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**HOUSE BILL NO. 862****AMENDMENT IN THE NATURE OF A SUBSTITUTE**(Proposed by the Senate Committee on Finance  
on March 3, 2004)

(Patron Prior to Substitute—Delegate Ware, R. Lee)

*A BILL to amend and reenact §§ 3.1-336.2, 3.1-336.3, 58.1-1000, 58.1-1003, 58.1-1009, 58.1-1010, 58.1-1011, and 58.1-1013 of the Code of Virginia and to repeal §§ 58.1-1004, 58.1-1005, and 58.1-1014 of the Code of Virginia, relating to tax stamping of cigarettes, nonparticipating manufacturers' escrow requirements, and enforcement of cigarette sales reporting requirements.*

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 3.1-336.2, 3.1-336.3, 58.1-1000, 58.1-1003, 58.1-1009, 58.1-1010, 58.1-1011, and 58.1-1013 of the Code of Virginia are amended and reenacted as follows:**

§ 3.1-336.2. Requirements on tobacco product manufacturers; escrow of funds; civil penalties for violations.

A. Any tobacco product manufacturer selling cigarettes to consumers within the Commonwealth, whether directly or through a distributor, retailer or similar intermediary or intermediaries, after July 1, 1999, shall do one of the following:

1. Become a participating manufacturer (as that term is defined in section II (jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or

2. Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation):

| Year | Amount per unit sold in such year (except for 1999 |
|------|--|
|------|--|

|  | the amount per unit sold after July 1, 1999) |
|--|--|
|--|--|

|      |             |
|------|-------------|
| 1999 | \$ .0094241 |
|------|-------------|

|      |             |
|------|-------------|
| 2000 | \$ .0104712 |
|------|-------------|

|                       |             |
|-----------------------|-------------|
| each of 2001 and 2002 | \$ .0136125 |
|-----------------------|-------------|

|                           |             |
|---------------------------|-------------|
| each of 2003 through 2006 | \$ .0167539 |
|---------------------------|-------------|

|                                       |             |
|---------------------------------------|-------------|
| each of 2007 and each year thereafter | \$ .0188482 |
|---------------------------------------|-------------|

B. A tobacco product manufacturer that places funds into escrow pursuant to subdivision A 2 shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

1. To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the Commonwealth or any releasing party located or residing in the Commonwealth. Funds shall be released from escrow under this subdivision (i) in the order in which they were placed into escrow and (ii) only to the extent and at the time necessary to make payments required under such judgment or settlement;

2. To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow *on account of units sold in this Commonwealth* in a particular year was greater than the Commonwealth's allocable share of the total payments that such manufacturer would have been required to make in that year under the Master Settlement Agreement (as determined pursuant to section IX(i) (2) of the Master Settlement Agreement, and before any of the adjustments or offsets described in section IX(i) (3) of that Agreement other than the Inflation Adjustment) Master Settlement Agreement payments, as determined pursuant to section IX(i) of that Agreement, including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or

3. To the extent not released from escrow under subdivisions 1 or 2, funds shall be released from escrow and revert back to such tobacco product manufacturer ~~twenty-five~~ 25 years after the date on which they were placed into escrow.

C. Each tobacco product manufacturer that elects to place funds into escrow pursuant to subdivision

59 A 2 shall annually certify to the Attorney General that it is in compliance with that subdivision. The  
60 Attorney General may bring a civil action on behalf of the Commonwealth against any tobacco product  
61 manufacturer that fails to place into escrow the funds required under this section. Any tobacco product  
62 manufacturer that fails in any year to place into escrow the funds required under this section shall:

63 1. Be required within ~~fifteen~~15 days to place such funds into escrow as shall bring it into compliance  
64 with this section. The court, upon a finding of a violation of this subsection, may impose a civil penalty;  
65 ~~to be paid to the general fund of the Commonwealth,~~ in an amount not to exceed five percent of the  
66 amount improperly withheld from escrow per day of the violation and in a total amount not to exceed  
67 100 percent of the original amount improperly withheld from escrow;

68 2. In the case of a knowing violation, be required within ~~fifteen~~15 days to place such funds into  
69 escrow as shall bring it into compliance with this section. The court, upon a finding of a knowing  
70 violation of this subsection, may impose a civil penalty; ~~to be paid to the general fund of the~~  
71 ~~Commonwealth,~~ in an amount not to exceed ~~fifteen~~15 percent of the amount improperly withheld from  
72 escrow per day of the violation and in a total amount not to exceed 300 percent of the original amount  
73 improperly withheld from escrow; and

74 3. In the case of a second knowing violation, be prohibited from selling cigarettes to consumers  
75 within the Commonwealth (whether directly or through a distributor, retailer or similar intermediary) for  
76 a period not to exceed two years.

77 Each failure to make an annual deposit required under this section shall constitute a separate  
78 violation.

79 § 3.1-336.3. Definitions.

80 As used in this article:

81 "Brand family" means all styles of cigarettes sold under the same trademark and differentiated from  
82 one another by means of additional modifiers or descriptors, including, but not limited to, "menthol,"  
83 "lights," "kings," and "100s" and includes any brand name alone or in conjunction with any other word,  
84 trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of  
85 product identification identical or similar to, or identifiable with, a previously known brand of cigarettes.

86 "Commissioner" means the Tax Commissioner of the Department of Taxation.

87 "Nonparticipating manufacturer" means any tobacco product manufacturer that is not a participating  
88 manufacturer.

89 "Stamping agent" means (i) a person who is authorized *by the Tax Commissioner pursuant to*  
90 *§ 58.1-1011* to affix *Virginia* tax stamps to packages, packs, cartons, or other containers ~~of~~ of cigarettes  
91 ~~under Article 4 (§ 58.1-1000 et seq.) of Chapter 10 of Title 58.1 or any regulations promulgated or~~  
92 ~~guidelines issued thereto;~~ or (ii) any person who is required to pay the excise tax imposed on cigarettes  
93 pursuant to § 58.1-1001.

94 Terms defined in § 3.1-336.1 shall have the same meaning when used in this article.

95 § 58.1-1000. Definitions.

96 As used in this chapter, unless the context clearly shows otherwise, the term or phrase:

97 "Carton" means 10 packs of cigarettes, each containing 20 cigarettes or nine packs each containing  
98 25 cigarettes.

99 "Manufacturer" means any tobacco product manufacturer as defined in § 3.1-336.1.

100 "Pack" means a package containing either 20 or 25 cigarettes.

101 "Retail dealer" includes every person other than a wholesale dealer, as defined in this section, who  
102 sells or offers for sale any cigarettes.

103 "Retail sale" or "sale at retail" includes all sales except sales by ~~wholesalers~~ *wholesale dealers* to  
104 retail dealers or other ~~wholesalers~~ *wholesale dealers* for resale.

105 "Stamping agent" shall have the same meaning as provided in § 3.1-336.3.

106 "Stamps" means the stamp or stamps by the use of which the tax levied under this chapter is paid  
107 and shall be officially designated as Virginia revenue stamps. The Department is hereby authorized to  
108 provide for the use of any type of stamp which will effectuate the purposes of this chapter including but  
109 not limited to decalcomania and metering devices.

110 "Storage" means any keeping or retention in this Commonwealth of cigarettes for any purpose except  
111 sale in the regular course of business or subsequent use solely outside this Commonwealth.

112 "Use" means the exercise of any right or power over cigarettes incident to the ownership thereof or  
113 by any transaction where possession is given, except that it shall not include the sale of cigarettes in the  
114 regular course of business.

115 "Wholesale dealer" includes persons who sell cigarettes at wholesale only to retail dealers for the  
116 purpose of resale only, or who sell at wholesale to institutional, commercial or industrial users. The  
117 phrase shall also include chain store distribution centers or houses which distribute cigarettes to their  
118 stores for sale at retail.

119 § 58.1-1003. How paid; affixing of stamps; records of stamping agents.

120 A. The taxes imposed by this chapter shall be paid by affixing stamps equaling the amount of the tax

in the manner and at the time herein set forth. The stamps shall be affixed to each individual package, bag, box or can in such a manner that their removal will require continued application of water or steam. Time allowed for affixing stamps shall be as follows: Every ~~wholesale or retail dealer~~ *stamping agent* in this Commonwealth shall, within one ~~hour~~ *after business day* of receipt of any unstamped cigarettes, ~~begin affixing~~ *affix* to the same the requisite denominations and amount of stamp or stamps that represent the proper tax levied by this chapter. Stamping shall be continued with reasonable diligence by the ~~wholesale or retail dealer~~ *until all of the unstamped cigarettes have been stamped*; however, any wholesale dealer engaged in interstate business shall be permitted to set aside such part of his stock as may be necessary for the conduct of such interstate business without affixing the stamps required by this chapter *stamping agent. Any wholesale dealer engaged in interstate business shall be permitted to set aside such part of his stock as may be necessary for the conduct of such interstate business without affixing the Virginia revenue stamps required by this chapter.* Interstate stock shall be kept entirely separate from stamped stock in such a manner as to prevent the commingling of the interstate stock with the stamped stock. *All interstate stock so set aside shall be in accordance with § 58.1-1010.*

B. Every wholesale dealer shall at the time of shipping or delivering any cigarettes make and retain a true duplicate invoice of the same which shall show full and complete details of the sale or delivery of the taxable article. ~~Wholesale and retail dealers~~ *All stamping agents* shall also keep a record of purchases of all cigarettes, and retain all books, records, and memoranda pertaining to the purchase and sale of such cigarettes *for a period of five years, and such records shall be subject to examination by the Department upon request.*

C. Every stamping agent shall be required to file a report between the first and tenth of each month, covering all revenue stamps the stamping agent affixed to cigarettes during the preceding month. The report shall list all brands of cigarettes to which the Virginia revenue stamp was affixed and the quantity, measured in packs, of all such brands to which the Virginia revenue stamp was affixed. In addition, the report shall list the name and address of both the manufacturer of the cigarettes and the entity from which the cigarettes were obtained.

~~ED.~~ Any ~~wholesaler or retailer~~ *stamping agent* who fails or refuses to comply with any of the above provisions shall *have his or its permit to affix revenue stamps revoked by the Commissioner and shall be* guilty of a Class 1 misdemeanor.

§ 58.1-1009. Preparation, design and sale of stamps; unlawful sale or purchase of stamps a felony; penalty.

The Department is hereby authorized and directed to have prepared and to sell stamps suitable for denoting the tax on all cigarettes. The Department shall design, adopt and promulgate the form and kind of stamps to be used. Stamps so adopted and promulgated shall be known as and termed "Virginia revenue stamps," and in any information or indictment, it shall be sufficient to describe the stamps as "Virginia revenue stamps."

Any person other than the Department who sells such revenue stamps, not affixed to cigarettes sold and delivered by them, whether the said stamps be genuine or counterfeit, shall be guilty of a Class 6 felony. Any person who purchases revenue stamps from anyone other than the Department, unless such stamps are already affixed to cigarettes being purchased by and delivered to him, or who uses or affixes, or causes to be used or affixed, any revenue stamps not purchased from the Department by the owner of the cigarettes being handled or stamped, whether such stamps are genuine or counterfeit, shall be guilty of a Class 6 felony. When ~~wholesalers~~ *stamping agents* have qualified as such with the Department, as provided in § 58.1-1011, and purchase stamps as prescribed herein for use on taxable cigarettes sold and delivered by them, the Department shall allow on such sales of revenue stamps a discount of two and one-half cents per carton. In addition to any other penalties provided by law, the Department may revoke the permit issued, in accordance with § 58.1-1011, to any person who violates this section.

As used herein "carton" shall mean ~~ten packs of cigarettes, each containing twenty cigarettes.~~ All stamps prescribed by the Department shall be designed and furnished in such a fashion as to permit identification of the wholesale dealer or retail dealer that affixed the stamp to the particular package of cigarettes, by means of a serial number or other mark on the stamp. The Department shall maintain for not less than three years information identifying which wholesale dealer or retail dealer affixed the revenue stamp to each package of cigarettes.

§ 58.1-1010. Sale of unstamped cigarettes by wholesale dealers.

A. A wholesale dealer who is duly qualified as ~~such a wholesale dealer~~ *stamping agent* under § 58.1-1011 may sell cigarettes without the Virginia revenue stamps affixed thereto, provided such cigarettes are sold and shipped or delivered in interstate commerce to a person outside this Commonwealth. Such ~~wholesaler~~ *wholesale dealer* shall have on file a record of such sale, the original purchase order, a copy of the invoice therefor, and a receipt from a common carrier, contract carrier, or post office showing shipment for delivery in such other state, or, if delivered by such *wholesale dealer*

182 to the purchaser at a point outside of this Commonwealth, a receipt showing such delivery in addition to  
183 the record, original purchase order and copy of the invoice relating to such sale.

184 B. Such duly qualified ~~wholesaler~~ *wholesale dealer* may sell cigarettes without the Virginia revenue  
185 stamps affixed thereto, provided:

186 1. Such cigarettes are sold to a person who is engaged in business as a dealer in cigarettes in another  
187 state;

188 2. Such cigarettes are purchased exclusively for resale in the other state; and

189 3. Such cigarettes are at the time of sale properly stamped by the Virginia ~~wholesaler~~ *wholesale*  
190 *dealer* with revenue stamps authorized and issued by the other state for use upon such cigarettes. A  
191 ~~wholesaler~~*wholesale dealer* shall have on file a record of each such sale, the original purchase order, a  
192 copy of the invoice therefor, a receipt from the purchaser showing that such purchase was made  
193 exclusively for resale in the other state, and a record showing the purchase and use of such revenue  
194 stamps of the other state ~~Any such wholesaler with a place of business in a city located partly within~~  
195 ~~and partly without this Commonwealth, or in a county adjoining such city, shall not be required to~~  
196 ~~obtain such receipt from a purchaser from the other state, if the other state imposes a cigarette tax and if~~  
197 ~~the cigarette tax in the other state is at a higher rate than the tax imposed by the Commonwealth of~~  
198 ~~Virginia, and shall set forth in his or its monthly report to the Department the quantity of cigarettes,~~  
199 ~~measured in packs, so set aside for sale outside of the Commonwealth. If upon examination of invoices~~  
200 ~~of any wholesale dealer, such dealer is unable to furnish evidence to the Department of sufficient stamp~~  
201 ~~purchases from such other state to cover unstamped cigarettes set aside for sale in such other state, the~~  
202 ~~prima facie presumption shall arise that such cigarettes were sold without the proper stamps affixed~~  
203 ~~thereto in violation of § 58.1-1003.~~

204 C. Cigarettes may be sold by duly qualified ~~wholesalers~~ *wholesale dealers*, without revenue stamps  
205 affixed thereto, when sold to the United States or to any instrumentality thereof for resale to or for the  
206 use or consumption by members of the armed services of the United States, or when sold to the  
207 Veterans Canteen Service of the Veterans Administration for resale to veterans of the armed services of  
208 the United States who are hospitalized or domiciled in hospitals and homes of the Veterans  
209 Administration, provided the books and records, including original purchase orders and copies of  
210 invoices showing such sales, are kept on file ~~and shall set forth in his or its monthly report to the~~  
211 ~~Department the quantity of cigarettes, measured in packs, so sold.~~

212 D. Cigarettes may be sold by duly qualified ~~wholesalers~~ *wholesale dealers*, without revenue stamps  
213 affixed thereto, when sold and delivered to ships regularly engaged in foreign commerce or coastwise  
214 shipping between points in this Commonwealth and points outside of this Commonwealth for resale to  
215 or for use or consumption upon such ship or in foreign commerce.

216 E. The Department is authorized to adopt rules and regulations with respect to the enforcement of the  
217 provisions of this section to prevent any evasion of the tax herein imposed.

218 A failure to comply with any provision of this section with respect to any sale of unstamped  
219 cigarettes shall subject the ~~wholesaler~~ *wholesale dealer* to the payment of the tax thereon imposed by  
220 this chapter.

221 Any person who violates any of the provisions of this section shall be guilty of a Class 2  
222 misdemeanor.

223 § 58.1-1011. Qualification for permit to affix Virginia revenue stamps.

224 *Only manufacturers, wholesale dealers and retail dealers may be permitted as stamping agents. It*  
225 *shall be unlawful for any person to purchase, possess or affix Virginia revenue stamps without first*  
226 *obtaining a permit to do so from the Department. Every* ~~wholesaler~~ *manufacturer, wholesale dealer or*  
227 *retail dealer who desires to qualify as such a stamping agent with the Department shall make*  
228 *application to the Department on* ~~blanks forms~~ *prescribed for this purpose, which shall be supplied upon*  
229 *request. The application* ~~blanks forms~~ *will require such information relative to the nature of business*  
230 *engaged in by the* ~~wholesaler~~ *applicant as the Department deems necessary to the qualifying of the*  
231 ~~wholesaler~~ *applicant as a stamping agent. If the Department after review of his application, believes the*  
232 ~~wholesaler~~ *manufacturer, wholesale dealer or retail dealer to be qualified, the Department shall issue to*  
233 *the* ~~wholesaler~~ *applicant a permit qualifying him as a* ~~wholesaler~~ *stamping agent, as defined in this*  
234 *chapter, and he shall be allowed the discount on purchases of Virginia revenue stamps as set out herein*  
235 *for* ~~wholesalers~~ *stamping agents purchasing stamps for their individual use. Such stamping agent shall*  
236 *be authorized to affix Virginia revenue stamps, and in addition, if the applicant qualifies as a wholesale*  
237 *dealer, that shall be so noted on the permit issued by the Department. Permits issued pursuant to this*  
238 *section shall be valid for a period of three years from the date of issue unless revoked by the*  
239 *Department in the manner provided herein. The Department shall not sell Virginia revenue stamps to*  
240 *any* ~~wholesaler~~ *person or entity unless and until the* ~~wholesale~~ *has complied with the provisions of this*  
241 *section* ~~Department has issued that person or entity a permit to affix Virginia revenue stamps. The~~  
242 *Department may promulgate regulations governing the issuance, suspension and revocation of stamping*  
243 *agent permits. The Department may at any time revoke the permit issued to any* ~~wholesaler~~ *stamping*

agent as ~~hereinabove~~ *herein* provided who is found guilty of violating any of the provisions of this chapter, or any of the rules of the Department adopted and promulgated under authority of this chapter.

§ 58.1-1013. Penalty for failing to affix stamps; subsequent violations of article.

Any person within this Commonwealth who sells, stores or receives cigarettes for the purpose of distribution to another within this Commonwealth and fails to properly affix the required stamps to any cigarettes pursuant to the provisions of this chapter shall be required to pay as part of the tax imposed hereunder, a penalty of ~~twenty-five dollars~~ \$250, to be assessed and collected by the Department as other taxes are collected. Where willful intent exists to defraud the Commonwealth of the tax levied under this chapter, such person shall be required to pay a penalty of ~~\$250~~ \$2,500. It shall be prima facie evidence of intent to defraud when the number of such unstamped cigarettes exceeds ~~thirty~~ 30 packs.

Each pack of cigarettes not having proper stamps affixed thereto as herein required shall be deemed a separate offense. Any cigarettes in the place of business of any person required by the provisions of this chapter to stamp the same shall be prima facie evidence that they are intended for sale.

Any person who has been found guilty of violating any of the provisions of this article and who, after being punished by fine, penalty, assessment or imprisonment, is guilty of a second or subsequent violation of this chapter shall, upon being found guilty of such second offense, have his or its permit revoked by the Department, and no further permit shall be issued or granted to such person for a period of one year from the date the permit has been revoked.

**2. That §§ 58.1-1004, 58.1-1005, and 58.1-1014 of the Code of Virginia are repealed.**

**3. That if any portion of the amendments to subdivision B 2 of § 3.1-336.2 pursuant to this act are held by a court of last resort to be unconstitutional, then such amendments to subdivision B 2 shall be deemed repealed in their entirety, and subdivision B 2 of § 3.1-336.2 shall be in effect as such subdivision existed on January 1, 2004. Neither any holding of unconstitutionality nor any repeal of subdivision B 2 of § 3.1-336.2 pursuant to this enactment clause shall affect, impair, or invalidate any other portion of § 3.1-336.2, or the application of such section to any other person or circumstance, and such remaining portions of § 3.1-336.2 shall at all times continue in full force and effect.**