VA 23220

Ryan's Concerns:

Does "penalty of law" actually mean "penalty of perjury"? Is this referring to the Virginia fraud statutes? It is unclear from the Draft Guideline language what laws Appendix A-2 is referring to. The Draft Guidelines should fully describe any penalties and cite to the supporting legal authority.

This draft certification provision requires sign-off on an absolute statement by a company Officer, under penalty of law. In reality, it would not be possible for a company Officer to sign off on such a statement, particularly for large and complex organizations.

There should be controls in place within TAX to ensure no duplicated claims are processed, which also involve vendor certification and TAX verification.

Is sign-off by a company Officer truly necessary? Can it instead be modified to reflect the statement certifies that no known refunds have been provided to claimant for these amounts?

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May 15, 2017
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Thank you for taking the time to review our concerns and comments on the Draft Guidelines for Retail Sales and Use Tax Refund Claim Procedures. We hope the Department will consider the additional burdens the Draft Guidelines will create for sales tax refund requests and take steps to make the Draft Guidelines more reasonable and equitable for taxpayers. Ryan feels that its suggestions, particularly incorporating an Assignment of Right to Refund as well as Protective Claim Procedures will benefit claimants, vendors and the Department. We welcome the opportunity for further discussion.

Sincerely,

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