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SENATE BILL NO. 347

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on February 6, 2012)

(Patron Prior to Substitute—Senator McDougle)

A BILL to amend and reenact §§ 18.2-246.13, 18.2-246.14, 18.2-246.15, 19.2-386.21, 58.1-1000, 58.1-1017, and 58.1-1037 of the Code of Virginia, relating to counterfeit and contraband cigarettes; penalties.

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-246.13, 18.2-246.14, 18.2-246.15, 19.2-386.21, 58.1-1000, 58.1-1017, and 58.1-1037 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-246.13. Penalties.

A. Except as specifically provided in § 18.2-246.14, a first violation of any provision of this article shall be punishable by a civil penalty of no more than \$1,000. A second or subsequent violation of any provision of this article shall be punishable by a civil penalty of no more than \$10,000.

B. Any prospective consumer who knowingly submits a false certification under subdivision A 1 of § 18.2-246.8 shall be subject to a civil penalty of no more than \$5,000 for each such offense.

C. Any person failing to collect or remit to the Board or the Department of Taxation any tax required in connection with a delivery sale shall be assessed, in addition to any other applicable penalty, a civil penalty of no more than five times the retail value of the cigarettes involved.

D. Any civil penalty collected under this article shall be paid to the general fund, except that penalties collected pursuant to § 18.2-246.14 shall be deposited in the Cigarette Enforcement Fund, pursuant to § 58.1-1017.

E. Any person who fails to file the statement required by subsection A of § 18.2-246.11 and thereafter makes a delivery sale is guilty of a Class 1 misdemeanor and for any second or subsequent offense is guilty of a violation of § 18.2-498.3.

F. Any person who knowingly and with the intent to defraud, mislead, or deceive makes a statement filed as required by subsection A of § 18.2-246.11 which is false is guilty of a violation of § 18.2-498.3. Each such filed statement containing one or more false statements shall constitute a separate offense.

G. Any person who fails to make the report required by subsection B of § 18.2-246.11 is guilty of a Class 1 misdemeanor and for any second or subsequent offense is guilty of a violation of § 18.2-498.3.

H. Any person who knowingly and with the intent to defraud, mislead, or deceive makes a materially false statement in any report required by subsection B of § 18.2-246.11 is guilty of a violation of § 18.2-498.3. Each such report containing one or more false statements constitutes a separate offense.

§ 18.2-246.14. Counterfeit cigarettes; penalties.

A. It shall be unlawful to sell or possess counterfeit cigarettes. A person who knowingly violates this subsection is guilty of a Class 2 misdemeanor and for a second or subsequent violation is guilty of a Class 6 felony. A person who knowingly violates this subsection by selling or possessing more than 50 cartons of counterfeit cigarettes is guilty of a Class 6 felony.

B. ~~Any~~ In addition to any criminal penalties, any person who knowingly violates subsection A with a total quantity of less than two cartons of cigarettes shall be punished by a civil penalty of no more than \$1,000. Any person who knowingly violates subsection A shall, for a second or subsequent offense involving a total quantity of less than two cartons of cigarettes, be punished by a civil penalty of no more than \$5,000 and, if applicable, the revocation by the Department of Taxation of his wholesale dealer license.

C. ~~Any~~ In addition to any criminal penalties, any person who knowingly violates subsection A with a total quantity of two or more cartons of cigarettes shall be punished by a civil penalty of no more than \$2,000. Any person who knowingly violates subsection A shall, for a second or subsequent offense involving a total quantity of two or more cartons of cigarettes, be punished by a civil penalty of no more than \$50,000 and, if applicable, the revocation by the Department of Taxation of his wholesale dealer license.

D. In addition to the penalties imposed by this section, any person, except as otherwise provided by law, who sells, purchases, transports, receives, or otherwise possesses counterfeit cigarettes in knowing violation of subsection A shall be required to pay any tax owed for such counterfeit cigarettes pursuant to this article.

E. All cigarettes in violation of this article shall be subject to seizure, forfeiture, and destruction in accordance with § 19.2-386.21.

F. For purposes of this section, "counterfeit cigarettes" shall include means cigarettes that are manufactured, fabricated, assembled, processed, packaged, or labeled by any person other than (i) the

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60 owner of the trademark rights in the cigarette brand or (ii) a person that is directly or indirectly
61 authorized by the owner of the trademark rights to manufacture, fabricate, assemble, process, package,
62 or label such cigarettes, in each case including, but not be limited to, cigarettes that (i) (a) have false
63 manufacturing labels, (ii) (b) are not manufactured by the manufacturer indicated on the container, or
64 (iii) (c) have affixed to the container a false tax stamp.

65 G. All civil penalties collected pursuant to this section shall be deposited in the Cigarette
66 Enforcement Fund, pursuant to § 58.1-1017.

67 § 18.2-246.15. Enforcement.

68 The Attorney General is authorized to enforce the provisions of this article. The Attorney General
69 may assess the civil penalties authorized by this article, with the concurrence of the attorney for the
70 Commonwealth pursuant to § 2.2-511.; may prosecute criminal violations under ~~§ 18.2-246.13, this~~
71 *article*; and may bring an action in the appropriate court to collect assessed penalties or prevent or
72 restrain violations of this article by any person, or any person controlling such person. The Board and
73 the State Department of Taxation shall cooperate with the Attorney General in his enforcement efforts
74 and provide to the Attorney General all information and documentation in their possession necessary for
75 the Attorney General to accomplish such enforcement.

76 § 19.2-386.21. Forfeiture of counterfeit cigarettes.

77 Counterfeit cigarettes possessed in violation of § 18.2-246.14 shall be subject to seizure, forfeiture
78 and destruction by the Virginia Alcoholic Beverage Control Board, *the Department of Taxation*, or any
79 law-enforcement officer of the Commonwealth. *Any cigarettes seized or forfeited in connection with a*
80 *violation of § 18.2-264.14 shall be destroyed. Prior to the destruction of such cigarettes, the true holder*
81 *of the applicable trademark rights in the cigarette brand may be permitted to inspect the cigarettes for*
82 *purposes of assisting law enforcement in any investigation regarding such cigarettes.* All fixtures,
83 equipment, materials and personal property used in substantial connection with sale or possession of
84 counterfeit cigarettes in a knowing and intentional violation of Article 10 (§ 18.2-246.6 et seq.) of
85 Chapter 6 of Title 18.2 shall be subject to seizure and forfeiture according to the procedures contained
86 in Chapter 22.1 (§ 19.2-386.1 et seq.) ~~of this title~~, applied mutatis mutandis.

87 § 58.1-1000. Definitions.

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

89 "*Authorized carrier*" means a common or contract carrier transporting cigarettes, whether such
90 cigarettes are tax-paid cigarettes or not, under a proper bill of lading or other documentation indicating
91 the true name and address of the consignor or seller and the consignee or purchaser of the brands and
92 the quantities being transported.

93 "*Authorized holder*" means (i) a manufacturer; (ii) a wholesale dealer; (iii) a stamping agent; (iv) an
94 authorized carrier; (v) an exclusive distributor; however, with respect to cigarettes that are not tax-paid
95 cigarettes, an exclusive distributor must comply with § 58.1-1012 in order to qualify as an authorized
96 holder; (vi) an officer, employee, or other agent of the United States or a state, or any department,
97 agency, or instrumentality of the United States or a state, or a political subdivision of a state, having
98 possession of such cigarettes in connection with the performance of official duties; or (vii) a person
99 properly holding cigarettes that do not require stamps or tax payment pursuant to § 58.1-1010.

100 "Carton" means 10 packs of cigarettes, each containing 20 cigarettes or eight packs, each containing
101 25 cigarettes.

102 "Cigarette" means any product that contains nicotine, is intended to be burned or heated under
103 ordinary conditions of use, and consists of or contains (i) any roll of tobacco wrapped in paper or in any
104 substance not containing tobacco; (ii) tobacco, in any form, that is functional in the product, which,
105 because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely
106 to be offered to, or purchased by, consumers as a cigarette; or (iii) any roll of tobacco wrapped in any
107 substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or
108 its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described
109 in clause (i) ~~of this definition~~. The term "cigarette" includes "roll-your-own" tobacco, which means any
110 tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to
111 be offered to, or purchased by, consumers as tobacco for making cigarettes. For purposes of this
112 definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual
113 "cigarette."

114 "*Contraband cigarettes*" means cigarettes for which tax is due under this chapter that are (i) not
115 "*tax-paid cigarettes*" as defined in this section, and that are in the possession of any person other than
116 an authorized holder or (ii) "*tax-paid cigarettes*" in amounts that exceed the presumed reseller
117 threshold, as defined in this section, and that are in the possession of any person other than an
118 authorized holder or retail dealer.

119 "*Counterfeit cigarettes*" has the same meaning as defined in § 18.2-246.14.

120 "Exclusive distributor" means any individual, corporation, limited liability company, or limited
121 liability partnership with its principal place of business in the Commonwealth that has the sole and

122 exclusive rights to sell to wholesale dealers in the Commonwealth a brand family of cigarettes
123 manufactured by a tobacco product manufacturer as defined in § 3.2-4200.

124 "Manufacturer" means any tobacco product manufacturer as defined in § 3.2-4200.

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

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

128 "Presumed reseller threshold" means more than 25 cartons of tax-paid cigarettes, as defined in this
129 section, held by a person other than an authorized holder or a retail dealer.

130 "Retail dealer" includes every person other than a wholesale dealer, as defined in this section, who
131 sells or offers for sale any cigarettes and who is properly registered as a retail trade with the
132 Commonwealth in accordance with the Virginia Department of Taxation Business Registration
133 Application (Form R-1).

134 "Retail sale" or "sale at retail" includes all sales except sales by wholesale dealers to retail dealers or
135 other wholesale dealers for resale.

136 "Stamping agent" shall have the same meaning as provided in § 3.2-4204. For the purposes of
137 provisions relating to "roll-your-own" tobacco, "stamping agent" shall include "distributor" as that term
138 is defined in § 58.1-1021.01.

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

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

145 "Tax-paid cigarettes" means cigarettes that (i) bear valid Virginia stamps to evidence payment of
146 excise taxes or (ii) were purchased outside of the Commonwealth and either (a) bear a valid tax stamp
147 for the state in which the cigarettes were purchased or (b) when no tax stamp is required by the state,
148 proper evidence can be provided to establish that applicable excise taxes have been paid.

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

152 "Wholesale dealer" includes persons who are properly registered as tobacco product merchant
153 wholesalers with the Commonwealth in accordance with the Virginia Department of Taxation Business
154 Registration Application (Form R-1) and who (i) sell cigarettes at wholesale only to retail dealers for the
155 purpose of resale only, or who (ii) sell at wholesale to institutional, commercial or industrial users. The
156 phrase "Wholesale dealer" shall also include chain store distribution centers or houses which distribute
157 cigarettes to their stores for sale at retail.

158 § 58.1-1017. Sale, purchase, possession, etc., of tax-paid, contraband cigarettes; mandatory
159 destruction; Cigarette Enforcement Fund; penalties.

160 A. Except as otherwise provided by law, it shall be unlawful for any person to knowingly sell,
161 purchase, transport, receive, or otherwise possess contraband cigarettes.

162 B. Any person, except as otherwise provided by law, who sells, purchases, transports, receives, or
163 otherwise possesses unstamped contraband cigarettes in violation of subsection A shall be required to
164 pay any tax owed for such contraband cigarettes pursuant to this chapter, unless such tax has already
165 been paid to the Commonwealth.

166 C. In addition, such to the payment of taxes required by subsection B and any criminal penalties
167 under this section, any person who violates the provisions of subsection A shall be required to pay a
168 civil penalty of (i) \$2.50 per pack, up to \$500 \$5,000, for the first violation by a legal entity within a
169 36-month period; (ii) \$5 per pack, up to \$1,000 \$10,000, for the second violation by the legal entity
170 within a 36-month period; and (iii) \$10 per pack, up to \$50,000, for the third and any subsequent
171 violation by the legal entity within a 36-month period, to be assessed and collected by the Department
172 as other taxes are collected. In addition, where willful intent exists to defraud the Commonwealth of the
173 tax levied under this chapter exists, such person shall be required to pay a civil penalty of \$25 per pack,
174 up to \$250,000.

175 B. It shall be unlawful for any person, except as otherwise provided by law, to sell, purchase,
176 transport, receive or possess less than 3,000 packages of cigarettes unless the same have been stamped
177 in the manner required by law, for the purpose of evading the payment of the taxes on such products.

178 D. Any person violating the provisions of this subsection shall be subsection A is guilty of a Class 2
179 misdemeanor; for a first offense and is

180 C. It shall be unlawful for any person, except as otherwise provided by law, to sell, purchase,
181 transport, receive or possess 3,000 or more packages of cigarettes unless the same have been stamped in
182 the manner required by law, for the purpose of evading the payment of the taxes on such products. Any

183 person violating the provisions of this subsection shall be guilty of a Class 6 felony for any second or
184 subsequent offense.

185 D. If a person who (i) has not been issued a permit to affix revenue stamps by the Department, as
186 provided in § 58.1-1011, or (ii) is not a retail dealer who has lawfully purchased cigarettes from such
187 permit holder has in his possession within the Commonwealth more than 30 packages of unstamped
188 cigarettes, such possession shall be presumed to be for the purpose of evading the payment of the taxes
189 due thereon.

190 E. Any person violating the provisions of subsection A by selling, purchasing, transporting, receiving,
191 or otherwise possessing more than 50 cartons of contraband cigarettes is guilty of a Class 6 felony.

192 F. No civil penalty shall be imposed under this section for any unstamped cigarettes that are not
193 tax-paid cigarettes if a civil penalty under § 58.1-1013 has been paid for such unstamped cigarettes.

194 G. All cigarettes in violation of this chapter shall be subject to seizure, forfeiture, and destruction in
195 accordance with § 58.1-1037.

196 H. 1. There is hereby created in the state treasury a special nonreverting fund to be known as the
197 Cigarette Enforcement Fund, hereinafter referred to in this article as the "Fund." The Fund shall be
198 established on the books of the Comptroller and any moneys remaining in the Fund at the end of each
199 fiscal year shall not revert to the general fund but shall remain in the Fund. For purposes of the
200 Comptroller's preliminary and final annual reports required by § 2.2-813, however, all deposits and
201 disbursements from the Fund shall be accounted for as part of the general fund of the State Treasury.

202 2. All civil penalties collected by the Department of Taxation or another department or agency of the
203 Commonwealth pursuant to the provisions of this section and §§ 58.1-1010, 58.1-1013, and 58.1-1035
204 shall be deposited to the Fund, notwithstanding any language in those provisions that such civil
205 penalties shall be assessed and collected by the Department as other taxes are collected. All civil
206 penalties collected by the Attorney General pursuant to the provisions of § 18.2-246.14 shall also be
207 deposited to the Fund.

208 3. Moneys deposited to the Fund shall be solely for use by the law-enforcement agency in the
209 Commonwealth that is responsible for discovering the violation that resulted in the civil penalty and to
210 offset the reasonable costs and expenses incurred in any related investigation and seizure. The balance,
211 if any, left after offsetting for such reasonable costs and expenses shall be retained by the applicable
212 law-enforcement agency and used to further the efforts of enforcing the provisions of this article,
213 including, without limitation, funding the creation of a tip line to receive information regarding
214 violations of this article and creating a fund from which to pay rewards to persons who furnish
215 information that leads to (i) the collection of excise taxes or (ii) the identification of persons violating
216 this article.

217 § 58.1-1037. Seizure.

218 Cigarettes that are acquired, held, owned, possessed, transported in, imported into, or sold or
219 distributed in the Commonwealth in violation of either this chapter or Chapter 10 (§ 58.1-1000 et seq.)
220 shall be deemed contraband and shall be subject to seizure, forfeiture and, destruction or court ordered
221 assignment for use by a law-enforcement undercover operation. Such cigarettes shall be deemed
222 contraband whether or not the violation of this chapter is with knowledge. Any cigarettes seized or
223 forfeited in connection with a violation of this chapter or Chapter 10 (§ 58.1-1000 et seq.) shall be
224 destroyed. Prior to the destruction of cigarettes, the true holder of the applicable trademark rights in
225 the cigarette brand may be permitted to inspect such cigarettes for purposes of assisting
226 law-enforcement in any investigation regarding such cigarettes. All fixtures, equipment, materials, and
227 personal property used to create, sell, purchase, transport, receive, or otherwise possess cigarettes that
228 violate this article shall also be subject to seizure and forfeiture according to the procedures contained
229 in Chapter 22.1 (§ 19.2-386.1 et seq.) of Title 19.2, applied mutatis mutandis. Enforcement authority for
230 this section shall include the Department of Taxation, any law-enforcement officer of the
231 Commonwealth, and, for seizures relating to violations of Chapter 10.1 (§ 58.1-1031 et seq.), those
232 authorities authorized in §§ 2.2-509.1 and 4.1-105.

233 2. That the provisions of this act may result in a net increase in periods of imprisonment or
234 commitment. Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot
235 be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter
236 890 of the Acts of Assembly of 2011 requires the Virginia Criminal Sentencing Commission to
237 assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4, the estimated amount of the
238 necessary appropriation cannot be determined for periods of commitment to the custody of the
239 Department of Juvenile Justice.