

Department of Legislative Services
Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE

House Bill 1200 (Delegate Love, *et al.*)
Economic Matters

Commercial Law - Cigarette Sales Below Cost - Wholesale Markup

This bill alters the presumptive cost of doing business used to determine the basic cost of cigarettes to a cigarette wholesaler for purposes of provisions of law governing the sale of cigarettes below cost. Specifically, the bill reduces the presumptive cost of doing business from 5.0% to 0.25% of the basic cost of cigarettes to the wholesaler. In addition, the bill authorizes a wholesaler to implement a wholesale markup that is less than 0.25% if (1) the wholesaler files satisfactory proof with the Comptroller that the wholesaler's cost of doing business is less than the presumptive 0.25% wholesale markup; and (2) the Comptroller approves the lesser wholesale markup.

Fiscal Summary

State Effect: Potential minimal increase in general fund revenues. To the extent that the bill results in a reduction in retail cigarette prices, the net impact on general funds is positive due to an increase in cigarette excise tax revenues, partially offset by a reduction in sales tax revenues. No effect on expenditures.

Local Effect: None.

Small Business Effect: Potential minimal benefit to small businesses that may buy and sell cigarettes at a slightly lower price.

Analysis

Current Law: "Cost to the wholesaler" means the basic cost of cigarettes to a wholesaler (*i.e.*, a person who purchases cigarettes directly from a manufacturer), plus a markup to cover the wholesaler's cost of doing business, which includes the cartage cost

to a retailer and – in the absence of satisfactory proof of a lesser cost – is presumed to be 5.0% of the basic cost of cigarettes to the wholesaler. However, in a wholesale sale of cigarettes, the presumptive wholesale markup of 5.0% may be reduced by two cents per carton of 200 cigarettes if (1) the cigarettes are not delivered (unless their full price is received by the wholesaler at or before delivery); and (2) the purchaser performs or pays for the cartage cost of the cigarettes to the place of business of the purchaser.

The Cigarette Sales Below Cost Act prohibits a retailer or wholesaler with intent to injure a competitor or destroy or substantially lessen competition from:

- selling cigarettes below cost;
- selling cigarettes in combination with any merchandise if the other merchandise is given free of charge or sold at a price below cost;
- selling cigarettes in combination with any other merchandise if the total sale price is less than cost to the retailer or wholesaler of the cigarettes and the retail or wholesale cost of all other items included in the sale, including items given free of charge in connection with the sale;
- giving cigarettes free of charge, except in the case of specially packaged manufacturers' samples; or
- making any rebate, advertising allowance, or any other concession in connection with the sale of cigarettes whereby the cigarettes are effectively sold below cost.

In addition, a retailer may not purchase cigarettes from a wholesaler at a cost that directly or indirectly is less than the cost to the wholesaler by any means, including offering, accepting, or attempting to induce a rebate in price or concession in connection with the cigarette sale.

The prohibition against the sale of cigarettes below cost does not apply if the sale is made in good faith to meet competition; as part of a final liquidation or closing of the business; as imperfect, damaged, or discontinued cigarettes; as part of a bona fide clearance sale; or under the direction or order of a court.

The Comptroller is required to enforce compliance with the Act and calculate minimum costs as specified in the Act. On complaint of the Comptroller or any person affected, a circuit court has the authority to enjoin a retailer or wholesaler from the commission of any act prohibited by the Act and award damages and costs. The Comptroller is required to suspend or revoke the cigarette license of any person who violates the Act.

Background: The Comptroller's Office advises that there were 48 licensed cigarette wholesalers and 38 licensed sub-wholesalers in the State in fiscal 2011, although the top

five wholesalers control approximately 63.6% of the market. More than 183 million packs of cigarettes were sold in the State in fiscal 2011.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Comptroller's Office, Department of Legislative Services

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Analysis by: Jennifer A. Ellick

Direct Inquiries to:
(410) 946-5510
(301) 970-5510