

008212436

SENATE BILL NO. 653

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Agriculture, Conservation and Natural Resources
on February 14, 2000)

(Patron Prior to Substitute—Senator Hawkins)

A BILL to amend and reenact §§ 4.1-105 and 59.1-200 of the Code of Virginia and to amend the Code of Virginia by adding in Title 58.1 a chapter numbered 10.1, consisting of sections numbered 58.1-1023 through 58.1-1030, relating to the sale of cigarettes produced for export; penalties.

Be it enacted by the General Assembly of Virginia:

1. That §§ 4.1-105 and 59.1-200 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding in Title 58.1 a chapter numbered 10.1, consisting of sections numbered 58.1-1023 through 58.1-1030, as follows:

§ 4.1-105. Police power of members, agents and employees of Board.

Members of the Board are vested, and such agents and employees of the Board designated by it shall be vested, with like power to enforce the provisions of (i) this title and the criminal laws of the Commonwealth as is vested in the chief law-enforcement officer of a county, city, or town and; (ii) § 18.2-371.2; and (iii) § 58.1-1030.

CHAPTER 10.1.

ENFORCEMENT OF ILLEGAL SALE OR DISTRIBUTION OF CIGARETTES ACT.

§ 58.1-1023. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Cigarette" means any product that contains nicotine, is intended to be burned or heated 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 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.

"Department" means the Department of Taxation.

"Importer" means the same as that term is defined in 26 U.S.C. § 5702 (1).

"Manufacturer" means the same as that term is defined in 26 U.S.C. § 5702 (d).

"Package" means the same as that term is defined in 15 U.S.C. § 1332 (4).

§ 58.1-1024. Applicability.

The provisions of this chapter shall not apply to (i) cigarettes allowed to be imported or brought into the United States for personal use free of federal tax or (ii) cigarettes sold or intended to be sold as duty-free merchandise by a duty-free sales enterprise in accordance with the provisions of 19 U.S.C. § 1555 (b) and any implementing regulations. This section, however, shall apply to any such cigarettes that are brought back into the customs territory for resale within the customs territory.

§ 58.1-1025. Prohibited acts.

It shall be unlawful for any person to:

1. Sell or distribute in the Commonwealth, acquire, hold, own, possess, or transport, for sale or distribution in the Commonwealth, or import, or cause to be imported, into the Commonwealth for sale or distribution in the Commonwealth (i) any cigarettes the package of which bears any statement, label, stamp, sticker, or notice indicating that the manufacturer did not intend the cigarettes to be sold, distributed, or used in the United States, including but not limited to labels stating "For Export Only," "U.S. Tax-Exempt," "For Use Outside U.S.," or similar wording; (ii) any cigarettes the package of which does not comply with (a) all requirements imposed by or pursuant to federal law regarding warnings and other information on packages of cigarettes manufactured, packaged, or imported for sale, distribution, or use in the United States, including but not limited to the precise warning labels specified in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333, or (b) all federal trademark and copyright laws; (iii) any cigarettes imported into the United States on or after January 1, 2000, in violation of 26 U.S.C. § 5754 or any other federal law or regulations; (iv) any cigarettes that such person otherwise knows or has reason to know the manufacturer did not intend to be sold, distributed, or used in the United States; or (v) any cigarettes for which there has not been submitted to the Secretary of the U.S. Department of Health and Human Services the list of the ingredients added to tobacco in the manufacture of such cigarettes required by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1335a;

2. Alter the package of any cigarettes, prior to sale or distribution to the ultimate consumer, so as to

remove, conceal or obscure (i) any statement, label, stamp, sticker, or notice described in clauses (i) or (ii) of subdivision 1 or (ii) any health warning that is not specified in, or does not conform with the requirements of, the federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1333; or

3. Affix any stamp required pursuant to Chapter 10 (§ 58.1-1000 et seq.) of this title to the package of any cigarettes described in subdivision 1 or altered in violation of subdivision 2.

§ 58.1-1026. Records to be kept; filing with Department.

A. Any person who acquires, holds, owns, possesses, transports in or imports into the Commonwealth cigarettes which are subject to this chapter shall, with respect to such cigarettes, maintain and keep all records required pursuant to Chapter 10 (§ 58.1-1000 et seq.) of this title.

B. On the first business day of each month, each person licensed to affix the state tax stamp to cigarettes shall file with the Department, for all cigarettes imported into the United States to which such person has affixed the tax stamp in the preceding month, (i) a copy of the permit issued pursuant to the Internal Revenue Code, 26 U.S.C. § 5713, to the person importing such cigarettes into the United States allowing such person to import such cigarettes, and the customs form containing, with respect to such cigarettes, the internal revenue tax information required by the U. S. Bureau of Alcohol, Tobacco and Firearms; (ii) a statement, signed by such person under the penalty of perjury, which shall be treated as confidential by the Department and shall be exempt from disclosure under the Virginia Freedom of Information Act (§ 2.1-340 et seq.), identifying the brand and brand styles of all such cigarettes, and the person or persons, if any, to whom such cigarettes have been conveyed for resale; and (iii) a statement, signed by an officer of the manufacturer or importer under penalty of perjury, certifying that the manufacturer or importer has complied with the package health warning and ingredient reporting requirements of the federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1333 and 1335a, with respect to such cigarettes and §§ 3.1-336.1 and 3.1-336.2, including a statement indicating whether the manufacturer is, or is not, a participating tobacco manufacturer within the meaning of § 3.1-336.1.

§ 58.1-1027. Unfair cigarette sales; presumption.

For the purposes of this chapter, cigarettes imported or reimported into the United States for sale or distribution under any trade name, trade dress, or trademark that is the same as, or is confusingly similar to, any trade name, trade dress, or trademark used for cigarettes manufactured in the United States for sale or distribution in the United States shall be presumed to have been purchased outside of the ordinary channels of trade.

§ 58.1-1028. Revocation or suspension of permit by Department; civil penalties; sharing of information.

A. The Department may revoke or suspend the permit of any wholesale dealer, as defined in § 58.1-1000, for a violation of this chapter or any rule adopted by the Department as provided in § 58.1-1011.

B. In addition, the Department may impose a civil penalty in an amount not to exceed the greater of 500 percent of the retail value of the cigarettes involved or \$5,000 upon finding a violation of this chapter and may assess the tax due and any interest on the product acquired, possessed, sold, or offered for sale in violation of this chapter.

C. For the purpose of enforcing this chapter, the Department may request or share information with any federal, state or local agency, including any agency of another state or local agency thereof.

§ 58.1-1029. Other penalties for violation; civil actions.

A. Any violation of § 58.1-1025 or § 58.1-1026 shall constitute a prohibited practice as provided in § 59.1-200 and, in addition to any remedies or penalties set forth in this chapter, shall be subject to any remedies or penalties available for a violation of that section.

B. Any person who commits any of the acts prohibited by § 58.1-1025, either knowingly or having reason to know he is doing so, or who fails to comply with any of the requirements of § 58.1-1026, shall be guilty of a Class 1 misdemeanor.

C. In addition to any other remedy provided by law, any person may bring an action for appropriate injunctive or other equitable relief for a violation of this chapter, for actual damages, if any, sustained by reason of the violation, and, as determined by the court, interest on the damages from the date of the complaint, and taxable costs. If the court finds that the violation was willful, it may increase damages to an amount not exceeding three times the actual damages sustained by reason of the violation.

§ 58.1-1030. Seizure.

Cigarettes that are acquired, held, owned, possessed, transported in, imported into, or sold or distributed in the Commonwealth in violation of this chapter shall be deemed contraband and shall be subject to seizure, forfeiture and destruction. Such cigarettes shall be deemed contraband whether or not the violation of this chapter is with knowledge.

§ 59.1-200. Prohibited practices.

A. The following fraudulent acts or practices committed by a supplier in connection with a consumer transaction are hereby declared unlawful:

1. Misrepresenting goods or services as those of another;

- 122 2. Misrepresenting the source, sponsorship, approval, or certification of goods or services;
 123 3. Misrepresenting the affiliation, connection or association of the supplier, or of the goods or
 124 services, with another;
 125 4. Misrepresenting geographic origin in connection with goods or services;
 126 5. Misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or
 127 benefits;
 128 6. Misrepresenting that goods or services are of a particular standard, quality, grade, style, or model;
 129 7. Advertising or offering for sale goods which are used, secondhand, repossessed, defective,
 130 blemished, deteriorated, or reconditioned, or which are "seconds," irregulars, imperfects, or "not first
 131 class," without clearly and unequivocally indicating in the advertisement or offer for sale that the goods
 132 are used, secondhand, repossessed, defective, blemished, deteriorated, reconditioned, or are "seconds,"
 133 irregulars, imperfects or "not first class";
 134 8. Advertising goods or services with intent not to sell them as advertised, or with intent not to sell
 135 at the price or upon the terms advertised.
- 136 In any action brought under this subdivision, the refusal by any person, or any employee, agent, or
 137 servant thereof, to sell any goods or services advertised or offered for sale at the price or upon the terms
 138 advertised or offered, shall be prima facie evidence of a violation of this subdivision. This paragraph
 139 shall not apply when it is clearly and conspicuously stated in the advertisement or offer by which such
 140 goods or services are advertised or offered for sale, that the supplier or offeror has a limited quantity or
 141 amount of such goods or services for sale, and the supplier or offeror at the time of such advertisement
 142 or offer did in fact have or reasonably expected to have at least such quantity or amount for sale;
- 143 9. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts
 144 of price reductions;
- 145 10. Misrepresenting that repairs, alterations, modifications, or services have been performed or parts
 146 installed;
- 147 11. Misrepresenting by the use of any written or documentary material which appears to be an
 148 invoice or bill for merchandise or services previously ordered;
- 149 12. Notwithstanding any other provision of law, using in any manner the words "wholesale,"
 150 "wholesaler," "factory," or "manufacturer" in the supplier's name, or to describe the nature of the
 151 supplier's business, unless the supplier is actually engaged primarily in selling at wholesale or in
 152 manufacturing the goods or services advertised or offered for sale;
- 153 13. Using in any contract or lease any liquidated damage clause, penalty clause, or waiver of
 154 defense, or attempting to collect any liquidated damages or penalties under any clause, waiver, damages,
 155 or penalties which are void or unenforceable under any otherwise applicable laws of this
 156 Commonwealth, or under federal statutes or regulations;
- 157 14. Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection
 158 with a consumer transaction;
- 159 15. Violating any provision of §§ 3.1-796.78, 3.1-796.79, or § 3.1-796.82, relating to the sale of
 160 certain animals by pet dealers which is described in such sections, is a violation of this chapter;
- 161 16. Failing to disclose all conditions, charges, or fees relating to:
- 162 a. The return of goods for refund, exchange, or credit. Such disclosure shall be by means of a sign
 163 attached to the goods, or placed in a conspicuous public area of the premises of the supplier, so as to be
 164 readily noticeable and readable by the person obtaining the goods from the supplier. If the supplier does
 165 not permit a refund, exchange, or credit for return, he shall so state on a similar sign. The provisions of
 166 this subdivision shall not apply to any retail merchant who has a policy of providing, for a period of not
 167 less than twenty days after date of purchase, a cash refund or credit to the purchaser's credit card
 168 account for the return of defective, unused, or undamaged merchandise upon presentation of proof of
 169 purchase. In the case of merchandise paid for by check, the purchase shall be treated as a cash purchase
 170 and any refund may be delayed for a period of ten banking days to allow for the check to clear. This
 171 subdivision does not apply to sale merchandise which is obviously distressed, out of date, post season,
 172 or otherwise reduced for clearance; nor does this subdivision apply to special order purchases where the
 173 purchaser has requested the supplier to order merchandise of a specific or unusual size, color, or brand
 174 not ordinarily carried in the store or the store's catalog; nor shall this subdivision apply in connection
 175 with a transaction for the sale or lease of motor vehicles, farm tractors, or motorcycles as defined in
 176 § 46.2-100;
- 177 b. A layaway agreement. Such disclosure shall be furnished to the consumer (i) in writing at the time
 178 of the layaway agreement, or (ii) by means of a sign placed in a conspicuous public area of the
 179 premises of the supplier, so as to be readily noticeable and readable by the consumer, or (iii) on the bill
 180 of sale. Disclosure shall include the conditions, charges, or fees in the event that a consumer breaches
 181 the agreement;
- 182 16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess

of five dollars (i) on an account maintained by the supplier and (ii) resulting from such consumer's overpayment on such account. Suppliers shall give consumers written notice of such credit balances within sixty days of receiving overpayments. If the credit balance information is incorporated into statements of account furnished consumers by suppliers within such sixty-day period, no separate or additional notice is required;

17. If a supplier enters into a written agreement with a consumer to resolve a dispute which arises in connection with a consumer transaction, failing to adhere to the terms and conditions of such an agreement;

18. Violating any provision of the Virginia Health Spa Act, Chapter 24 (§ 59.1-294 et seq.) of this title;

19. Violating any provision of the Virginia Home Solicitation Sales Act, Chapter 2.1 (§ 59.1-21.1 et seq.) of this title;

20. Violating any provision of the Automobile Repair Facilities Act, Chapter 17.1 (§ 59.1-207.1 et seq.) of this title;

21. Violating any provision of the Virginia Lease-Purchase Agreement Act, Chapter 17.4 (§ 59.1-207.17 et seq.) of this title;

22. Violating any provision of the Prizes and Gifts Act, Chapter 31 (§ 59.1-415 et seq.) of this title;

23. Violating any provision of the Virginia Public Telephone Information Act, Chapter 32 (§ 59.1-424 et seq.) of this title;

24. Violating any provision of § 54.1-1505;

25. Violating any provision of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter 17.6 (§ 59.1-207.34 et seq.) of this title;

26. Violating any provision of § 3.1-949.1, relating to the pricing of merchandise;

27. Violating any provision of the Pay-Per-Call Services Act, Chapter 33 (§ 59.1-429 et seq.) of this title;

28. Violating any provision of the Extended Service Contract Act, Chapter 34 (§ 59.1-435 et seq.) of this title;

29. Violating any provision of the Virginia Membership Camping Act, Chapter 25 (§ 59.1-311 et seq.) of this title;

30. Violating any provision of the Comparison Price Advertising Act, Chapter 17.7 (§ 59.1-207.40 et seq.) of this title;

31. Violating any provision of the Virginia Travel Club Act, Chapter 36 (§ 59.1-445 et seq.) of this title;

32. Violating any provision of §§ 46.2-1231 and 46.2-1233.1; ~~and~~

33. Violating any provision of Chapter 40 (§ 54.1-4000 et seq.) of Title 54.1; *and*

34. *Violating any provision of Chapter 10.1 (§ 58.1-1023 et seq.) of Title 58.1.*

B. Nothing in this section shall be construed to invalidate or make unenforceable any contract or lease solely by reason of the failure of such contract or lease to comply with any other law of the Commonwealth or any federal statute or regulation, to the extent such other law, statute or regulation provides that a violation of such law, statute or regulation shall not invalidate or make unenforceable such contract or lease.