

VIRGINIA ACTS OF ASSEMBLY -- 2007 SESSION

CHAPTER 345

An Act to amend and reenact §§ 32.1-354, 32.1-356, 32.1-359, and 32.1-360 of the Code of Virginia; to amend and reenact §§ 2, 3, 6, 11, 12, 13, 18, and 19 of Chapter 488 of the Acts of Assembly of 2002; to amend the Code of Virginia by adding a section numbered 32.1-361.1; and to amend Chapter 488 of the Acts of Assembly of 2002 by adding a section numbered 22, relating to the Tobacco Settlement Foundation; sale of revenues derived from the Tobacco Master Settlement Agreement.

[H 3111]

Approved March 13, 2007

Be it enacted by the General Assembly of Virginia:

1. That §§ 32.1-354, 32.1-356, 32.1-359, and 32.1-360 of the Code of Virginia are amended and reenacted and the Code of Virginia is amended by adding a section numbered 32.1-361.1 as follows:

§ 32.1-354. Definitions.

As used in this chapter, unless the context clearly indicates otherwise:

"Agreement" means the agreement or agreements between the Commonwealth, as seller of the Tobacco Assets, and the Corporation, as purchaser of the Tobacco Assets. The sale by the Commonwealth of the Tobacco Assets pursuant to any such agreement shall be a true sale and not a borrowing.

"Board" means the Board of Trustees of the Foundation appointed pursuant to § 32.1-357.

"Corporation" means the Tobacco Settlement Financing Corporation as created under state law.

"Director" means the director of the Foundation appointed pursuant to § 32.1-358.

"Endowment" means the Virginia Tobacco Settlement Foundation Endowment established pursuant to § 32.1-361.1.

"Foundation" means the Virginia Tobacco Settlement Foundation, created pursuant to § 32.1-355.

"Foundation Allocation" means 10 percent of the annual amount received under the Master Settlement Agreement by the Commonwealth, or that would have been received but for the sale of such allocation pursuant to an agreement, between the starting and ending dates specified in the agreement.

"Fund" means the Virginia Tobacco Settlement Fund established pursuant to § 32.1-360.

"Period of sale" means the time during which a purchase under an agreement is entitled to receive the Foundation Allocation.

"Tobacco Assets" means all right, title, and interest in and to the portion of the Foundation Allocation that may be sold to the Corporation from time to time.

§ 32.1-356. Powers of the Foundation.

The Foundation is hereby granted all powers necessary or appropriate to carry out and effectuate its corporate purposes, including, without limitation, the following:

1. To have an official seal and to alter the same at pleasure;
2. To maintain an office at such place or places within this Commonwealth as it may designate;
3. To accept, hold, and administer moneys, grants, securities, or other property transferred, given, or bequeathed to the Foundation, absolutely or in trust, for the purposes for which the Foundation is created;

4. To determine how moneys in the Fund are to be distributed and to authorize distribution of moneys in the Fund to entities whose goal is to discourage, eliminate or prevent the use of tobacco products by minors in the Commonwealth, on such terms and in such amounts as determined by the Board;

5. To deposit moneys from the Fund to the Endowment as determined by the Board;

6. To make and execute contracts and all other instruments and agreements necessary or convenient for the exercise of its powers and functions;

- ~~6.~~ 7. To appoint and prescribe the duties of such officers, agents, employees, advisors, and consultants as may be necessary to carry out its functions, and to fix and pay such compensation to them for their services as the Foundation may determine;

- ~~7.~~ 8. To adopt and from time to time amend and repeal bylaws, not inconsistent with this chapter, to carry into effect the powers and purposes of the Foundation;

- ~~8.~~ 9. To receive and accept aid, grants, contributions and cooperation of any kind from any source for the purposes of this chapter subject to such conditions, acceptable to the Foundation, upon which such aid, grants, contributions and cooperation may be made;

- ~~9.~~ 10. To do any lawful act necessary or appropriate to carry out the powers herein granted or reasonably implied, including use of whatever lawful means may be necessary and appropriate to

recover any payments wrongfully made from the Fund.

§ 32.1-359. Duties of the Board.

The Board shall perform the following duties:

1. Establish specific criteria and procedures governing decisions by the Foundation to cause the moneys in the Fund to be distributed to entities for use in the discouragement, elimination or prevention of the use of tobacco products by minors;
2. Establish requirements that every recipient of money distributed from the Fund establish and maintain policies that restrict the use of tobacco products by minors, as provided in § 32.1-361;
3. Evaluate the proposals for the use of the assets of the Fund in accordance with the criteria established by the Board and the provisions of this chapter; ~~and~~
4. Evaluate the implementation and results of all efforts receiving support from the Foundation; *and*
5. *Determine amounts to be deposited from time to time from the Fund to the Endowment.*

§ 32.1-360. Virginia Tobacco Settlement Fund.

There is hereby created in the state treasury a special nonreverting fund to be known as the Virginia Tobacco Settlement Fund. The Fund shall be established on the books of the Comptroller. ~~Ten percent of the annual amount received by the Commonwealth from the Master Settlement Agreement shall be paid into the state treasury and credited to the Fund. Subject to the sale of all or any portion of the Foundation Allocation, 10 percent of the annual amount received by the Commonwealth from the Master Settlement Agreement shall be paid into the state treasury and credited to the Fund. In the event of such sale (i) the Foundation Allocation shall be paid in accordance with the agreement for the period of sale and (ii) the fund shall receive amounts withdrawn from the Endowment in accordance with § 32.1-361.1.~~ Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund. Moneys in the Fund shall be used solely for the purposes described in this chapter. Expenditures and disbursements from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written authorization signed by the chairman of the Board or his designee. Moneys in the Fund shall be used for the purposes of discouraging, eliminating or preventing the use of tobacco products by minors, including but not limited to educational and awareness programs on the health effects of tobacco use on minors and laws restricting the distribution of tobacco products to minors.

§ 32.1-361.1. Virginia Tobacco Settlement Foundation Endowment.

A. *There is hereby established in the state treasury a special fund to be designated the "Virginia Tobacco Settlement Foundation Endowment" (the Endowment). The Endowment shall receive any proceeds from any sale of all or any portion of the Foundation Allocation, deposits from the Fund as determined by the Board pursuant to subparagraph 5 of § 32.1-356, and any gifts, grants, and contributions that are specifically designated for inclusion in such Endowment. No part of the Endowment, neither corpus nor income, or interest thereon, shall revert to the general fund of the state treasury. The Endowment shall be under the management and control of the Treasury Board and the Treasury Board shall have such powers and authority as may be necessary to exercise such management and control consistent with the provisions of this section. The income of the Endowment shall be paid out, not less than annually, to the Fund. In addition, up to 10 percent of the corpus of the Endowment shall be paid to the Fund annually upon request of the Board to the Treasury Board; provided, however, that upon two-thirds vote of the Board, up to 15 percent of the corpus of the Endowment shall be so paid. No use of proceeds shall be made that would cause bonds issued on a tax-exempt basis to be considered taxable. For purposes of this section, "income" of the Endowment means at the time of determination the lesser of the available cash in, or the realized investment income for the applicable period of the Endowment, and "corpus" of the endowment means at the time of determination the sum of the proceeds from the sale of all or any portion of the Foundation Allocation, deposits from the Fund as determined by the Board pursuant to subparagraph 5 of § 32.1-356, any gifts, grants, and contributions that have been credited to such Endowment, and any income not appropriated and withdrawn from the Endowment before June 30 of each year, less withdrawals from the corpus. Determinations by the Treasury Board, or the State Treasurer on behalf of the Treasury Board, as to the amount of income or the amount of the corpus shall be conclusive.*

B. *The Treasury Board shall serve as trustee of the Endowment and the corpus and income of the Endowment shall be withdrawn and credited to the Fund by order of the Treasury Board as provided in subsection A. The State Treasurer shall be custodian of the funds credited to the Endowment. The Treasury Board shall have full power to invest and reinvest funds credited to the Endowment in accordance with the provisions of the Uniform Management of Institutional Funds Act (§ 55-268.1 et seq.) and, in addition, as otherwise provided by law. The Treasury Board may borrow money in such amounts as may be necessary whenever in its judgment it would be more advantageous to borrow money than to sell securities held for the Fund. Any debt so incurred may be evidenced by notes duly authorized by resolution of the Treasury Board, such notes to be retired no later than the end of the biennium in which such debt is incurred. The Treasury Board may commingle, for purposes of investment, the corpus of the Endowment provided that it shall appropriately account for the investments*

credited to the Endowment. The Treasury Board may hire independent investment advisors and managers as it deems appropriate to assist with investing the Endowment. The expenses of making and disposing of investments, such as brokerage commissions, legal expenses related to a particular transaction, investment advisory and management fees and expenses, transfer taxes and other customary transactional expenses shall be payable out of the income of the Endowment.

C. Not less than annually and more frequently if desired by the Board or requested by the Treasury Board, the Board shall provide to the Treasury Board schedules of anticipated disbursements from the Fund for the current and succeeding fiscal year, and the Treasury Board shall, to the extent practicable, take into account such schedules and changes thereto in scheduling maturities and redemptions of its investments of the Endowment.

2. That §§ 2, 3, 6, 11, 12, 13, 18, and 19 of Chapter 488 of the Acts of Assembly of 2002 are amended and reenacted and that Chapter 488 of the Acts of Assembly of 2002 is amended by adding a section numbered 22 as follows:

§ 2. Findings.

A. The major United States tobacco manufacturers and forty-six states (including the Commonwealth of Virginia), the District of Columbia, the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa and the Territory of the Northern Marianas have signed a Master Settlement Agreement (MSA) that should result in the Commonwealth receiving substantial sums of money in perpetuity. Virginia has reached State-Specific Finality, the Master Settlement Agreement has become effective in accordance with its terms, and Virginia has begun receiving its allocation of the tobacco settlement payments made under the Master Settlement Agreement.

B. Tobacco is Virginia's number one cash crop. Although tobacco production occurs in many states, the majority of production occurs within six states, including Virginia, of the southeastern United States. Virginia is home to tobacco growers, processors, warehouses and manufacturers. The relative prosperity of the tobacco industry directly influences the relative prosperity of the Commonwealth. Virginia derives income, sales and excise taxes directly and indirectly from the tobacco industry. Virginia derives a higher percentage of its general fund revenue directly and indirectly from the tobacco industry than do most other states.

C. The General Assembly has studied the techniques used recently by other jurisdictions to address their most critical needs and, in particular, the techniques used to convert future tobacco settlement payments received under the Master Settlement Agreement into current assets and thereby reduce such jurisdictions' exposure to the payment risks associated with the Master Settlement Agreement, and the credit risks associated with the tobacco industry, and finds that many jurisdictions have sold their allocations of payments under the Master Settlement Agreement and applied the sale proceeds toward such needs.

D. The Governor is authorized to sell all or part of the Commission Allocation *and the Foundation Allocation* to the Corporation created hereby, such sale to transfer to the Corporation that portion of the Tobacco Assets as provided in this act.

E. The General Assembly finds and determines that the optimum method for Virginia to convert its future tobacco settlement payments, under the Master Settlement Agreement, to current assets is one that does not require any increase in general taxes, that is not funded from taxes or other traditional general fund sources, that does not divert resources from other needs of the Commonwealth and that is nonrecourse to, and requires no credit support by, the Commonwealth.

F. The General Assembly finds and determines that its creation of a special purpose corporation with power to issue obligations and use the proceeds to purchase the Tobacco Assets from the Commonwealth is compatible with the preceding subsections.

§ 3. Definitions. As used in this act:

"Agreement" means the agreement or agreements referred to in this act between the Commonwealth, as seller of the Tobacco Assets, and the Corporation, as purchaser of the Tobacco Assets. The sale by the Commonwealth of the Tobacco Assets pursuant to any such agreement shall be a true sale and not a borrowing.

"Ancillary contracts" means contracts described in subsection A of § 15 hereof.

"Board" means the Board of the Corporation.

"Bonds" means Tobacco Bonds and refunding bonds, notes and other evidences of indebtedness, issued by the Corporation pursuant to this act.

"Closing Date" means the date of delivery of the first issue of Tobacco Bonds.

"Commission Allocation" means fifty percent of the annual amount received under the Master Settlement Agreement by the Commonwealth, or that would have been received but for a sale of such allocation pursuant to an agreement, between the commencing and ending dates specified in the agreement.

"Corporation" means the Tobacco Settlement Financing Corporation created pursuant to this act.

"Financing costs" means all capitalized interest, costs, fees, reserves and credit and liquidity enhancements as the Corporation determines to be desirable in issuing, securing and marketing the bonds.

"Foundation Allocation" means 10 percent of the annual amount received under the Master Settlement Agreement by the Commonwealth, or that would have been received but for the sale of such allocation pursuant to an agreement, between the starting and ending dates specified in the agreement.

"Holders" and similar terms refer to the owners of the bonds. References to covenants and contracts with such holders, and to their rights and remedies shall, if so provided by the Corporation, extend to the parties to swaps and ancillary contracts.

"Income" means the portion of the Commission Allocation *and Foundation Allocation* received by the Corporation and all aid, rents, fees, charges, payments and other income and receipts paid or payable to the Corporation or a trustee for the account of the Corporation or the holders.

"Indenture trustee" means the trust company or bank serving at the time as trustee under the trust indenture referred to in § 14 hereof.

"Master Settlement Agreement" or "MSA" means the settlement agreement and related documents between the Commonwealth and leading United States tobacco product manufacturers dated November 23, 1998, and including the Consent Decree and Final Judgment entered in the Circuit Court of the City of Richmond on February 23, 1999, Chancery Number HJ-2241-4.

"Outstanding," when used with respect to bonds, shall exclude bonds that shall have been paid in full at maturity, or shall have otherwise been refunded, redeemed, defeased or discharged, or that may be deemed not outstanding pursuant to agreements with the holders thereof.

"Residual Trust" means the trust to be established by the Corporation, which is entitled to receive the income and bond proceeds of the Corporation that are in excess of the Corporation's expenses, debt service and contractual obligations to the holders and the Commonwealth of Virginia.

"Swap contracts" or "swaps" means contracts described in subsection B of § 15 hereof.

"Tobacco Assets" means all right, title, and interest in and to the portion of the Commission Allocation *and Foundation Allocation* that may be sold to the Corporation from time to time.

"Tobacco Bonds" means the bonds, notes and other obligations issued by the Corporation, exclusive of bonds that the Corporation may issue to refund bonds, the net proceeds (after financing costs) of the first issue of which shall be used by the Corporation to pay the cash portion of the purchase price to the Commonwealth for the Tobacco Assets.

§ 6. Powers of Corporation enumerated.

A. To enable the Corporation to carry out the financing, purchasing, owning and managing of the Tobacco Assets and activities incidental thereto, the Corporation is vested (subject to § 8 and the other provisions hereof) with all the powers of a private corporation including, without limitation, the power to sue and be sued, to make contracts, to adopt and use a common seal and to alter the same and is further particularly authorized and empowered to:

1. Purchase the Tobacco Assets and receive, or to authorize the indenture trustee to receive, as the same shall be paid, the portion of the Commission Allocation *and Foundation Allocation* sold to the Corporation;
2. Adopt or alter or repeal any bylaws, rules or regulations as the Board may deem necessary or expedient;
3. Issue bonds as authorized by this act and refund any of such bonds;
4. Commence any action to protect or enforce any right conferred upon it by any law, contract or other agreement;
5. Pay its operating expenses;
6. Establish the Residual Trust; and
7. Do any and all other acts and things necessary, convenient, appropriate or incidental in carrying out the provisions of this act.

B. The Corporation is further authorized and empowered to incur obligations to pay its operating expenses in such form as may be authorized by the Corporation. This act shall govern the issuance of such obligations insofar as the same may be applicable.

C. The Corporation shall submit an annual report to the Governor, the Appropriations Committee of the House of Delegates and the Finance Committee of the Senate on or before November 1 of each year. Such report shall contain, at a minimum, the annual operating and financial statements of the Corporation for the year ending the preceding June 30. The annual report shall be distributed in accordance with the provisions of § 2.2-1127 of the Code of Virginia.

D. Any funds held by the Corporation or by the indenture trustee may be invested and reinvested in securities that are legal investments under the laws of the Commonwealth for funds held by fiduciaries.

E. The Corporation, subject to such agreements with holders as may then exist, shall have power to purchase bonds out of any funds available therefor.

§ 11. Sale of Commission Allocation *and Foundation Allocation*. Subject to the limitations and conditions set forth in this act, the Governor is authorized to sell, at one time or from time to time, to the Corporation all or any portion of the Commission Allocation *and Foundation Allocation*. The Governor is authorized to enter into one or more agreements, with such terms and covenants as he deems appropriate, and to execute and deliver an agreement on the Closing Date and the effective date of any subsequent sale. Each agreement shall provide that the purchase price payable by the

Corporation to the Commonwealth for the Tobacco Assets sold shall consist of such cash and noncash consideration as provided in the agreement. Any sale of Tobacco Assets shall be treated as a true sale and absolute transfer of the property so transferred and not as a pledge or other security interest for any borrowing. The characterization of such a sale as an absolute transfer by the participants shall not be negated or adversely affected if less than all of the Commission Allocation *or Foundation Allocation* is transferred, nor by the Commonwealth's acquisition of a direct or indirect subordinate interest in the Tobacco Assets, nor by any characterization of the Corporation or its bonds for purposes of accounting, taxation or securities regulation, nor by any other factor whatsoever.

§ 12. Ownership of Tobacco Assets. On and after the effective date of each sale of Tobacco Assets, the Commonwealth shall have no right, title or interest in or to the Tobacco Assets sold; and such Tobacco Assets shall be property of the Corporation and not of the Commonwealth, and shall be owned, received, held and disbursed by the Corporation or the indenture trustee and not the state treasury. On or before the Closing Date and the effective date of any subsequent sale, the Commonwealth, through the Attorney General, shall notify the escrow agent under the MSA that the Tobacco Assets have been sold to the Corporation and irrevocably instruct such escrow agent that, subsequent to the Closing Date or other effective date, the Commission Allocation *and Foundation Allocation* related thereto is to be paid directly to the indenture trustee for the account of the Corporation.

§ 13. Issuance of bonds of Corporation. The Board is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of bonds of the Corporation in such amount or amounts as the Board shall determine. Such bonds shall be payable solely from funds of the Corporation, including, without limitation, all or any combination of the following sources: (i) the Commission Allocation *and Foundation Allocation* received by the Corporation, (ii) the proceeds of the sale of any such bonds, (iii) earnings on funds of the Corporation or the indenture trustee, and (iv) such other funds as may become available, as shall be provided by the resolution of the Board authorizing any such bonds. Bonds issued under the provisions of this act shall not be deemed to constitute a debt of the Commonwealth or a pledge of the faith or credit of the Commonwealth, and all bonds shall contain on the face thereof a statement to the effect that neither the faith and credit nor the taxing power nor any other assets or revenues of the Commonwealth or of any political subdivision thereof is or shall be pledged to the payment of the principal of or the interest on such bonds. The bonds of each issue shall be dated, shall bear interest (which may be includable or excludable in the gross income of the holders for federal income tax purposes) at such fixed or variable rates, payable at or prior to maturity, and shall mature at such time or times, as may be determined by the Board and may be made redeemable before maturity, at the option of the Corporation, at such price or prices and under such terms and conditions as may be fixed by the Board. The principal and interest of such bonds may be made payable in any lawful medium. The Board shall determine the form of the bonds, including any interest coupons to be attached thereto, and the manner of execution of the bonds and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest thereof, which may be at any bank or trust company within or without the Commonwealth. If any officer whose signature or a facsimile thereof appears on any bonds or coupons shall cease to be such officer before the delivery of such bonds, such signature or facsimile shall nevertheless be valid and sufficient for all purposes, the same as if he had remained in office until such delivery. The bonds may be issued in coupon or in registered form or both, as the Board may determine, and provisions may be made for the registration of any coupon bonds as to principal alone and as to both principal and interest and for the reconversion of any bonds registered as to both principal and interest into coupon bonds. The Board may sell such bonds in such manner, either at public or at private sale, and for such price as it may determine to be for the best interests of the Corporation. The proceeds of such bonds shall be disbursed for the purposes for which such bonds were issued under such restrictions, if any, as the laws of the Commonwealth and the resolution authorizing the issuance of such bonds or the trust indenture provided for in § 14 hereof may provide. The Corporation may also provide for temporary bonds and for the replacement of any bond that shall become mutilated or shall be destroyed or lost. Such bonds may be issued without any other proceedings or the happening of any other conditions or things than the proceedings, conditions, and things that are specified and required by this act. Neither the members of the Board nor any other person executing the bonds shall be subject to any personal liability or accountability by reason of the issuance thereof.

§ 18. Distributions subject to appropriation. Amounts received by the Commonwealth as a result of its sale of all or any portion of the Commission Allocation *or Foundation Allocation* shall be subject to appropriation in accordance with the provisions of Article X, Section 7 of the Constitution of Virginia.

§ 19. Pledge and agreement. The Commonwealth pledges and agrees with the Corporation, and the holders of the bonds in which the Corporation has included such pledge and agreement, that the Commonwealth will (i) irrevocably direct the escrow agent under the MSA to transfer all of the Commission Allocation *and Foundation Allocation* related to the Tobacco Assets sold, directly to the Corporation or its assignee, (ii) enforce the Commonwealth's rights to receive the Commission Allocation *and Foundation Allocation* to the full extent permitted by the terms of the MSA, (iii) not amend the MSA in any manner that would materially impair the rights of the holders, (iv) not limit or

alter the rights of the Corporation to fulfill the terms of its agreements with such holders, and (v) not in any way impair the rights and remedies of such holders or the security for such bonds until such bonds, together with the interest thereon and all costs and expenses in connection with any action or proceeding by or on behalf of such holders, are fully paid and discharged.

§ 22. Appropriation. There is hereby appropriated to the Virginia Tobacco Settlement Foundation Endowment all of the proceeds of any sale of the Foundation Allocation pursuant to this act between the effective date of this act and June 30, 2009.