



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 479 (Patron – Albo)

LD#: 12101446

Date: 1/6/2012

Topic: Counterfeit and contraband cigarettes

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
\$50,000*
- **Local Adult Correctional Facilities:**
Cannot be determined
- **Adult Community Corrections Programs:**
Cannot be determined

- **Juvenile Correctional Centers:**
Cannot be determined, likely to be small
- **Juvenile Detention Facilities:**
Cannot be determined, likely to be small

* The estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 890 of the 2011 Acts of Assembly requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Summary of Proposed Legislation:

The proposal amends several sections in the *Code of Virginia* relating to cigarettes. First, the proposal creates criminal penalties under § 18.2-246.14 for selling or possessing counterfeit cigarettes. Under the proposal, a person who knowingly sells or possesses counterfeit cigarettes would be guilty of a Class 2 misdemeanor for the first offense and a Class 6 felony for a second or subsequent violation. If a person knowingly sells or possesses more than 50 cartons of counterfeit cigarettes, he would be guilty of a Class 6 felony. Knowledge would be presumed if a person possesses more than 1,000 counterfeit cigarettes and, if multiple persons are found in possession of counterfeit cigarettes in a single distinguishable location, each person present at the location would be deemed to possess the aggregate amount of counterfeit cigarettes found at the location. This statute currently prescribes only civil penalties. The proposal clarifies that, for the purposes of § 18.2-246.14, counterfeit cigarettes are defined as cigarettes that are manufactured, fabricated, assembled, processed, packaged, or labeled by any person other than the owner of the trademark rights or a person who is authorized by the owner of the trademark rights to manufacture, fabricate, etc., the cigarettes.

The proposed modifications to § 58.1-1007 expand the requirements for dealers who sell cigarettes in excess of five cartons in a single transaction to include the collection and retention of certain information about the buyer. Failure to comply with the new requirement would be a Class 2 misdemeanor. Currently, under § 58.1-1007(A), it is a Class 2 misdemeanor to fail or refuse to keep required documents relating to the purchase, sale, exchange, receipt, or transportation of cigarettes for three years. The proposal would also give the Attorney General the authority to prescribe the form and manner in which the required records must be kept and the Attorney General could prescribe additional requirements for the collection of certain information.

The proposal also modifies several statutes relating to unstamped and contraband cigarettes. Under the proposed changes to § 58.1-1000, contraband cigarettes would be defined as cigarettes for which tax is due that are (1) not tax-paid cigarettes and are in the possession of a person other than an authorized holder or (2) tax-paid cigarettes in amounts exceeding the presumed reseller threshold (5,000 tax-paid cigarettes) that are in the possession of any person other than an authorized holder or retail dealer. Tax-paid cigarettes would be defined as cigarettes that bear valid Virginia tax stamps or that were purchased outside of Virginia and evidence exists to establish that the applicable excise taxes have been paid. Authorized holders would include manufacturers, wholesale dealers, stamping agents, authorized carriers, exclusive distributors in compliance with § 58.1-1012, government agents, and persons holding cigarettes in compliance with § 58.1-1010. The definitions of retail dealer and wholesale dealer would be limited to include only persons who are properly registered with the Commonwealth.

In addition, the proposal replaces references to unstamped cigarettes in § 58.1-1017 with the term “contraband cigarettes” and modifies criminal penalties relating to the sale, possession, etc., of such cigarettes. Under the proposal, knowingly selling, purchasing, transporting, receiving, or otherwise possessing contraband cigarettes would be a Class 2 misdemeanor for the first offense and a Class 6 felony for a second or subsequent offense. If a person knowingly sells, purchases, etc., more than 50 cartons of contraband cigarettes, he or she would be guilty of a Class 6 felony. Knowledge would be presumed if a person possesses more than 1,000 contraband cigarettes. If multiple persons are found in possession of contraband cigarettes in a single distinguishable location, each person present at the location would be deemed to possess the aggregate amount of contraband cigarettes found at the location. However, under the proposal, each person at the location where the contraband cigarettes are found could lawfully possess as many as 1,000 tax-paid cigarettes. Currently, § 58.1-1017 prohibits the sale, purchase, etc., of unstamped cigarettes for the purpose of evading the payment of taxes on such products. In general, this offense is a Class 2 misdemeanor. In 2004, however, the General Assembly increased the penalty for this offense to a Class 6 felony for violations involving 3,000 or more packages of cigarettes.

The proposal also creates the Cigarette Enforcement Fund, which would hold the civil penalties collected from individuals who violate certain sections of the *Code*, including § 18.2-246.14 (selling or possessing counterfeit cigarettes), § 58.1-1010 (sale of unstamped cigarettes by wholesale dealers), and § 58.1-1013 (failing to affix revenue stamps). Moneys deposited to the Fund would be used by the law-enforcement agency responsible for discovering the violation that resulted in the civil penalty. The proposed changes to several sections affect the process of seizing and destroying counterfeit and contraband cigarettes.

Analysis:

According to the General District Court Automated Information System (CAIS) for fiscal year (FY) 2010 and FY2011, eleven offenders were convicted of a misdemeanor violation of § 58.1-1017 for the unlawful sale, etc., of less than 3,000 packs of unstamped cigarettes. Of these, seven offenders (63.6%) did not receive an active term of incarceration to serve after sentencing and four offenders (36.4%) were sentenced to a local-responsible (jail) term, with a median sentence length of 1.5 months.

According to FY2010 and FY2011 Circuit Court CAIS data, five offenders were convicted of a felony under § 58.1-1017 for the unlawful sale, etc., of 3,000 or more packs of unstamped cigarettes. The cigarette offense was the primary, or most serious, offense in four of the cases. None of these offenders received an active term of incarceration to serve after sentencing.

Impact of Proposed Legislation:

State adult correctional facilities. By defining new Class 6 felony offenses, the proposal may increase the state-responsible (prison) bed space needs of the Commonwealth. Data are not available to estimate

the number of additional felony convictions that would result from the proposal; therefore, the magnitude of the impact on prison beds cannot be determined.

Local adult correctional facilities. Similarly, the proposal may have an impact on local-responsible (jail) bed space needs, but the magnitude of the impact cannot be determined.

Adult community corrections programs. Because the proposal could result in felony convictions and subsequent supervision requirements for an additional number of offenders, the proposal may increase the need for adult community corrections resources. Since the number of cases that may be affected cannot be determined, the potential impact on community corrections programs cannot be quantified.

Virginia's sentencing guidelines. As new crimes in the *Code of Virginia*, the proposed felonies would not be covered by the sentencing guidelines as the primary (most serious) offense. A conviction for such an offense, however, may augment the guidelines recommendation if the most serious offense at sentencing is covered by the guidelines. No adjustment to the guidelines would be necessary under the proposal.

Juvenile correctional centers. The Department of Juvenile Justice (DJJ) reports that there were no juvenile intake petitions or commitments to DJJ involving a violation of §§ 18.2-246.13 or 58.1-1017 between FY2009 and FY2011. It is possible that a person under the age of 18 could be subject to the provisions of the proposed legislation. In such an event, an adjudication for a Class 2 misdemeanor offense would have no impact on juvenile correctional center bed space needs. However, an adjudication for an offense that would be a Class 6 felony in juvenile and domestic relations district court would make that person eligible for commitment to a juvenile correctional center pursuant to subsection (A)(14) of § 16.1-278.8 of the *Code*. Therefore, according to the Department of Juvenile Justice, the legislative proposal may have an impact on juvenile correctional center bed space needs. While the actual impact on juvenile correctional center bed space needs cannot be determined, it is likely to be small.

Juvenile detention facilities. It is possible that a person under the age of 18 could be subject to the provisions of the proposed legislation. In such an event, a person alleged to have committed a felony offense could be subject to pre-trial detention in a juvenile detention facility pursuant to § 16.1-248.1 of the *Code*. In addition, an adjudication for a Class 2 misdemeanor or a Class 6 felony in juvenile and domestic relations district court would make that person eligible for post-dispositional detention under § 16.1-284.1. Therefore, according to the Department of Juvenile Justice, the legislative proposal may have an impact on juvenile detention facility bed space needs. The actual impact on juvenile correctional center bed space needs cannot be determined but is likely to be small.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 890 of the 2011 Acts of Assembly requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.