

VIRGINIA ACTS OF ASSEMBLY -- 2005 SESSION

CHAPTER 899

An Act to amend and reenact § 32.1-366 of the Code of Virginia, to amend the Code of Virginia by adding in Chapter 18 of Title 3.1 an article numbered 5.1, consisting of sections numbered 3.1-336.2:1 and 3.1-336.2:2, and by adding a section numbered 58.1-439.15:01, relating to assignments of escrow payments under the Master Settlement Agreement and financial incentives for making assignments of escrow payments.

[H 2919]

Approved March 28, 2005

Be it enacted by the General Assembly of Virginia:

1. That § 32.1-366 of the Code of Virginia is amended and reenacted, and that the Code of Virginia is amended by adding in Chapter 18 of Title 3.1 an article numbered 5.1, consisting of sections numbered 3.1-336.2:1 and 3.1-336.2:2, and by adding a section numbered 58.1-439.15:01 as follows:

Article 5.1.

Escrow Funds Contributed to the Commonwealth.

§ 3.1-336.2:1. Assignment to the Commonwealth of rights to tobacco manufacturer escrow funds; contribution to the Commonwealth.

Notwithstanding the provisions of subsection B of § 3.1-336.2, a tobacco product manufacturer who elects to place funds into escrow pursuant to subdivision A 2 of § 3.1-336.2 may make an irrevocable assignment of its interest in the funds to the benefit of the Commonwealth. Such assignment shall be permanent and shall apply to all funds in the subject escrow account at the time of assignment or that may subsequently come into such account, including those deposited into the escrow account prior to the assignment being executed, those deposited into the escrow account after the assignment is executed, and interest or other appreciation on such funds. However, any interest or other appreciation withdrawn from the subject escrow account prior to the time of assignment shall not be a part of the assignment. The tobacco product manufacturer, the Attorney General, and the financial institution where the escrow account is maintained shall make such amendments to the qualified escrow account agreement, title to the account, and the account itself as may be necessary to effectuate an irrevocable assignment of rights executed pursuant to this section or a withdrawal or payment of funds from the escrow account pursuant to § 3.1-336.2:2. An assignment of rights executed pursuant to this section shall be in writing, signed by a duly authorized representative of the tobacco product manufacturer making the assignment, and shall become effective upon delivery of the assignment to the Attorney General and the financial institution where the escrow account is maintained.

§ 3.1-336.2:2. Withdrawal of escrow funds assigned and contributed to the Commonwealth.

Notwithstanding the provisions of subsection B of § 3.1-336.2, any escrow funds assigned and contributed to the Commonwealth pursuant to § 3.1-336.2:1, less the aggregate limitation for incentive payments to all small tobacco product manufacturers for the relevant year due from the escrow funds pursuant to § 58.1-439.15:01, shall be withdrawn by the Commonwealth by request of the State Treasurer to the Attorney General and upon approval of the Attorney General. The State Treasurer shall make such request as soon as practicable and such escrow funds withdrawn shall be deposited into the Virginia Health Care Fund established under § 32.1-366.

After such withdrawal, and after the actual incentive payments pursuant to § 58.1-439.15:01 have been made from the escrow funds in the escrow account, any remaining escrow funds shall be withdrawn under the withdrawal procedures provided in this section, and the withdrawn escrow funds shall be deposited into the Virginia Health Care Fund. Nothing in this article shall be construed to relieve a tobacco product manufacturer from any past, current, or future obligations it may have pursuant to Article 5 (§ 3.1-336.1 et seq.) or Article 6 (§ 3.1-336.3 et seq.) of this chapter.

§ 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 § 2.2-813, 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 (i) §§ 58.1-1001 and 58.1-1018 and, (ii) Article 2.1 (§ 58.1-1021.01 et seq.) of Chapter 10 of Title 58.1, and (iii) § 3.1-336.2:2 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.

§ 58.1-439.15:01. Tax incentives for use of domestic tobacco.

A. Definitions.

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

"Domestic tobacco" means tobacco grown, produced, and processed entirely within the United States of America.

"Master Settlement Agreement" means the same as that term is defined in § 3.1-336.1.

"Small tobacco product manufacturer" means an entity making an assignment pursuant to § 3.1-336.2:1 that directly (and not exclusively through any affiliate) manufactures fewer than 5 billion cigarettes in the calendar year in which the assignment is made, whose manufactured cigarettes contain a minimum of 75 percent domestic tobacco, who is not participating in the Master Settlement Agreement, who is in compliance with all obligations imposed pursuant to Article 5 (§ 3.1-336.1 et seq.) and Article 6 (§ 3.1-336.3 et seq.) of Chapter 18 of Title 3.1, and who has executed an assignment and payment to the Commonwealth in accordance with Article 5.1 (§ 3.1-336.2:1 et seq.) of Chapter 18 of Title 3.1.

B. Any small tobacco product manufacturer who intends to apply for incentive payments pursuant to this section shall, by January 31 of the applicable year, provide in a written certification to the Department such information as the Department may require to establish: (i) the percentage of domestic tobacco contained in cigarettes produced by such manufacturer; and (ii) the amount paid for domestic tobacco purchased by the manufacturer on or after January 1, 2005, which was used by the manufacturer in manufacturing cigarettes in the immediately preceding year. For all such certifications made by an eligible manufacturer that are approved by the Department, the Department shall cause incentive payments to be made to the small tobacco product manufacturer. Incentive payments shall first be made pursuant to this section in calendar year 2007 for calendar year 2006 manufacturing.

The Tax Commissioner shall, as soon as practicable but no later than 30 days after the manufacturer's certification, make a written certification to the Comptroller of the amount of the incentive payment to be made to the small tobacco product manufacturer. As soon as practicable after receipt of the Tax Commissioner's certification, but no later than 15 days after receipt of such certification, the Comptroller shall draw his warrant from funds in the appropriate escrow account pursuant to §§ 3.1-336.2 and 3.1-336.2:2 on the Treasurer of Virginia in the proper amount in favor of the small tobacco product manufacturer.

C. 1. For incentive payments made in 2007 for calendar year 2006, the incentive payments shall equal the amount paid by the small tobacco product manufacturer for domestic tobacco that was purchased by the manufacturer on or after January 1, 2005, and was used by the manufacturer in manufacturing cigarettes in 2006, provided that the aggregate incentive payments for which a small tobacco product manufacturer may be eligible for such purchases shall not exceed a total sum equal to 25 percent of the amount that the manufacturer paid in calendar year 2005 into a qualified escrow account established pursuant to Article 5 (§ 3.1-336.1 et seq.) of Chapter 18 of Title 3.1. The amount paid into a qualified escrow account in calendar year 2005 for purposes of the incentive payments shall be computed net of any escrow funds released and reverted back to the small tobacco product manufacturer that are attributable to calendar year 2005 escrow payments, pursuant to subdivision B 2 of § 3.1-366.2 as it was in effect on June 30, 2005.

The aggregate amount of incentive payments to all small tobacco product manufacturers pursuant to this subdivision shall not exceed \$9 million. However, if the amount of the incentive payments computed by the Tax Commissioner pursuant to the provisions of this subdivision without regard to such \$9 million limitation is in excess of \$9 million, the share of the \$9 million to be paid to each qualifying small tobacco product manufacturer shall be determined as provided in subsection D.

2. For incentive payments made in 2008 for calendar year 2007, the incentive payments shall equal the amount paid by the small tobacco product manufacturer for domestic tobacco that was purchased by the manufacturer on or after January 1, 2005, and was used by the manufacturer in manufacturing cigarettes in 2007, provided that the aggregate incentive payments for which a small tobacco product manufacturer may be eligible for such purchases shall not exceed a total sum equal to 20 percent of the amount that the manufacturer paid in calendar year 2006 into a qualified escrow account established pursuant to Article 5 (§ 3.1-336.1 et seq.) of Chapter 18 of Title 3.1.

The aggregate amount of incentive payments to all small tobacco product manufacturers pursuant to this subdivision shall not exceed \$8 million. However, if the amount of the incentive payments computed by the Tax Commissioner pursuant to the provisions of this subdivision without regard to such \$8 million limitation is in excess of \$8 million, the share of the \$8 million to be paid to each qualifying small tobacco product manufacturer shall be determined as provided in subsection D.

3. For incentive payments made in 2009 for calendar year 2008, the incentive payments shall equal the amount paid by the small tobacco product manufacturer for domestic tobacco that was purchased by

the manufacturer on or after January 1, 2005, and was used by the manufacturer in manufacturing cigarettes in 2008, provided that the aggregate incentive payments for which a small tobacco product manufacturer may be eligible for such purchases shall not exceed a total sum equal to 15 percent of the amount that the manufacturer paid in calendar year 2007 into a qualified escrow account established pursuant to Article 5 (§ 3.1-336.1 et seq.) of Chapter 18 of Title 3.1.

The aggregate amount of incentive payments to all small tobacco product manufacturers pursuant to this subdivision shall not exceed \$6 million. However, if the amount of the incentive payments computed by the Tax Commissioner pursuant to the provisions of this subdivision without regard to such \$6 million limitation is in excess of \$6 million, the share of the \$6 million to be paid to each qualifying small tobacco product manufacturer shall be determined as provided in subsection D.

4. For incentive payments made in 2010 for calendar year 2009, the incentive payments shall equal the amount paid by the small tobacco product manufacturer for domestic tobacco that was purchased by the manufacturer on or after January 1, 2005, and was used by the manufacturer in manufacturing cigarettes in 2009, provided that the aggregate incentive payments for which a small tobacco product manufacturer may be eligible for such purchases shall not exceed a total sum equal to 10 percent of the amount that the manufacturer paid in calendar year 2008 into a qualified escrow account established pursuant to Article 5 (§ 3.1-336.1 et seq.) of Chapter 18 of Title 3.1.

The aggregate amount of incentive payments to all small tobacco product manufacturers pursuant to this subdivision shall not exceed \$4 million. However, if the amount of the incentive payments computed by the Tax Commissioner pursuant to the provisions of this subdivision without regard to such \$4 million limitation is in excess of \$4 million, the share of the \$4 million to be paid to each qualifying small tobacco product manufacturer shall be determined as provided in subsection D.

5. For incentive payments made in 2011 for calendar year 2010, the incentive payments shall equal the amount paid by the small tobacco product manufacturer for domestic tobacco that was purchased by the manufacturer on or after January 1, 2005, and was used by the manufacturer in manufacturing cigarettes in 2010, provided that the aggregate incentive payments for which a small tobacco product manufacturer may be eligible for such purchases shall not exceed a total sum equal to five percent of the amount that the manufacturer paid in calendar year 2009 into a qualified escrow account established pursuant to Article 5 (§ 3.1-336.1 et seq.) of Chapter 18 of Title 3.1.

The aggregate amount of incentive payments to all small tobacco product manufacturers pursuant to this subdivision shall not exceed \$3 million. However, if the amount of the incentive payments computed by the Tax Commissioner pursuant to the provisions of this subdivision without regard to such \$3 million limitation is in excess of \$3 million, the share of the \$3 million to be paid to each qualifying small tobacco product manufacturer shall be determined as provided in subsection D.

6. For incentive payments made in 2012 for calendar year 2011, the incentive payments shall equal the amount paid by the small tobacco product manufacturer for domestic tobacco that was purchased by the manufacturer on or after January 1, 2005, and was used by the manufacturer in manufacturing cigarettes in 2011, provided that the aggregate incentive payments for which a small tobacco product manufacturer may be eligible for such purchases shall not exceed a total sum equal to five percent of the amount that the manufacturer paid in calendar year 2010 into a qualified escrow account established pursuant to Article 5 (§ 3.1-336.1 et seq.) of Chapter 18 of Title 3.1.

The aggregate amount of incentive payments to all small tobacco product manufacturers pursuant to this subdivision shall not exceed \$3 million. However, if the amount of the incentive payments computed by the Tax Commissioner pursuant to the provisions of this subdivision without regard to such \$3 million limitation is in excess of \$3 million, the share of the \$3 million to be paid to each qualifying small tobacco product manufacturer shall be determined as provided in subsection D.

7. No incentive payments shall be made in calendar years subsequent to 2012.

D. If the aggregate amount of the incentive payments to all small tobacco product manufacturers to be made in any calendar year exceeds the aggregate limitation for incentive payments for the year, the payment to each qualifying small tobacco product manufacturer for such year shall be a pro rata share of such aggregate limitation based upon the amount of the incentive payment that would have been made to each qualifying manufacturer for such year if there were no such aggregate limitation.

E. A small tobacco product manufacturer shall not be eligible for any incentive payment under this section for purchases of domestic tobacco that is grown by an agent or director of the small tobacco product manufacturer.

F. The provisions of Chapter 18 (§ 58.1-1800 et seq.) shall apply to the administration of this section, *mutatis mutandis*.

2. That the Department of Taxation shall within 280 days of the passage of this act develop and make publicly available guidelines governing the payments to small tobacco product manufacturers purchasing domestic tobacco. The development of such guidelines shall be exempt from the provisions of the Administrative Process Act (§ 2.2-4000 et seq.) of the Code of Virginia.