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## HOUSE BILL NO. 1885

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Finance  
on February 2, 2005)

(Patron Prior to Substitute—Delegate Ware)

A BILL to amend and reenact §§ 58.1-1021.01 through 58.1-1021.04 of the Code of Virginia, to amend the Code of Virginia by adding sections numbered 58.1-1021.04:1 through 58.1-1021.04:5, relating to the tobacco products tax.

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-1021.01 through 58.1-1021.04 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding sections numbered 58.1-1021.04:1 through 58.1-1021.04:5 as follows:

§ 58.1-1021.01. Definitions.

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

"Distributor" means (i) any person engaged in the business of selling tobacco products in the Commonwealth who brings, or causes to be brought, into the Commonwealth from outside the Commonwealth any tobacco products for sale; (ii) any person who makes, manufactures, fabricates, or stores tobacco products in the Commonwealth for sale in the Commonwealth; (iii) any person engaged in the business of selling tobacco products outside the Commonwealth who ships or transports tobacco products to any person in the business of selling tobacco products in the Commonwealth; or (iv) any retail dealer in possession of untaxed tobacco products in the Commonwealth.

"Manufacturer" means a person who manufactures or produces tobacco products and sells tobacco products to a distributor.

"Manufacturer's representative" means a person employed by a manufacturer to sell or distribute the manufacturer's tobacco products.

"Manufacturer's sales price" means the actual price for which a manufacturer, manufacturer's representative, or any other person sells tobacco products to an unaffiliated distributor.

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

"Person" means any individual, corporation, partnership, association, company, business, trust, joint venture, or other legal entity.

"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 to consumers.

"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

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house for each such package of tobacco product so distributed upon the privilege of selling or dealing in tobacco products in the Commonwealth by any person engaged in business as a distributor thereof, at the rate of 10 percent of the manufacturer's sales price of such tobacco products. Such tax shall be imposed at the time the distributor (i) brings or causes to be brought into the Commonwealth from outside the Commonwealth tobacco products for sale; (ii) makes, manufactures, or fabricates tobacco products in the Commonwealth for sale in the Commonwealth; or (iii) ships or transports tobacco products to retailers in the Commonwealth to be sold by those retailers. It is the intent and purpose of this article that the distributor who first possesses the tobacco product subject to this tax in the Commonwealth shall be the distributor liable for the tax. It is further the intent and purpose of this article to impose the tax once, and only once on all tobacco products for sale in the Commonwealth.

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. No tax shall be imposed pursuant to this section upon tobacco products not within the taxing power of the Commonwealth under the Commerce Clause of the United States Constitution.

§ 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 April 2005, 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 month.

B. Every retail dealer distributor subject to the tax imposed under this article shall, beginning with the month of April 2005, file a monthly return no later than the tenth twentieth of each month on a form prescribed by the Department, covering the purchase of tobacco products by such dealer distributor during the preceding month, for which a tax is imposed pursuant to subsection B A of § 58.1-1021.02, during the preceding month. Each return shall show the quantity and manufacturer's sales price of each tobacco product (i) brought, or caused to be brought, into the Commonwealth for sale; and (ii) made, manufactured, or fabricated in the Commonwealth for sale in the Commonwealth during the preceding calendar month. Every licensed distributor outside the Commonwealth shall in a like manner file a return showing the quantity and manufacturer's sales price of each tobacco product shipped or transported to retailers in the Commonwealth to be sold by those retailers, during the preceding calendar month. The return shall be made on forms furnished or prescribed by the Department and shall contain or be accompanied by such further information as the Department shall require. The retail dealer distributor, at the time of filing the return, shall pay to the Department the tax imposed under subsection B A of § 58.1-1021.02 on the purchase manufacturer's sales price for each such package of tobacco product purchased in the preceding month on which tax is due.

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

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

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

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

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

has been filed for such month.

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

§ 58.1-1021.04:1. *Distributor's license; penalty.*

A. No person shall engage in the business of selling or dealing in tobacco products as a distributor in the Commonwealth without first having received a separate license from the Department for each location or place of business. Each application for a distributor's license shall be accompanied by a fee to be prescribed by the Department. Every application for such license shall be made on a form prescribed by the Department and the following information shall be provided on the application:

1. The name and address of the applicant. If the applicant is a firm, partnership or association, the name and address of each of its members shall be provided. If the applicant is a corporation, the name and address of each of its principal officers shall be provided;

2. The address of the applicant's principal place of business;

3. The place or places where the business to be licensed is to be conducted; and

4. Such other information as the Department may require for the purpose of the administration of this article.

B. A person outside the Commonwealth who ships or transports tobacco products to retailers in the Commonwealth, to be sold by those retailers, may make application for license as a distributor, be granted such a license by the Department, and thereafter be subject to all the provisions of this article. Once a license is granted pursuant to this section, such person shall be entitled to act as a licensed distributor if the person files with the application proof that the person has appointed the Clerk of the State Corporation Commission as the agent for service of process relating to any matter or issue involving the person and arising under the provisions of this article.

The Department shall conduct a background investigation, to include a Virginia Criminal History Records search, and fingerprints of the applicant, or the responsible principals, managers, and other persons engaged in handling tobacco products at the licensable locations, that shall be submitted to the Federal Bureau of Investigation if the Department deems a National Criminal Records search necessary, on applicants for licensure as tobacco products distributors. The Department may refuse to issue a distributor's license or may suspend, revoke or refuse to renew a distributor's license issued to any person, partnership, corporation, limited liability company or business trust, if it determines that the principals, managers, and other persons engaged in handling tobacco products at the licensable location of the applicant have been (i) found guilty of any fraud or misrepresentation in any connection; (ii) convicted of robbery, extortion, burglary, larceny, embezzlement, fraudulent conversion, gambling, perjury, bribery, treason, or racketeering; or (iii) convicted of a felony. Anyone who knowingly and willfully falsifies, conceals or misrepresents a material fact or knowingly and willfully makes a false, fictitious or fraudulent statement or representation in any application for a distributor's license to the Department, shall be guilty of a Class 1 misdemeanor. The Department may establish an application or renewal fee not to exceed \$750 to be retained by the Department to be applied to the administrative and other costs of processing distributor's license applications, conducting background investigations and issuing distributor's licenses. Any amount collected pursuant to this section in excess of such costs as of June 30 in even numbered years shall be reported to the State Treasurer and deposited into the state treasury.

C. Upon receipt of an application in proper form and payment of the required license fee, the Department shall, unless otherwise provided by this article, issue to the applicant a license, which shall permit the licensee to engage in business as a distributor at the place of business shown on the license. Each license, or a copy thereof, shall be prominently displayed on the premises covered by the license. No license shall be transferable to any other person. Distributor's licenses issued pursuant to this section shall be valid for a period of three years from the date of issue unless revoked by the Department in the manner provided herein. The Department may at any time revoke the license issued to any distributor who is found guilty of violating or noncompliance with any of the provisions of this chapter, or any of the rules of the Department adopted and promulgated under authority of this chapter.

D. The Department shall compile and maintain a current list of licensed distributors. The list shall be updated on a monthly basis, and published on the Department's official Internet website, available to any interested party.

§ 58.1-1021.04:2. *Certain records required of distributor; access to premises.*

A. Each distributor shall keep in each licensed place of business complete and accurate records for that place of business, including itemized invoices of: (i) tobacco products held, purchased, manufactured, brought in or caused to be brought in from outside the Commonwealth or shipped or transported to retailers in the Commonwealth; (ii) all sales of tobacco products made; (iii) all tobacco products transferred to other retail outlets owned or controlled by that licensed distributor; and (iv) any records required by the Department.

All books, records and other papers and documents required by this subsection to be kept shall be preserved, in a form prescribed by the Department, for a period of at least three years after the date of the documents or the date of the entries thereof appearing in the records, unless the Department authorizes, in writing, their destruction or disposal at an earlier date.

B. At any time during usual business hours, duly authorized agents or employees of the Department may enter any place of business of a distributor and inspect the premises, the records required to be kept under this article and the tobacco products contained therein, to determine whether all the provisions of this article are being complied with fully. Refusal to permit such inspection by a duly authorized agent or employee of the Department shall be grounds for revocation of the license.

C. Each person who sells tobacco products to persons other than an ultimate consumer shall render with each sale itemized invoices showing the seller's name and address, the purchaser's name and address, the date of sale and all prices. Such person shall preserve legible copies of all such invoices for three years after the date of sale.

D. Each distributor shall procure itemized invoices of all tobacco products purchased. The invoices shall show the name and address of the seller and the date of purchase. The distributor shall preserve a legible copy of each invoice for three years after the date of purchase. Invoices shall be available for inspection by authorized agents or employees of the Department at the distributor's place of business.

E. Any violation of § 58.1-1021.04:1, 58.1-1021.04:2, 58.1-1021.04:3, or 58.1-1021.04:4 of this article shall be grounds for revocation of the license.

§ 58.1-1021.04:3. *Unlawful importation, transportation, or possession of tobacco products.*

It shall be unlawful for any person who is not a licensed distributor in the Commonwealth pursuant to this article to import, transport, or possess, for resale, any tobacco products in the Commonwealth, or under circumstances and conditions that indicate that tobacco products are being imported, transported, or possessed in a manner as to knowingly and intentionally evade or attempt to evade the tax imposed by this article. Such tobacco products shall be subject to seizure, forfeiture and destruction by the Department or any law-enforcement officer of the Commonwealth. All fixtures, equipment, materials and personal property used in substantial connection with the sale or possession of tobacco products involved in a knowing and intentional violation of this article shall be subject to seizure and forfeiture according to the procedures contained in Chapter 22.1 (§ 19.2-386.1 et seq.) of Title 19.2, applied mutatis mutandis.

§ 58.1-1021.04:4. *Purchase of tobacco products for resale.*

No retail dealer shall purchase tobacco products, for resale to consumers, from any person within or outside the Commonwealth of Virginia, except as follows:

1. A retail dealer purchases from a distributor licensed by the Commonwealth of Virginia.

2. A retail dealer applies for and is granted a license as a distributor, and files returns and maintains records as required of licensed distributors under this article.

§ 58.1-1021.04:5. *Tax Commissioner to establish guidelines and rules.*

The Tax Commissioner shall establish guidelines and rules, including record keeping requirements, for implementation of the tax on tobacco products under Article 2.1 (§ 58.1-1021.01 et seq.) of Chapter 10 of Title 58.1 of the Code of Virginia. The establishment of the guidelines and rules by the Tax Commissioner shall be exempt from the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).

2. That the provisions of this act shall be effective January 1, 2006.