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SENATE BILL NO. 465**AMENDMENT IN THE NATURE OF A SUBSTITUTE**(Proposed by the Senate Committee on Finance
on February 17, 2004)

(Patron Prior to Substitute—Senator Chichester)

A BILL to amend and reenact §§ 58.1-1001, 58.1-1009, and 58.1-1018 of the Code of Virginia; to amend the Code of Virginia by adding in Title 32.1 a chapter numbered 15, consisting of sections numbered 32.1-366 and 32.1-367, and to amend the Code of Virginia by adding in Chapter 10 of Title 58.1 an article numbered 2.1, consisting of sections numbered 58.1-1021.01 through 58.1-1021.05; relating to state taxation of cigarettes and other tobacco products.

Whereas, the cost to the Commonwealth for Medicaid services has grown at an annual rate of 7.1 percent since 1997; and

Whereas, the annual cost for Medicaid services is expected to increase by 8.5 percent each year through 2012, a rate of growth that is higher than the expected growth in general fund revenue; and

Whereas, cigarettes and other tobacco products contribute to the cost of health care services; and

Whereas, Virginia's state cigarette tax is the lowest in the nation; now, therefore,

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-1001, 58.1-1009, and 58.1-1018 of the Code of Virginia are amended and reenacted, that the Code of Virginia is amended by adding in Title 32.1 a chapter numbered 15, consisting of sections numbered 32.1-366 and 32.1-367, and that the Code of Virginia is amended by adding in Chapter 10 of Title 58.1 an article numbered 2.1, consisting of sections numbered 58.1-1021.01 through 58.1-1021.05, as follows:

CHAPTER 15.**VIRGINIA HEALTH CARE FUND.****§ 32.1-366. Virginia Health Care Fund Established.**

A. There is hereby created in the state treasury a special nonreverting fund to be known as the Virginia Health Care Fund, hereafter referred to as the "Fund." The Fund shall be established on the books of the Comptroller and any moneys remaining in the Fund at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund. For purposes of the Comptroller's preliminary and final annual reports required by § , however, all deposits to and disbursements from the Fund shall be accounted for as part of the general fund of the state treasury.

B. All revenue received by the Commonwealth pursuant to the provisions of §§ 58.1-1001 and 58.1-1018 and Article 2.1 (§ 58.1-1021.01 et seq.) of Chapter 10 of Title 58.1 shall be paid into the state treasury and deposited to the Fund. The Comptroller shall also deposit 40 percent of the Commonwealth's allocation pursuant to the Master Settlement Agreement with tobacco product manufacturers, as defined in § 3.1-1106, to the Fund. The Fund shall also consist of all recoveries received during a fiscal year resulting from expenditures incurred in the Medicaid program during a prior fiscal year or years to the extent that such amounts represent recoveries of state funds that would otherwise be deposited to the general fund of the state treasury.

§ 32.1-367. Uses of Virginia Health Care Fund.

Moneys deposited to the Fund shall be used solely for the provision of health care services. Health care services include, but are not limited to, Medicaid payments, disease diagnosis, prevention and control, and community health services. Disbursements from the Fund shall be made in accordance with appropriations made by law.

§ 58.1-1001. Tax levied; rate.

In addition to all other taxes now imposed by law, every person within this Commonwealth who sells, stores or receives cigarettes made of tobacco or any substitute thereof, for the purpose of distribution to any person within this Commonwealth, shall pay to this Commonwealth an excise tax of one and one-quarter mills on each such cigarette sold, stored or received before July 1, 2004; an excise tax of one cent on each such cigarette sold, stored or received on or after July 1, 2004, through midnight on June 30, 2005; and an excise tax of 1.75 cents on each such cigarette sold, stored or received on or after July 1, 2005.

The revenues generated by the tax imposed under this section on and after July 1, 2004, shall be collected by the Department and deposited into the Virginia Health Care Fund established under § 32.1-366.

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

A. 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

60 of stamps to be used. Stamps so adopted and promulgated shall be known as and termed "Virginia
61 revenue stamps," and in any information or indictment, it shall be sufficient to describe the stamps as
62 "Virginia revenue stamps."

63 Any person other than the Department who sells such revenue stamps, not affixed to cigarettes sold
64 and delivered by them, whether the said stamps be genuine or counterfeit, shall be guilty of a Class 6
65 felony. Any person who purchases revenue stamps from anyone other than the Department, unless such
66 stamps are already affixed to cigarettes being purchased by and delivered to him, or who uses or affixes,
67 or causes to be used or affixed, any revenue stamps not purchased from the Department by the owner of
68 the cigarettes being handled or stamped, whether such stamps are genuine or counterfeit, shall be guilty
69 of a Class 6 felony. When wholesalers have qualified as such with the Department, as provided in
70 § 58.1-1011, and purchase stamps as prescribed herein for use on taxable cigarettes sold and delivered
71 by them, the Department shall allow on such sales of revenue stamps a discount of two and one-half
72 cents per carton. ~~In addition to any other penalties provided by law, the Department may revoke the~~
73 ~~permit issued, in accordance with § 58.1-1011, to any person who violates this section.~~

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

80 *B. 1. The Department shall provide Virginia revenue stamps to certain wholesale dealers holding a*
81 *current permit issued pursuant to § 58.1-1011 prior to collecting the tax imposed under this chapter*
82 *from such wholesale dealer. Such wholesale dealers shall be allowed to obtain the stamps from the*
83 *Department without concurrent payment of the tax only if the conditions of this subsection are satisfied.*

84 *In order to obtain Virginia revenue stamps without concurrent payment of the tax imposed under this*
85 *chapter, a wholesale dealer shall (i) file a bond with a corporate surety licensed to do business in*
86 *Virginia, or (ii) file an irrevocable letter of credit satisfactory to the Tax Commissioner as to the bank*
87 *or savings institution, the form and substance, and payable to the Commonwealth in the face amount of*
88 *approximately two times the anticipated average monthly amount in purchases of Virginia revenue*
89 *stamps by the wholesale dealer as determined by the Commissioner. The letter of credit shall be from a*
90 *bank incorporated or authorized to conduct banking business under the laws of the Commonwealth or*
91 *authorized to do business in the Commonwealth under the banking laws of the United States, or a*
92 *federally insured savings institution located in the Commonwealth. Such bond or irrevocable letter of*
93 *credit shall be conditioned upon payment of the tax imposed by this chapter relating to Virginia revenue*
94 *stamps obtained by the wholesale dealer from the Department (without concurrent payment of the tax)*
95 *for which such tax, net of any applicable discount described in subsection A, shall be paid within the 30*
96 *days immediately following the date that the related revenue stamp or stamps were provided by the*
97 *Department to such wholesale dealer. Any such bond shall be so written that, on timely payment of the*
98 *premium thereon, it shall continue in force from year to year unless sooner terminated.*

99 *2. Any surety on a bond filed by any wholesale dealer shall be released and discharged from any*
100 *and all liability to the Commonwealth accruing on such bond after the expiration of 60 days from the*
101 *date upon which such surety shall have lodged with the Commissioner written request to be released*
102 *and discharged. But such request shall not operate to relieve, release or discharge such surety from any*
103 *liability already accrued or which shall accrue before the expiration of such 60-day period. The*
104 *Commissioner shall, promptly on receipt of such notice, notify the wholesale dealer who furnished such*
105 *bond. Unless such dealer on or before the expiration of such 60 days' notice files with the*
106 *Commissioner a new bond or letter of credit that meets all the conditions described in subdivision 1, the*
107 *Commissioner shall forthwith require the wholesale dealer to pay the tax imposed under this chapter*
108 *concurrent with obtaining revenue stamps from the Department.*

109 *In the event that liability upon the bond or letter of credit filed by the wholesale dealer with the*
110 *Commissioner shall be discharged or reduced, whether by judgment rendered, payment made or*
111 *otherwise, or if in the opinion of the Commissioner any surety on the bond becomes unsatisfactory or*
112 *unacceptable, then the Commissioner may require the filing of a new bond or letter of credit. Unless*
113 *such new bond or letter of credit meets all the conditions described in subdivision 1, the Commissioner*
114 *shall forthwith require the wholesale dealer to pay the tax imposed under this chapter concurrent with*
115 *obtaining revenue stamps from the Department.*

116 *3. Notwithstanding any other provision in this subsection, the Tax Commissioner, for good cause,*
117 *shall require a wholesale dealer to pay the tax imposed under this chapter concurrent with obtaining*
118 *revenue stamps from the Department, regardless of whether or not such dealer has filed or agreed to*
119 *file the bond or letter of credit described in this subsection.*

120 *C. In addition to any other penalties provided by law, the Department may revoke the permit issued,*
121 *in accordance with § 58.1-1011, to any person who violates any provision of this section.*

§ 58.1-1018. Tax imposed on storage, use or consumption of cigarettes; exemption of products on which sales tax has been paid.

An excise tax is hereby imposed on the storage, use or other consumption in this Commonwealth of cigarettes purchased at retail in an amount equal to that set out in § 58.1-1001. Every person storing, using or otherwise consuming in this Commonwealth cigarettes purchased at retail shall be liable for the tax imposed by this article, and the liability shall not be extinguished until the tax has been paid to this Commonwealth; however, if such cigarettes have attached thereto the requisite stamps or if the excise tax imposed by Article 1 (§ 58.1-1000 et seq.) has been paid by the seller of such cigarettes, then the tax imposed by this article shall not be due.

The revenues generated by the tax imposed under this section on and after July 1, 2004, shall be collected by the Department and deposited into the Virginia Health Care Fund established under § 32.1-366.

Article 2.1. Tobacco Products Tax.

§ 58.1-1021.01. Definitions.

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

"Package" means any package, bag, box, can, or other container in which tobacco products are packaged and sold.

"Purchase price" means the same as sales price but applies to the total price paid for tobacco products.

"Retail dealer" means every person other than a wholesale dealer, as defined in this section, who sells or offers for sale any tobacco product.

"Sales price" means 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. "Sales price" shall 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.

"Tobacco product" or "tobacco products" means (i) "cigar" as defined in § 5702 (a) of the Internal Revenue Code, and as such section may be amended; (ii) "smokeless tobacco" as defined in § 5702 (m) of the Internal Revenue Code, and as such section may be amended; (iii) "pipe tobacco" as defined in § 5702 (n) of the Internal Revenue Code, and as such section may be amended; or (iv) "roll-your-own tobacco" as defined in § 5702 (o) of the Internal Revenue Code, and as such section may be amended.

"Wholesale dealer" means persons who sell any tobacco product at wholesale to retail dealers, or who sell any tobacco product at wholesale to institutional, commercial or industrial users.

§ 58.1-1021.02. Tax on tobacco products.

A. In addition to all other taxes now imposed by law, there is hereby imposed a tax on every wholesale dealer within the Commonwealth selling any tobacco product to a retail dealer located in the Commonwealth or selling any tobacco product to institutional, commercial or industrial users located in the Commonwealth. For purposes of such tax, chain store distribution centers or houses that distribute any tobacco product to their stores for sale at retail shall be deemed to be a wholesale dealer selling to a retail dealer.

The tax shall be imposed at a rate of 10 percent of the sales price charged by the wholesale dealer for each such package of tobacco product sold to a retail dealer or institutional, commercial or industrial user. In any case where a chain store distribution center or house distributes any tobacco product to its stores, the tax shall be imposed on the purchase price paid by the chain store distribution center or house for each such package of tobacco product so distributed.

B. In addition to all other taxes now imposed by law, there is hereby imposed a tax on every retail dealer within the Commonwealth purchasing any tobacco product from a wholesale dealer located outside the Commonwealth.

The tax shall be imposed at a rate of 10 percent of the purchase price paid by the retail dealer for each such package of tobacco product purchased from a wholesale dealer located outside the Commonwealth.

§ 58.1-1021.03. Monthly return and payments of tax.

A. Every wholesale dealer subject to the tax imposed under this article shall, beginning with the month of October 2004, file a monthly return no later than the tenth of each month on a form prescribed by the Department, covering the sale of tobacco products by such dealer, for which a tax is imposed pursuant to subsection A of 58.1-1021.02, during the preceding month. The return shall contain or be accompanied by such further information as the Department shall require. The wholesale dealer, at the time of filing the return, shall pay to the Department the tax imposed under subsection A of § 58.1-1021.02 on the sales price for each such package of tobacco product sold in the preceding

183 month.

184 B. Every retail dealer subject to the tax imposed under this article shall, beginning with the month of
185 October 2004, file a monthly return no later than the tenth of each month on a form prescribed by the
186 Department, covering the purchase of tobacco products by such dealer, for which a tax is imposed
187 pursuant to subsection B of 58.1-1021.02, during the preceding month. The return shall contain or be
188 accompanied by such further information as the Department shall require. The retail dealer, at the time
189 of filing the return, shall pay to the Department the tax imposed under subsection B of § 58.1-1021.02
190 on the purchase price for each such package of tobacco product purchased in the preceding month.

191 § 58.1-1021.04. Failure to file return; fraudulent return; penalties; interest; overpayment of tax.

192 A. When any wholesale dealer or retail dealer fails to make any return or pay the full amount of the
193 tax required by this article, there shall be imposed a specific penalty to be added to the tax in the
194 amount of five percent if the failure is for not more than one month, with an additional two percent for
195 each additional month, or fraction thereof, during which the failure continues, not to exceed 20 percent
196 in the aggregate. In no case, however, shall the penalty be less than \$10 and such minimum penalty
197 shall apply whether or not any tax is due for the period for which such return was required. If such
198 failure is due to providential or other good cause shown to the satisfaction of the Tax Commissioner,
199 such return with or without remittance may be accepted exclusive of penalties. In the case of a false or
200 fraudulent return where willful intent exists to defraud the Commonwealth of any tax due under this
201 article, or in the case of a willful failure to file a return with the intent to defraud the Commonwealth
202 of any such tax, a specific penalty of 50 percent of the amount of the proper tax shall be assessed. All
203 penalties and interest imposed by this article shall be payable by the wholesale dealer or retail dealer
204 and collectible by the Department in the same manner as if they were a part of the tax imposed.

205 B. It shall be prima facie evidence of intent to defraud the Commonwealth of any tax due under this
206 article when any wholesale dealer or retail dealer reports his sales or purchases, as the case may be, at
207 50 percent or less of the actual amount.

208 C. Interest at a rate determined in accordance with § 58.1-15 shall accrue on the tax until the same
209 is paid.

210 No deficiency, interest or penalty shall be assessed for any month after the expiration of three years
211 from the date set for the filing of the return for such month, except in cases of fraud, or where no
212 return has been filed for such month.

213 D. If the Tax Commissioner determines that the amount paid the Commonwealth under this article in
214 regard to any monthly return was greater than the amount of tax due the Commonwealth, the excess
215 may be taken as a credit by the wholesale dealer or retail dealer against a subsequent month's tax
216 imposed under this article. However, if such wholesale dealer or retail dealer requests a refund, such
217 excess shall be refunded to the dealer within 45 days of the request. The refund shall include interest at
218 the rate provided in § 58.1-15. Interest on such refunds shall accrue from the due date of the return to
219 which such excess is attributable to or the date such excess was paid to the Department, whichever is
220 later, and shall end on a date determined by the Department preceding the date of the refund check by
221 not more than seven days.

222 § 58.1-1021.05. Use of revenues.

223 The revenues generated by the taxes imposed under this article shall be collected by the Department
224 and deposited into the Virginia Health Care Fund established under § 32.1-366.

225 2. That the taxes set forth under Article 2.1 (§ 58.1-1021.01 et seq.) of Chapter 10 of Title 58.1
226 pursuant to the provisions of this act shall be imposed beginning September 1, 2004, for taxable
227 sales or purchases under such article occurring on or after such date.

228 3. That the Tax Commissioner shall establish guidelines and rules for (i) transitional procedures in
229 regard to the increase in the state cigarette tax and (ii) implementation of the tax on tobacco
230 products under Article 2.1 (§ 58.1-1021.01 et seq.) of Chapter 10 of Title 58.1, pursuant to the
231 provisions of this act. Such guidelines and rules issued by the Tax Commissioner shall be exempt
232 from the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).