

# SENATE BILL 978

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By: **Senator Astle**

Introduced and read first time: March 3, 2008

Assigned to: Rules

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## A BILL ENTITLED

1 AN ACT concerning

2 **Commercial Law - Maryland Cigarette Sales Below Cost Act - Repeal**

3 FOR the purpose of repealing provisions of law, known as the Maryland Cigarette  
4 Sales Below Cost Act, that regulate the wholesale and retail sale of certain  
5 cigarettes, define certain terms, and establish a certain short title.

6 BY repealing

7 Article - Commercial Law

8 Section 11-501 through 11-510 and the subtitle "Subtitle 5. Cigarette Sales  
9 Below Cost Act"

10 Annotated Code of Maryland

11 (2005 Replacement Volume and 2007 Supplement)

12 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF  
13 MARYLAND, That the Laws of Maryland read as follows:

14 **Article - Commercial Law**

15 [Subtitle 5. Cigarette Sales Below Cost Act.]

16 [11-501.

17 (a) In this subtitle the following words have the meanings indicated.

18 (b) "Basic cost of cigarettes" means the lesser of the invoice cost or the  
19 replacement cost of cigarettes to the retailer or wholesaler; plus any in-freight charge  
20 to the wholesaler otherwise not included in the invoice cost or the replacement cost;  
21 plus, for the wholesaler, the full face value of any applicable Maryland cigarette tax  
22 payable by the wholesaler; minus any trade discount or discount for cash.

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EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 (c) (1) "Cigarettes" means any size or shaped roll for smoking that is  
2 made of tobacco or tobacco mixed with another ingredient and wrapped in paper or in  
3 any other material except tobacco.

4 (2) "Cigarettes" does not include cigars.

5 (d) (1) "Cost to the retailer", subject to the special cost provisions of §  
6 11-503 of this subtitle, means the basic cost of cigarettes to a retailer, which includes  
7 the cost to a wholesaler, plus a markup to cover his cost of doing business, which cost  
8 of doing business, in the absence of satisfactory proof of a lesser cost, is presumed to be  
9 8 percent of the basic cost of cigarettes to him.

10 (2) As to each carton of 200 cigarettes, a fractional part of a cent equal  
11 to one-tenth of a cent or more in the cost to the retailer shall be rounded off to the  
12 next higher cent.

13 (e) (1) "Cost to the wholesaler", subject to the special cost provisions of §  
14 11-503 of this subtitle, means the basic cost of cigarettes to a wholesaler, plus a  
15 markup to cover his cost of doing business, which cost of doing business:

16 (i) Includes the cartage cost to a retailer; and

17 (ii) In the absence of satisfactory proof of a lesser cost, is  
18 presumed to be 5 percent of the basic cost of cigarettes to him.

19 (2) As to each carton of 200 cigarettes, a fractional part of a cent equal  
20 to one-tenth of a cent or more in the cost to the wholesaler shall be rounded off to the  
21 next higher cent.

22 (f) "Person" includes an individual, corporation, business trust, estate, trust,  
23 partnership, association, two or more persons having a joint or common interest, or  
24 any other legal or commercial entity.

25 (g) "Replacement cost" means the cost per unit for which the cigarettes could  
26 have been bought by the wholesaler or retailer at any time within 30 days before the  
27 date of sale by him if bought in the same quantity as his last purchase of the  
28 cigarettes.

29 (h) "Retail sale of cigarettes" includes any sale whereby cigarettes are sold  
30 for a valuable consideration, including an exchange or barter and a sale through a  
31 vending machine, made in the ordinary course of trade or the usual conduct of the  
32 seller's business to a purchaser for consumption or use other than resale.

33 (i) (1) "Retailer" includes any person engaged in the business of making  
34 retail sales of cigarettes within the State at a store, stand, booth, or concession,  
35 through vending machines, or otherwise.

1           (2) If the person is engaged in the business of making both retail sales  
2 of cigarettes and wholesale sales of cigarettes, the word only applies to the retail sales  
3 of cigarettes portion of the business.

4           (j) “Sell” includes advertise, offer to sell, or offer for sale.

5           (k) “Vending machine operator” means a person who:

6           (1) Makes retail sales of cigarettes or has cigarettes in his possession  
7 with the intent to sell them exclusively at retail through the medium of a vending  
8 machine or any other mechanical device used for dispensing cigarettes;

9           (2) Owns, operates, and services vending machines or other  
10 mechanical devices used to dispense cigarettes on 40 or more premises; and

11           (3) Services the machines or devices by maintaining an established  
12 place of business for the purchase of cigarettes, including warehousing facilities for the  
13 storage and distribution of cigarettes.

14           (1) (1) “Wholesale sale of cigarettes” includes any sale whereby cigarettes  
15 are sold for a valuable consideration, made in the ordinary course of trade or in the  
16 usual conduct of the seller’s business to a retailer, other than to a vending machine  
17 operator or to a sub-wholesaler described in subsection (m) (2) of this section, for the  
18 bona fide purpose of resale.

19           (2) “Wholesale sale of cigarettes” includes any transfer of cigarettes on  
20 consignment or otherwise, whereby title is retained by the seller as security for the  
21 payment of the purchase price.

22           (m) (1) “Wholesaler” means a person who purchases cigarettes directly  
23 from a manufacturer.

24           (2) “Wholesaler” includes a person, who, as a sub-wholesaler:

25           (i) Purchases cigarettes from another wholesaler solely for the  
26 purpose of bona fide resale to retailers other than those directly or indirectly owned,  
27 affiliated, or controlled by him; and

28           (ii) Services the retailers by maintaining an established place of  
29 business for the sale of cigarettes, including warehouse facilities, adequate inventory,  
30 proper accounting records, and necessary equipment and vehicles for the storage and  
31 distribution of cigarettes.

32           (3) If the person is engaged in the business of making both wholesale  
33 sales of cigarettes and retail sales of cigarettes, the word only applies to the wholesale  
34 sales of cigarettes portion of the business.]

1 [11-502.

2 (a) This subtitle does not apply to a retail sale of cigarettes or a wholesale  
3 sale of cigarettes, if they are sold:

4 (1) At a bona fide clearance sale, are so advertised and marked, and  
5 the quantity is accurately, clearly, and conspicuously stated in all advertising of the  
6 sale and on signs conspicuously posted where the sale takes place;

7 (2) As imperfect, damaged, or being discontinued, are so advertised  
8 and marked, and the quantity is accurately, clearly, and conspicuously stated in all  
9 advertising of the sale and on signs conspicuously posted where the sale takes place;

10 (3) On the complete and final liquidation of the business of the seller;

11 (4) Under an order, direction, or supervision of a court; or

12 (5) Subject to subsection (b) of this section, by a retailer or wholesaler  
13 at a price set in good faith to meet the competition of another retailer or wholesaler  
14 who is rendering the same type of service as the seller, if the price of the competitor  
15 which the seller desires to meet is lawful.

16 (b) For purposes of subsection (a)(5) of this section, the price of cigarettes  
17 sold under subsections (a)(1) through (4) of this section is not the lawful price of a  
18 competitor.

19 (c) In calculating the basic cost of cigarettes purchased at a sale under  
20 subsections (a)(1) through (4) of this section or at any other sale outside the ordinary  
21 channels of trade, a retailer or wholesaler shall use, instead of invoice costs, the  
22 replacement cost of the cigarettes based on the quantity last purchased by him  
23 through the ordinary channels of trade.]

24 [11-503.

25 (a) In a wholesale sale of cigarettes, the presumptive wholesale markup of 5  
26 percent provided for in § 11-501(e) of this subtitle may be reduced by 2 cents for each  
27 carton of 200 cigarettes, if:

28 (1) The cigarettes are not delivered unless their full price is received  
29 by the wholesaler at or before delivery; and

30 (2) The purchaser performs or pays for the cartage cost of the  
31 cigarettes to the place of business of the purchaser.

32 (b) (1) In the absence of satisfactory proof of a lesser aggregate cost of  
33 doing business, a vending machine operator or retailer who purchases cigarettes at

1 prices ordinarily invoiced to a wholesaler and who receives the wholesaler's discounts  
2 on them shall:

3 (i) First, add to his basic cost of cigarettes the wholesale  
4 markup of 5 percent provided for in § 11-501(e) of this subtitle to cover the cost of  
5 doing business as a wholesaler; and

6 (ii) Then, on the resultant sum, add the retail markup of 8  
7 percent provided for in § 11-501(d) of this subtitle.

8 (2) If the discount received by the vending machine operator or  
9 retailer is less than that ordinarily allowed to wholesalers, the wholesale markup of 5  
10 percent may be reduced by the difference between the discount ordinarily allowed to  
11 wholesalers and the discount received by the retailer or vending machine operator.

12 (c) (1) A wholesaler who sells cigarettes to another wholesaler or to a  
13 vending machine operator is not required to include in his selling price the cost to the  
14 wholesaler. However, in the absence of satisfactory proof of a lesser cost for the service  
15 rendered, the wholesaler shall include in the selling price his basic cost of cigarettes,  
16 plus a charge of 1 percent of his basic cost of cigarettes.

17 (2) If a wholesaler purchases cigarettes from another wholesaler, then,  
18 on resale of the cigarettes to a retailer, he is the wholesaler for the purposes of this  
19 subtitle.]

20 [11-504.

21 (a) A retailer or wholesaler with intent to injure a competitor or to destroy or  
22 substantially lessen competition may not make a retail sale of cigarettes or a  
23 wholesale sale of cigarettes at less than the cost to the retailer or the cost to the  
24 wholesaler, respectively.

25 (b) A retailer may not purchase cigarettes from a wholesaler at a cost which  
26 directly or indirectly is less than the cost to the wholesaler by any means, including  
27 offering, accepting, inducing, or attempting to induce a rebate in price or a concession  
28 of any kind in connection with the sale or purchase of cigarettes.]

29 [11-505.

30 (a) Except as provided in subsection (b) of this section, a retailer or  
31 wholesaler with intent to injure a competitor or to destroy or substantially lessen  
32 competition may not:

33 (1) Sell cigarettes in combination with any other item of merchandise  
34 if the other item is given free of charge or sold at a price below its cost to the retailer  
35 or its cost to the wholesaler, respectively, as defined in Subtitle 4 of this title;

1                   (2)    Sell cigarettes in combination with any other item of merchandise  
2 if the total sale price for the cigarettes and all other items included in the sale is less  
3 than the sum of:

4                   (i)    The cost to the retailer or the cost to the wholesaler,  
5 respectively, of the cigarettes; and

6                   (ii)   The cost to the retailer or the cost to the wholesaler,  
7 respectively, as defined in Subtitle 4 of this title, of all other items included in the sale,  
8 including items given free of charge in connection with the sale;

9                   (3)    Give cigarettes free of charge, except in the case of specially  
10 packaged manufacturers' samples which are designated on the package as not to be  
11 sold; or

12                  (4)    Make any rebate, advertising allowance, or any other concession by  
13 any means or device in connection with the sale of cigarettes whereby the cigarettes  
14 are in effect sold below their cost to the retailer or their cost to the wholesaler,  
15 respectively.

16                  (b)    A retailer or wholesaler may pass on to a purchaser any reduction in cost  
17 which results from:

18                   (1)    Payment or compensation given by a manufacturer of cigarettes on  
19 a uniform and nondiscriminatory basis for promotional services; or

20                   (2)    Any coupon issued and ultimately redeemed by a cigarette  
21 manufacturer.]

22 [11-506.

23                  (a)    In any proceeding under this subtitle, including a proceeding relating to  
24 licenses before the State Comptroller, proof of a sale by a retailer or a wholesaler of  
25 cigarettes or of any other item in combination or in connection with cigarettes at less  
26 than their cost to the retailer or their cost to the wholesaler, respectively, is prima  
27 facie evidence of intent to injure a competitor or to destroy or substantially lessen  
28 competition.

29                  (b)    In determining cost to the retailer or cost to the wholesaler, the State  
30 Comptroller or the court shall receive and consider evidence:

31                   (1)    That the person complained against purchased cigarettes at a  
32 fictitious price or on terms, in a manner, or under invoices which conceal the true  
33 costs, discounts, or terms of purchase; and

34                   (2)    Of the normal, customary, and prevailing terms and discounts in  
35 connection with other sales of a similar nature in the trade area.]

1 [11-507.

2 (a) It is the duty of the State Comptroller to enforce this subtitle.

3 (b) The State Comptroller shall:

4 (1) Employ and determine the duties and compensation of the  
5 inspectors and other personnel necessary to enforce this subtitle; and

6 (2) Adopt reasonable rules and regulations necessary to effectuate and  
7 enforce the policies of this subtitle.]

8 [11-508.

9 (a) (1) On complaint of the State Comptroller or any person affected, a  
10 circuit court has jurisdiction to:

11 (i) Enjoin a retailer or wholesaler from the commission of any  
12 act prohibited by this subtitle; and

13 (ii) Award damages and costs.

14 (2) In an action for injunctive relief, it is not necessary for the  
15 complainant to allege or prove that an adequate remedy at law does not exist or that  
16 the complainant has suffered actual damages.

17 (b) If injunctive relief is not sought or required, an injured person may  
18 institute an action for damages in any court of competent jurisdiction.

19 (c) On violation of this subtitle, the State Comptroller shall suspend or  
20 revoke the cigarette license of the offender required by § 16-210 of the Business  
21 Regulation Article.]

22 [11-509.

23 Except as specifically provided by § 11-505 of this subtitle with respect to  
24 combination sales and concessions, the Maryland Sales Below Cost Act does not apply  
25 to the sale of cigarettes.]

26 [11-510.

27 This subtitle may be cited as the Maryland Cigarette Sales Below Cost Act.]

28 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect  
29 October 1, 2008.